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IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

WILLIAM WAIT

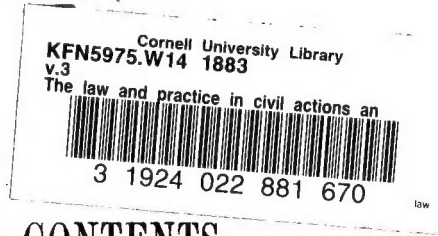


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PART V.

PRACTICE, PROCESS AND PLEADING.

CHAPTER I.

JUSTICES OF THE PEACE, AND JUSTICES' COURTS.

SECTION 1. Election and term of office of justices of the peace. The Constitution of this State provides that "the electors of the several towns shall, at their annual town-meeting, and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. * * * Justices of the peace and District Court justices shall be elected in the different cities of this State, in such manner, and with such powers, and for such terms respectively, as shall be prescribed by law." Art. 6, § 18.

The Revised Statutes provide for the election of four justices of the peace in each town, each of whom, except when elected to fill a vacancy, or on the erection of a new town, is entitled to hold the office for four years, unless sooner removed. 1 R. S. 95, §§ 1 and 35. But as the Constitution of the State permits the number of justices of the peace to be regulated by law, the legislature have from time to time changed the number in certain towns and cities by special statutes, or city charters. See Laws of 1848, chap. 155; Laws of 1851, chap. 40; Laws of 1852, chaps. 7 and 16; Laws of 1853, chap. 3; Laws of 1854, chaps. 20, 31, 44, 94; Laws of 1856, chap. 12; Laws of 1857, chaps. 130 and 665; Laws of 1880, chaps. 255 and 256; Laws of 1881, chaps. 9, 65 and 575.

Under the general statutes justices of the peace in each town are divided into four classes, so that one justice of the peace in each town is annually elected at the time that the supervisor and other elective

Election and term of office of justices of the peace.

town officers are chosen, to hold the office for four years, commencing on the first day of January next succeeding his election. 1 R. S. 111, § 35; Laws of 1829, chap. 356, §§ 1 and 3. In case of a vacancy or the erection of a new town, two or more justices may be balloted for at the same town meeting as the case may require.

Within ten days after each town meeting the clerk of the meeting makes and files with the clerk of his county a certificate of the result of the election, and this certificate is made by statute evidence of the facts therein certified. Laws of 1829, chap. 356, § 2.

In case of the election of two or more justices of the peace to supply a vacancy or vacancies existing at the time, or in case of the election of two or more justices in any new town, the person or persons so elected may enter at once upon the duties of the office upon taking the oath and filing the requisite bond. Laws of 1830, chap. 290, § 1. When more than one justice is elected at the same town meeting upon the erection of a new town the class to which each justice belongs, and upon which the length of his term depends, is determined by lot. Duplicate certificates of the result of the drawing are then made by the supervisor and town clerk, if both were present, or by the one in attendance, if the other was not present at the drawing; and these certificates are filed, one with the town clerk, and the other with the county clerk, and are recorded by said clerks in the books in which the canvasses of the votes have been recorded. These certificates are conclusive evidence of the respective classes to which the persons so elected justices belong. 1 R. S. 111, 112, §§ 35-46. See Laws of 1829, chap. 356, § 3; Laws of 1830, chap. 290, § 2.

Such, in brief, is the mode prescribed by statute for the election and classification of justices of the peace, and the statutory evidence of their official character and the duration of their terms.

The manner in which the office of justice of the peace may be forfeited or declared vacant, and the manner of filling the vacancy will be noticed hereafter.

By a special statute, the additional justice of the peace of the town of Allegany in the county of Cattaraugus enters upon the duties of his office on the first day of March next after his election, and holds his office for two years. Laws of 1881, chap. 65, § 3. There may be other statutory exceptions to the general rule.

§ 2. Qualifications. No person is capable of holding a civil office, who at the time of his election or appointment was not twenty-one years of age and a citizen of this State. 1 R. S. 116, § 1. A justice of the peace must reside in the town for which he was chosen, and

Qualifications.— Official oaths and bonds.— When bond required.

must be an elector of the town. 1 R. S. 102, § 12; id. 343, § 11. The Code of Civil Procedure provided that no person could hold the office of the justice of the peace for the sixth judicial district of the city of Brooklyn, unless he had been regularly admitted to practice as an attorney and counselor at law in the courts of record of the State. Code of Civil Pro., § 3116; vol. 1, p. 77. But the city has since been divided into three judicial districts, and any person is qualified and eligible for election to the office of justice of the peace, in either of such districts, who is, at the time of such election, a resident and an elector in the judicial district in which such election is held. No other person is eligible. Laws of 1880, chap. 256, § 5. See Laws of 1881, chap. 141. No person is eligible to the office of a justice of the justice's court of the city of Troy who is not an elector of said city and who is not an attorney and a counselor at law, duly admitted to practice in the courts of record of this State. Laws of 1880, chap. 255, § 2. So no person is eligible to the office of justice of the peace of the city of Albany, unless he is a resident elector of that city and has been regularly admitted to practice as an attorney at law, in the Supreme Court of this State, at least three years previous to his election. Laws of 1881, chap. 438, § 3; vol. 1, p. 180.

The Constitution of this State provides that "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." Art. 6, § 13. But this does not apply to justices of the peace. *Dohring v. People*, 2 Sup. Ct. (T. & C.) 458; S. C. affirmed, 59 N. Y. 374.

§ 3. **Official oaths and bonds. When bond required.** In the year 1845 an act was passed requiring justices of the peace to give an official bond. Laws of 1845, chap. 180, § 34. This act was soon after repealed; Laws of 1846, chap. 144, § 4; and for a period of more than thirty years a justice of the peace was not required, by any general statute, to give a bond before entering upon the duties of his office. But in the year 1878, an act was passed requiring every justice of the peace elected or appointed in any of the towns or cities of this State, excepting the city of New York and those cities in which the giving of the bond is required by the charter, to execute, before entering upon the duties of the office, an instrument in writing, with two sureties, conditioned for the payment on demand to the officer, person or persons entitled to the same, all moneys received by the justice by virtue of his office. Laws of 1878, chap. 107, §§ 1 and 3; id., chap. 367.

A justice of the peace already in office, except in the cities above

mentioned, was also required to execute and file a similar bond within sixty days after written notice from the county clerk of the passage of the act. Laws of 1878, chap. 107, §§ 2, 3.

This act was so generally disregarded by the justices, that the legislature in the following year passed another act, providing that justices of the peace who were required by the act of 1878 to execute a bond, but had omitted to do so, should be entitled to hold their offices and discharge the duties thereof during the remainder of the term for which they were elected or appointed, upon executing and filing the proper bond within the next sixty days; and that all their official acts should be as valid and of the same effect as though they had executed and filed the bond within the time stated in the act of 1878. This act, however, did not affect suits pending at the time of its passage. Laws of 1879, chap. 201. Similar acts have been subsequently passed. See Laws of 1881, chap. 19; Laws of 1882, chap. 52.

Approval and filing. After the bond has been executed by the justice and his sureties it must be approved by the supervisor of the town, or by the town clerk if the justice is also the supervisor, or by the common council of the city in which the justice resides. Laws of 1878, chap. 107, as amended by chap. 367, Laws of 1878, and chap. 123, Laws of 1881. The person to whom the bond is presented for approval, if satisfied with its form and amount and the sufficiency of the sureties therein, should indorse upon it his approval and return it to the justice, who should thereupon file it in the office of the clerk of the city or town in which he resides. The justice should then obtain from the clerk a certificate that the justice has filed the bond required by statute, and should file this certificate in the office of the county clerk at or before the time of presenting himself to be sworn into office. *Ib.*

The statute requiring a bond of a newly-elected justice of the peace merely required that the bond should be filed by him before entering upon the duties of his office. The Revised Statutes, however, provided generally that "whenever any officer is required by law to execute any official bond, he shall cause the same to be filed in the proper office within the time herein prescribed for filing his oath of office, unless otherwise provided by law." 1 R. S. 120, § 26. The statute required the oath of office to be filed within fifteen days after the officer had received notice of his election or appointment, or within fifteen days after the commencement of his term of office. *Id.*, § 21. Both statutes are in force, and no difficulty can be experienced in complying with the requirements of either.

Effect of the bond. The Revised Statutes provide that every bond executed by any officer pursuant to law, for the faithful discharge of the duties of his office, shall be deemed to be in force and obligatory upon the principal and his sureties therein so long as such officer shall continue to discharge the duties of his office and until his successor shall be appointed and duly qualified. But the sureties in any such bond shall be exonerated from all liability by reason thereof, for all acts or omissions of their principal after he shall have duly renewed any official bond pursuant to law. 1 R. S. 121, §§ 29, 30.

The obligation entered into by the justice and his sureties is that he shall pay over on demand to the officer, person or persons entitled to the same, all moneys received by him *in virtue of his office*. This does not cover moneys which may come into his hands by a trespass. And if a justice fails to pay on demand the proceeds of a sale under execution issued upon a void judgment, his sureties will not be liable, as such moneys come into his hands by a trespass and not by virtue of his office. *Barnes v. Whitaker*, 45 Wis. 204. So if he collects money as a mere agent, without suit, his sureties will not be liable by reason of his failure to pay it over on demand. *Commonwealth v. Kendig*, 2 Barr, 448. See *McCormick v. Thompson*, 10 Neb. 484. But if a justice, in his official capacity, receives a demand for collection, and after collecting it, appropriates the proceeds to his own use, his sureties will be liable on their bond. *Widener v. State*, 45 Ind. 244; *Bessenger v. Dickerson*, 20 Iowa, 260; *Latham v. Brown*, 16 id. 118.

In all cases it must be made to appear that there has been a demand and refusal to pay, or some omission of official duty before an action can be maintained against the sureties on the official bond of the justice. *Price v. Farrar*, 5 Ill. App. 536.

Official oath. Every justice of the peace, before entering upon the duties of his office, is required to take the following oath or affirmation: "I do solemnly swear" or "affirm," as the case may be, "that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of justice of the peace according to the best of my ability." 1 R. S. 119, § 20. This oath must be taken before the county clerk, and subscribed and deposited in the office of the county clerk within fifteen days after the justice has received notice of his election or appointment, or within fifteen days after the commencement of his term of office. *Id.*, §§ 21, 23, 24. Before taking the oath the justice must file with the clerk a certificate showing that he has filed the bond required by the act of 1878. See Laws of 1881, chap. 123. And no

Effect of want of official oath or bond.

justice of the peace can properly be sworn into office until he has filed such certificate. *Id.* The clerk is not entitled to any fee for administering the oath of office to any town officer. Code of Civil Pro., § 3289.

Effect of want of official oath or bond. The Revised Statutes provide that if any person shall execute any of the duties or functions of any office without having taken and subscribed the oath of office required by law, or without having executed and filed in the proper office any bond required by law, he shall forfeit the office to which he may have been elected or appointed, and shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment. 1 R. S. 121, § 31.

Under this statute it is clear that a failure to file the bond or take the oath of office is a cause of forfeiture. The office in that case does not become *ipso facto* vacant, but there must be a direct judicial or other authorized proceeding on the part of the proper authority to enforce the forfeiture. *Foot v. Stiles*, 57 N. Y. 399; *Cronin v. Gundy*, 16 Hun, 520; *Hall v. Luther*, 13 Wend. 491; *Hamlin v. Dingman*, 5 Lans. 61; *Mayor of New York v. Tucker*, 1 Daly, 107; *People v. Hopson*, 1 Denio, 574; *Weeks v. Ellis*, 2 Barb. 320. And see *Sprowl v. Lawrence*, 33 Ala. 674-689; *State v. Toomer*, 7 Rich. 216; *Kattman v. Ayer*, 3 Strobh. 92; *Crawford v. Howard*, 9 Ga. 316; *Snyder v. Schram*, 59 How. 404. A justice of the peace who has been duly elected, and who has entered upon the discharge of his duties without having first taken the oath prescribed by law, is rightfully in office, and the failure to take the oath does not go to his jurisdiction. He is not in terms prohibited from holding the office before taking the oath, but is required to take the oath before entering on the duties of his office, and the consequences of his omission to do so are declared to be a forfeiture. He is a rightful officer holding by a defeasible title; and his acts are in all respects lawful until the statute interferes by a proceeding in the nature of a *quo warranto*. See *Foot v. Stiles*, 57 N. Y. 399. His acts are as binding between the parties to an action and as to third persons as though he were an officer *de jure*. *Greenleaf v. Low*, 4 Denio, 168; *Weeks v. Ellis*, 2 Barb. 320. And this is the rule even as to ministerial officers, for it will be no defense to an indictment for an assault upon a constable in the discharge of his duties that he did not take the oath of office. *People v. Hopson*, 1 Denio, 574. And see *Bentley v. Phelps*, 27 Barb. 524. It is undoubtedly true that if a person comes into court and seeks to recover money or property by virtue of his office, he cannot recover if he is a mere officer *de facto* in the true sense of that term. He must show an

Effect of want of official oath or bond.—Vacancies, how created and filled.

unquestionable right, and be an officer *de jure*, having a right to act. *People v. Nostrand*, 46 N. Y. 375. The acts of a mere officer *de facto* are only valid as to the public, and as to third persons, and cannot be sustained as to himself. But if a justice has taken the oath of office, but has failed to file the proper bond, he is not a mere officer *de facto*; and until the State enforces the forfeiture, he has the same rights and is subject to the same responsibilities as if he had given the statutory bond. See *Foot v. Stiles*, 57 N. Y. 399.

The effect of a failure to file a statutory bond or to take the statutory oath of office prior to the 2d day of March, 1881, has been conclusively settled by statute, except so far as suits or proceedings there pending might be affected thereby. In that year the legislature declared that "the official acts of every justice of the peace heretofore done and performed, duly elected or appointed to the office, so far as such official acts may be affected, impaired, or questioned by reason of the failure of the justice to take and subscribe the official oath, or to give an official bond as required by law, are hereby legalized, ratified and confirmed, and any justice of the peace, heretofore elected or appointed to the office, who has neglected to file an official bond within the time prescribed by law, may file such bond within twenty days from and after the passage of this act, and the same shall have all the force and effect and validity as if said bond had been filed within the time required by law." Laws of 1881, chap. 19, § 1. See, also, Laws of 1882, chap. 52; Laws of 1879, chaps. 201, 360; Laws of 1880, chaps. 221, 341.

§ 4. **Vacancies, how created and filled.** The Revised Statutes declare that every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: 1. The death of the incumbent; 2. His resignation; 3. His removal from office; 4. His ceasing to be an inhabitant of the State, or if the office is local, of the district, county, town or city for which he shall have been chosen or appointed, or within which the duties of his office are required to be discharged; 5. His conviction of an infamous crime, or of any offense involving a violation of his oath of office; 6. His refusal or neglect to take the oath of office within the time required by law; or to give or renew any bond within the time prescribed by law; 7. The decision of a competent tribunal declaring void his election or appointment. 1 R. S. 122, § 34. The governor may also declare vacant the office of every officer required by law to execute an official bond, whenever a judgment shall be obtained against such officer for a breach of the condition of such bond. *Id.*, § 40.

A justice of the peace may resign his office by tendering his written resignation to the supervisor of the town. 1 R. S. 121, § 33. The moment the resignation is received by the supervisor, the office of the justice becomes vacant without any formal acceptance. See *Olmsted v. Dennis*, 77 N. Y. 378; *Gilbert v. Luce*, 11 Barb. 91.

Justices of the peace may be removed, after due notice, and an opportunity of being heard, by the Supreme Court at General Term, for causes to be assigned in the order of removal. Const., art. 6, § 18; Laws of 1847, chap. 280, § 25; Laws of 1880, chap. 354.

Under the Code of Civil Procedure, a justice of the peace is guilty of a misdemeanor who (1) issues and delivers to an officer to be executed any mandate not signed by him, or not entirely filled up, but in which he has left a blank, either in the date or otherwise, except for the names of witnesses in a subpoena; or (2) who is directly or indirectly interested in buying a note or other demand or cause of action for the purpose of bringing an action or instituting a special proceeding before a justice founded thereupon; or (3) who either before or after an action or special proceeding is commenced, lends or advances or agrees to lend or advance, or procures to be lent or advanced, any money or other valuable thing to any person in consideration of or as a reward for, or an inducement to the placing or having placed in his hands a debt or other demand or cause of action for prosecution or collection; or (4) who neglects or refuses, within a reasonable time after demand to pay any money collected by him in his official capacity, to the person entitled thereto. And a conviction of the justice for the misdemeanor operates as a forfeiture of his office. See vol. 1, pp. 83, 87, §§ 3135, 3137, 3138, 3153; Penal Code, §§ 138, 141.

Whenever a vacancy occurs in the office of justice of the peace of any town in this State, the supervisor, town clerk and remaining justices of the peace, or a majority of such officers, may by a warrant under their hands and seals appoint a suitable person to fill the vacancy. The person so appointed holds the office until the next regular annual town meeting in the town, unless he was appointed to fill the vacancy of an officer whose term of office would have expired on the thirty-first day of December next succeeding his appointment, in which case his term of office expires on the thirty-first day of December succeeding his appointment. The appointee may at once qualify and enter upon the discharge of the duties of his office. Laws of 1859, chap. 476; Laws of 1875, chap. 166. The warrant must be filed in the office of the town clerk, and a copy must also be filed in the office of the county clerk, before the justice is authorized to act. Ib. The justice must

Courts of justices of the peace.—How and where held.—When held.

also file his bond, with the town clerk, file a certificate of that fact with the county clerk, and take the oath of office. See *ante*, 3.

For the statutes governing the election of justices of the peace to fill vacancies, see Laws of 1830, chap. 290; Laws of 1833, chap. 270.

§ 5. Courts of justices of the peace. How and where held. The justices' court of the city of Albany is a court of record. Code of Civil Pro., § 2. But courts of justices of the peace in each town and in certain cities and villages; the District Courts in the city of New York; the justices' court of the city of Troy; the municipal court of the city of Rochester; and certain other inferior courts are not courts of record. *Id.* § 3; Laws of 1882, chap. 410, § 1279.

A justice of the peace is prohibited from holding court for the trial of any civil cause in any town other than that in which he resides except in cases otherwise provided for by law. 1 R. S. 102, § 12. But he must hold within his town or city a court for the trial of any action or special proceeding, of which he has jurisdiction, which is brought before him, unless he is a member of the senate or assembly, in which case he may decline to act. Vol. 1, p. 3. He must hear, try and determine the same according to law and equity, and for that purpose, where special provisions not otherwise made by law, the court is vested with all the necessary powers of the Supreme Court. *Ib.* The sittings of his court must be public, and every citizen must be allowed to attend the same freely. Vol. 1, p. 104, § 5. In case his official proceedings are interrupted by noise, breach of the peace, or other disturbance created by those in attendance he has an ample remedy by way of commitment for contempt. Vol. 1, p. 4, § 2870.

Courts of justices of the peace for the trial of civil actions are held by a single justice except in one instance. Where an action is brought before him under the "civil damage act" and the damages claimed exceed \$200 but do not exceed \$500, the justice must associate with him any other two justices of the peace of the same county, and the court so constituted will have jurisdiction to try and determine the action. Laws of 1873, chap. 646.

When held. No court can be opened or transact any civil business on Sunday, except to receive a verdict or discharge a jury. Vol. 1, p. 105. Nor can any court be opened to transact any business in any city or town on any day an election, other than for militia officers, is held therein, unless it is for the purpose of receiving a verdict or discharging a jury. Laws of 1842, chap. 130, § 5; Laws of 1847, chap. 240, § 2; Laws of 1878, chap. 354.

Courts of justices of the peace.— Clerks, stenographers, etc.— Constables.

Clerks, stenographers, etc. In the city of Brooklyn, the justices of the peace and police justices have each sole power to appoint a clerk of their respective courts; also to appoint such other clerks, assistants, stenographers and interpreters as the common council may authorize. All such appointees serve during the pleasure of the justices. Laws of 1880, chap. 256, § 14. The powers and duties of these clerks are defined by the Code, and are limited chiefly to the performance of ministerial acts and clerical duties which would otherwise be performed by the justice. See vol. 1, p. 78.

Constables. In the city of Brooklyn the common council is authorized to designate one or more policemen or constables to attend each of the justices' courts of that city. Vol. 1, p. 80. The common council is also authorized to fix and define the duties of such officers in and about those courts, and to allow them such compensation in lieu of all fees and perquisites as it deems proper. *Ib.*

Ordinarily, a constable is not an "attendant" upon courts held by justices of the peace, and there is no provision of law requiring him to be present at the sittings of those courts. When a mandate issued by a justice of the peace is directed and delivered to him, he must execute it in person according to its tenor, and cannot act by deputy. If he finds or has reason to apprehend that resistance will be made to the execution of the mandate, he may require the sheriff to execute it. Vol. 1, p. 88. For such services as he may perform in an action or special proceeding he is entitled to a statutory fee. He cannot ask or receive any money or other valuable thing as a consideration, reward or inducement for omitting to perform any of the duties of his office; nor can he ask or receive any money or valuable thing other than the fees expressly allowed him by law, for executing any duty pertaining to his office. He cannot be directly or indirectly interested in buying demands for the purpose of bringing suit thereon before a justice; nor can he offer any pecuniary inducement to any person to place a debt, demand or other cause of action in his hands for prosecution or collection. See vol. 1, p. 83. If he does any of these prohibited acts he is guilty of a misdemeanor, and may be punished accordingly. A conviction will operate also as a forfeiture of his office. *Ib.*

The powers, duties and liabilities of these officers in the execution of the mandates of the justice will be considered hereafter. And see vol. 2, pp. 430, 438, 546.

Attorneys. In courts of record an attorney at law is an officer of the court, vested with certain powers and duties and subject to certain liabilities clearly defined by the statute and the common law. But in

justices' courts there are no attorneys at law. All persons who appear there for parties are mere agents or attorneys in fact. *Sperry v. Reynolds*, 65 N. Y. 179. In a court of record, the appearance of an attorney at law is evidence of his authority, while in a justice's court his appearance is governed by the general law of agency. *Ib.* In a court of record an attorney at law has a lien for his services upon a judgment recovered in favor of his client. Code of Civil Pro., § 66. In a justice's court he has not. *Read v. Joselyn*, 1 Sheld. 60.

In the city and county of New York and the county of Kings a person who is not an attorney or counselor at law is prohibited from making it a business to practice as an attorney in a court in either county; and a justice of the peace in those counties who knowingly permits a person to practice in his court who has not been regularly admitted to practice in the courts of record of the State is guilty of a misdemeanor and liable to a fine or imprisonment, or both. But this does not prohibit a party to a cause from appearing therein in person. See Code Civil Pro., §§ 63, 64.

There are certain persons or classes of persons prohibited by statute from acting or practicing as attorneys and counselors in any court, and others who are likewise prohibited from acting or practicing as attorneys and counselors in certain courts upon certain contingencies. See vol. 1, p. 9, note. But as all persons appearing and acting for others in a justice's court, appear and act as attorneys in fact, or mere agents, it may well be doubted whether they can be deemed to be acting or practicing as attorneys or counselors within the meaning of the statute.

CHAPTER II.

JURISDICTION AND GENERAL POWERS OF JUSTICES OF THE PEACE.

SECTION 1. Nature and source of the jurisdiction of a justice.

The first and most important question which arises when a justice is called upon to act in the discharge of his official duties is whether he has jurisdiction of the matter before him. This he should determine at the earliest possible moment, and even in making his decision he will be exercising jurisdiction to a limited extent. A court having the parties to an action before it must necessarily obtain jurisdiction so far as to decide whether it can entertain the suit or proceeding; that is, whether it has jurisdiction of the action. Its decision of that question, whether made in the form of an order or of a judgment, is a judicial act, the determination of a question between the parties, and is necessarily an exercise of jurisdiction. *King v. Poole*, 36 Barb. 242. And whenever a justice takes cognizance of an action and proceeds in it, he in effect decides that he has jurisdiction, although that decision is not announced in terms. *Clary v. Hoagland*, 6 Cal. 685.

To determine intelligently this question of jurisdiction it is essential to fully understand the meaning of the term, the source from which the jurisdiction of the justice is derived, upon what it depends, and the nature of the power conferred.

Definition. The term "jurisdiction" has been variously defined, but not always with that accuracy and comprehensiveness which is essential to a definition. The term is applied in so many very different ways that it is difficult to give any single definition which will be entirely accurate in every case.

Jurisdiction is that power or authority which the law has conferred upon courts, judges, or justices of the peace, over the persons or the property of parties, and over the subject-matter of actions or proceedings, to take cognizance of, to hear, try and determine the matters in controversy between the parties, and to carry that determination into effect. See *People v. Sturtevant*, 9 N. Y. 263, 267. "Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power

Definition.

over them." BALDWIN, J., in the *State of Rhode Island v. State of Massachusetts*, 12 Peters, 718. The term has reference to the power to act, and not to the manner in which that power shall be exercised. If the law confers power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and which has the right of the case is a mere exercise of jurisdiction by judicial action, and is a matter wholly distinct from the power to render the judgment or decree. *Ib.*; *Fisher v. Hepburn*, 48 N. Y. 41, 53; *Buffalo and State Line R. R. Co. v. Supervisors of Erie*, 48 id. 93, 98; *Hunt v. Hunt*, 72 id. 217; *People v. Sturtevant*, 9 id. 263. The question of the existence of jurisdiction is an abstract inquiry not involving the existence of an equity to be enforced, nor of the right of the plaintiff to avail himself of it if it exists. It precedes these questions; and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else. *Ib.*

It is sometimes said that a justice had no jurisdiction to render a particular judgment in a case before him, when the idea intended to be conveyed by the words used is that the justice erred in the exercise of the power conferred upon him by law. But this is a perversion of terms. When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment is binding in every other court. But if it act without authority, its judgments are nullities. *Elliott v. Piersol*, 1 Peters, 328, 340; *Wilcox v. Jackson*, 13 id. 511; *Buffalo and State Line R. R. Co. v. Supervisors of Erie*, 48 N. Y. 93, 98; *Risley v. Phenix Bank of New York*, 83 id. 318, 337. If a court is authorized by statute to entertain jurisdiction in a particular case only, and it undertakes to exercise the power and jurisdiction so conferred in a case to which the statute has no application, it acquires no jurisdiction, and its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. *Ib.*; *Thompson v. Whitman*, 18 Wall. 457; *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

In some cases considerable confusion has been occasioned by confounding matters conferring jurisdiction of a proceeding and matters affecting only the regularity of the proceedings. The term "want of jurisdiction" should never be employed to express the want of control over proceedings in a cause on account of some irregularity. See *D'Ivernois v. Leavitt*, 8 Abb. 59, 62. As an example of the improper use of the term "jurisdiction," it is frequently said that where a justice has adjourned a cause the second time, on the motion of the

Definition.—Source of jurisdiction

plaintiff and against the objections of the defendant, that the action is discontinued, out of court, or that the justice has lost his jurisdiction of the action. If the justice originally had jurisdiction of the subject-matter and of the person of the defendant, and the adjournment is improper, the judgment subsequently rendered may be *erroneous* or *irregular*, and therefore reversible on appeal, but it is not *void*, however erroneous it may be. *Horton v. Auchmoody*, 7 Wend. 200. So, if a magistrate, having power to impose a fine to a limited amount, imposes a fine glaringly in excess of that which he is authorized to inflict, it is sometimes said that his act is as much without authority or jurisdiction as would have been a sentence that the party should be hanged or imprisoned in the State prison. But this is a confusion of ideas and principles essentially and fundamentally different. The latter sentence would have been a nullity because the magistrate had no power or authority to inflict any punishment of that kind or quality. He has no such power conferred upon him which he could exercise in any manner or degree. But he has the authority to inflict a fine, and erred in the exercise of it in measure or degree only. And this is the true distinction between the acts of an inferior magistrate which are without jurisdiction and void, and those which are erroneous, and voidable merely. In the former case the magistrate would not be sheltered and protected by the shield of judicial irresponsibility, while in the latter case he would. *Clark v. Holdridge*, 40 How. 320; S. C., 58 Barb. 61.

Source of jurisdiction. A justice of the peace does not exercise a common-law jurisdiction of a general character; but it is a limited statutory authority. He has such jurisdiction in actions and special proceedings as is specially conferred upon him by statute, and no other. Vol. 1, p. 2, § 2861.

In all matters relating to the acquirement of jurisdiction, the authority conferred must be strictly pursued. As to jurisdictional matters nothing can be taken by implication. *Jones v. Reed*, 1 Johns. Cas. 20. And in every preliminary step which is required by law in order to acquire jurisdiction of the person or of the property of the defendant there must be the strictest compliance with the statute, or jurisdiction will not be obtained.

While a justice of the peace cannot acquire jurisdiction by mere implication, yet in respect to those incidents which are usually annexed to jurisdiction and necessary to its exercise, the rule is that the grant of jurisdiction, in express terms, carries with it all the legal incidents necessary to a legal and proper exercise of the authority. *Robbins v. Gorham*, 25 N. Y. 588, 594; S. C., 26 Barb. 586; *Voorhees v. Martin*, 12 id.

508. For the purpose of hearing, trying and determining an action or special proceeding of which he has jurisdiction, the statute confers upon him, when no special provision is otherwise made by law, all the necessary powers of the Supreme Court. Vol. 1, p. 3, § 2668. This statute is a recognition of the common-law rule that the grant of jurisdiction carries with it a grant of all powers necessary to the proper exercise of such jurisdiction. This incidental power is illustrated by the case of *Connors v. Joyce*, 3 Lans. 315. This was an action of replevin under the statute of 1860. That statute provided that if the property replevied had not been delivered to plaintiff, or if the defendant by his answer claimed a return of the property, its value should be assessed and also the damages sustained by the taking or detention, and that the justice should render judgment accordingly. But the statute made no provision for a judgment, where, as in the case referred to, the property had not been delivered to the plaintiff, and the defendant did not claim its return. It was, nevertheless, held that the legislature undoubtedly intended to confer upon the court the power to render an appropriate judgment in such a case, as otherwise the trial would be a futile proceeding; and that a judgment that the plaintiff was entitled to the possession of the property was one that the justice had power to render and enforce.

It should not be overlooked that the statute above mentioned conferred upon the justice power to render a judgment in an action of replevin, but did not, in express terms, confer upon him the power to render the particular judgment which was rendered in the case cited.

As the jurisdiction of a justice of the peace is limited by statute so it may at any time be extended by statute. The legislature has undoubted power to enlarge the jurisdiction of justices' courts either as to the amount involved, or as to the nature of the controversy. See *Knight v. Campbell*, 62 Barb. 16; *Dawson v. Horan*, 51 id. 459; *People v. Lane*, 6 Abb. (N. S.) 105, 115; S. C., 55 Barb. 168.

How far conferred by consent. In seeming conflict with the doctrine that a justice of the peace has no jurisdiction unless it is expressly conferred by statute, it is frequently stated that jurisdiction in a particular matter was conferred by consent. But it has long been settled that consent can never confer jurisdiction of the subject-matter of an action; and that not even the most direct assent by the parties can confer jurisdiction, or render effectual the judgment of a tribunal in a matter over which the law has not given it cognizance. *Dudley v. Mayhew*, 3 N. Y. 9; *Coffin v. Tracy*, 3 Caines, 129; *Davis v. Packard*, 7 Peters, 276; *Burk v. Ayres*, 19 Hun, 17, 24; *Dake*

Where exercised.

v. *Miller*, 15 id. 356, 358; *McMahon v. Rauhr*, 47 N. Y. 67; *Ansonia Brass and Copper Co. v. New Lamp Chimney Co.*, 64 Barb. 435. It is sometimes said that consent will confer jurisdiction over the person, though it cannot confer jurisdiction of the subject-matter of the action. But this statement is not entirely accurate. Jurisdiction of courts is conferred by law, and in no case by the consent of parties. When jurisdiction of the subject-matter and of the *person* is required as a prerequisite to judicial action, a defendant may waive any irregularities in the mode by which his person is sought to be subjected to the jurisdiction of the court, by a voluntary appearance. He may dispense with the service of a summons as he may waive any other personal privilege. But when the defendant is in court as a party, the *law* gives jurisdiction of the person without regard to whether his appearance was voluntary or by compulsion. This is all that is meant by consent giving jurisdiction of the person. *Burckle v. Eckhart*, 3 N. Y. 132. If consent alone would confer jurisdiction of the person, then a written stipulation entered into between two parties reciting the existence of a controversy based upon a certain admitted state of facts, and authorizing the justice to render judgment thereon without issuing process and without the appearance of the parties before him, would give the justice jurisdiction to proceed to render a judgment as a court. But whatever might be the effect of the stipulation as a submission to arbitration it would hardly be claimed that the justice had jurisdiction to act as a court. Parties may arbitrate their claims, but an award is not a judgment.

Where exercised. Every judicial authority ought to be exercised within the territorial limits of the officer's jurisdiction. And this is true not only as to justices of the peace, but as to higher judicial officers. So strictly is this rule enforced, that the first judge of the Court of Common Pleas, under the former practice, could not allow an appeal from a justice's court, where the allowance was made at Albany, and the judge was the first judge of the Montgomery Common Pleas. The Supreme Court said: "The judge had no jurisdiction to allow the appeal, it was a judicial act which could properly be performed only in the county for which he was appointed." *People, ex rel. Newell, v. Mont. Com. Pleas*, 18 Wend. 649. This rule is to be most carefully observed by justices of the peace, especially since it has been held in one case, that a justice could not legally try a cause out of his own precinct, even by the consent of the parties. *Foster v. McAdams*, 9 Tex. 542, See, also, *Reed v. Warth*, 2 Hilt. 281.

The City Court of Brooklyn is a court of special and limited juris-

Territorial extent.

diction, and therefore a referee appointed by that court has no power to try the cause in the city of New York, as that is situated beyond the territorial limits of the court. *Bonner v. McPhail*, 31 Barb. 107.

The statute also declares the same rule as to justices. "Justices of the peace must reside in the town for which they were chosen, *and shall not try a civil cause in any other town*, except in cases otherwise provided by law." 1 R. S. 383, § 10, 5th ed. See vol. 1, p. 3, § 2868.

In the city of Brooklyn a justice of the peace is required to hold court within the judicial district from which he was elected, except that in case any justice is absent or unable to hold court, any other justice of the peace of the city may, upon the request of the justice or his clerk, hold court in his stead pending such absence or disability. Laws of 1881, chap. 141.

Territorial extent. The word "jurisdiction" is used in two distinct senses both by the courts and by the legislature. It primarily means the power of the court to hear and determine the subject-matter of the controversy between the parties to a suit or proceeding, and to adjudicate or exercise any judicial power over them. See *ante*, 12. It is also used in a secondary sense as a brief expression to indicate the territorial boundaries of the exercise of judicial power; as, for example, when it is said that an offense was committed without the jurisdiction of the court, meaning that it was committed at a place beyond the limits of the process of the court. It is this jurisdiction, in the secondary sense, that will be considered here.

There has been considerable discussion as to whether a justice of the peace holds a town or a county office. *Schroepel v. Taylor*, 10 Wend. 196; *Gurnsey v. Lovell*, 9 id. 319; *People v. Carter*, 29 Barb. 208; *People v. Keeler*, 17 N. Y. 370; *People v. Crawford*, 7 Alb. Law Jour. 204. It is perhaps unimportant to determine the question in this connection, but the decided weight of authority is in favor of the theory that the office is a county office.

So far as the power to issue and enforce obedience to process is concerned, it may be laid down as a general rule that the territorial limits of a justice's jurisdiction are coextensive with the county in which he resides. In some respects they are still wider. He may send his subpoena to any part of his own or an adjoining county, and if necessary, compel obedience thereto by warrant of attachment and the arrest of the defaulting witness in an adjoining county. Vol. 1, pp. 34, 35. He may send his commission into any part of the State, or without the State, and the deposition taken under his commission has the same value as evidence as one taken under a commission issued by the Su-

Territorial extent.

preme Court. Vol. 1, p. 38. In an action brought before him to foreclose a mechanic's lien, he may send the notice which takes the place of the summons in ordinary actions, to any part of the State, and, in case of the absence of the party to be served, may order its service upon him without the State by publication. Laws of 1873, chap. 489, §§ 8, 9. But, as has been stated, he cannot try a civil cause in any town other than that for which he was elected, except in a case otherwise provided by law; and there are many cases in which a justice of the peace has no jurisdiction of a cause of action arising in another town not adjoining his own, though within his county.

An action must be brought before a justice of a town or city where one of the parties resides, or a justice of an adjoining town or city in the same county, unless the case falls within one of the exceptions of the statute. Vol. 1, p. 3, § 2869. These exceptions are four in number.

1. If the defendant has absconded from his residence, the action may be brought before a justice of the town or city where the defendant is at the time of the commencement of the action.

2. If the plaintiff is not a resident of the county, or if there are two or more plaintiffs, and all of them are non-residents of the county, the action may be brought before a justice of the town or city in which the plaintiff, or either of the plaintiffs, or his attorney is at the time of the commencement of the action.

3. If the defendant is a non-resident of the county, the action may be brought before a justice of the town or city in which he is at the time of the commencement of the action.

4. If it is specially prescribed by law that a particular action may be brought before a justice of the town, city, county or district where an offense was committed, or where property is found, then the action may be commenced before such justice without regard to the residence of the parties.

A non-resident plaintiff may sue any where in the county of the defendant's residence. *Bird v. Crane*, 26 Hun, 531.

For the purpose of determining the town or city in which an action must be brought when the defendant is a corporation, foreign or domestic, a railroad corporation, or a corporation, association, partnership or person doing business in this State as an express company, the defendant is deemed a resident of the town or city where the person resides to whom a copy of the summons is delivered. *Id.* And see vol. 1, pp. 6, 7, §§ 2879-2881.

The statute also designates the justice of the peace before whom a civil action must be brought in the city of Brooklyn. Laws of 1881,

Territorial extent.

chap. 141, § 2; Laws of 1880, § 6. And other special statutes contain similar provision in relation to the jurisdiction of local courts, which need not be specifically pointed out in this work.

An action to foreclose a mechanic's lien may be commenced in a justice's court of the town or city in which the premises are located. Laws of 1873, chap. 489, § 8. And the same rule applies to summary proceedings to recover real property. Vol. 1, p. 157. In case the property sought to be recovered is located in a city, the limitation of the jurisdiction of the justice may not extend beyond his district, or the district adjoining it, as will be hereafter noticed. See Code Civil Pro., § 2234; Laws of 1880, chap. 256, § 6; Laws of 1881, chap. 141, § 2.

As a general rule, statutes giving a penalty declare in what court or before what officer the action to recover the penalty may be brought. Thus, the statute provides that an action to recover a penalty for a violation of the act regulating the size of apple, pear and potato barrels (Laws of 1875, chap. 573, § 2), or for the violation of the act for the protection of dairymen and dealers in milk and to prevent deception in the sale of milk (Laws of 1878, chap. 220), or for a violation of the "game laws" (Laws of 1879, chap. 534, § 33), may be brought before any justice of the peace in the county where the offense was committed; and in the latter case, before any justice of an adjoining county as well. While actions by overseers of the poor, or other officers, to recover a penalty for the malicious or wanton injury or defacement of monuments, works of art, buildings, fences, etc., may be brought in the court of any justice of the peace, or in a justice or District Court of any city. Laws of 1877, chap. 451.

It is a general rule that the jurisdiction of a *local* court must be exercised within the locality, and that its process cannot be executed outside of it. Therefore, where a justice's court is established in a city, and the statute creating it confers upon the justices "the same jurisdiction *in said city* that justices of towns have by law in respect to the towns for which they have been elected," and declares that the justices shall be deemed justices of the peace of the county in which the city is located, a justice of such court has no power to send process into an adjoining town for service, and will acquire no jurisdiction by the service of a summons outside the limits of his city. *Geraty v. Reid*, 78 N. Y. 64.

The statute lays down the general rule that an action must be brought before a justice of the peace of the town or city where one of the parties resides, or a justice of an adjoining town or city in the same county. Two towns which touch at their corners are adjoining towns,

Territorial extent.

within the meaning of the statute. *Holmes v. Carley*, 31 N. Y. 289. See *In re Ward*, 52 id. 395. If a justice of the peace renders a judgment in an action brought in the wrong town, the judgment may be reversed on appeal. *Tiffany v. Gilbert*, 4 Barb. 320; *Willins v. Wheeler*, 8 Abb. 116; 17 How. 93; 28 Barb. 669. It has been held that such a judgment is entirely void, and that an action could be maintained in the Supreme Court to have it declared void. *Cooper v. Ball*, 14 How. 295. And see *Beattie v. Larkin*, 2 E. D. Smith, 244. But in the case of *Tiffany v. Gilbert*, 4 Barb. 324, it is said by the Supreme Court: "The jurisdiction was made local by statute; not in such a sense as to render the judgment *coram non judice*, as though the justice had entertained jurisdiction in an action of slander, but in a sense that rendered the judgment *erroneous*." The question came up in that case on an appeal, so that the question as to the validity of the judgment in a collateral proceeding was not in question. In *Foster v. Hazen*, 12 Barb. 547, the action was for an assault, etc., and a false imprisonment. The defendant set out in his answer the various proceedings by virtue of which a justice issued a warrant on which the plaintiff was arrested, which was the alleged assault, etc. The answer did not state that the action was brought before a justice of the town wherein either of the parties resided, etc. The plaintiff demurred to the answer for this and various other causes. But the Supreme Court held the answer sufficient in that respect, and cited with approbation the language of the Supreme Court in *Tiffany v. Gilbert*, as already cited. The question was one of pleading; and the precise point decided was, that the answer sufficiently set forth the judgment of the justice for the purposes of pleading; although the court evidently regarded the judgment as valid in this collateral action. In *Barnes v. Harris*, 4 N. Y. 374, the action was brought upon a justice's judgment, in which a long summons had been issued, but the complaint in the action in the Supreme Court upon the judgment did not show the residence of the defendant, at the time of commencing the action. The defendant demurred to the complaint, assigning, among other causes, that the complaint did not even show that the defendant was a resident of the county, etc. The Court of Appeals held the complaint sufficient. But this case was one in which the sufficiency of the pleading was in question, and nothing else could be properly decided. The judgment was properly pleaded, because it was not necessary in the pleadings to state affirmatively or negatively all the facts which might relate to jurisdiction. But the question whether the judgment would be void, if it should appear on the trial that the defendant was a non-

As to amount.

resident of the county, did not arise in the case. In *Pollock v. Aldrich*, 17 How. 109, it was held that a justice might take a confession of a judgment in any town in the county in which he resided. In that case the confession was taken in a town in which the justice did not reside, but was not entered in his docket until his return home. In such a case it may perhaps be said that there was no trial. The statute does not in terms prescribe that a confession of judgment shall be made in any particular town, and the reasons which induce the law-makers to limit the territorial jurisdiction of a justice in the trial of causes do not apply in the case of a confession of judgment. Nevertheless it would not be doing violence to the statute to construe the proceeding under our present practice as a trial.

As to amount. A justice of the peace must keep within the jurisdiction conferred upon him as to the amount involved in the action or special proceeding if a limit as to amount is fixed by statute. See *Mattison v. Bancus*, Hill & Denio (Lalor's Sup.), 321.

In some cases a limit as to the amount of a demand of which a justice may take cognizance has been fixed by statute, and in others no limit has been prescribed. A justice of the peace may take cognizance of an action upon a surety bond taken by any justice of the peace, or of an action upon a judgment rendered in a court of a justice of the peace, or in the District Court of the city of New York, or in a justice's court of a city, being a court not of record. Vol. 1, p. 2.

The statute also permits the plaintiff, in an action against a person suffering animals to stray in a public street or highway, to recover the full amount of the penalties given by the statute, although the amount exceeds the sum for which a justice can render a judgment in an ordinary action. Vol. 1, p. 66, § 3083.

But in other actions a justice of the peace has no jurisdiction if the amount claimed exceeds \$200. See vol. 1, p. 2. Ordinarily the amount claimed in an action in justice's court cannot be determined before the complaint is filed. But where a provisional remedy accompanies the summons, the amount claimed may be determined from the plaintiff's affidavit, upon which the application for the order, warrant or requisition is based. •

In an action of replevin, or, as it is termed in the Code, an action to recover a chattel, the jurisdiction of the justice as to amount is made to depend exclusively upon the value of the chattel as stated in the affidavit made on the part of the plaintiff, and not upon the actual value of the chattel as stated in the complaint or proven upon the trial. Vol. 1, p. 2, § 2862; *Dennis v. Crittenden*, 42 N. Y. 542. When a requisition is based.

As to character of the parties.

tion to replevy, based on an affidavit stating the actual value of the property, issues with the summons, the question of jurisdiction can be determined by a mere inspection of the affidavit.

But a plaintiff is not obliged to resort to the provisional remedy given by the statute. He may commence and prosecute his action in the ordinary manner and demand and obtain judgment for the possession of the chattel as if a requisition had issued. See vol. 1, p. 24, § 2933. In such case there will be no affidavit stating the value of the chattel by which the jurisdiction of the justice, as to amount, can be determined; and if it should appear upon the trial that the property was worth more than \$200 the justice would not be ousted of jurisdiction. See *Dennis v. Crittenden*, 42 N. Y. 542.

A justice of the peace has jurisdiction to render judgment upon the confession of the defendant in the mode prescribed by the statute, where the sum confessed does not exceed \$500. Vol. 1, p. 2, § 2864. In the municipal court of Buffalo a judgment may be confessed for the same amount. Laws of 1880, chap. 344, § 5.

The statute gives to the justice's court of the city of Albany jurisdiction in any civil action or proceeding of which it has cognizance to the amount of \$300. Laws of 1881, chap. 438, § 4. The municipal court of Buffalo has jurisdiction to the same amount. Laws of 1880, chap. 344, § 5. The corresponding limit of jurisdiction, as to amount, of the municipal court of the city of Rochester is \$500. Laws of 1880, chap. 14, § 245; vol. 1, p. 95. The limit of the jurisdiction, as to amount, of the District Courts of the city of New York is fixed by the Code at \$250, so far as any limitation is prescribed. See vol. 1, pp. 91, 92; Laws of 1882, chap. 410, §§ 1284, 1285. And the same amount is fixed by that act as the limit of jurisdiction of a justice of the peace of the city of Brooklyn. Vol. 1, p. 77.

As to character of the parties. An action cognizable by a justice of the peace may be brought by or against a corporation; by or against a natural person in his own right; by or against a town or county officer in his official character; or by an executor or administrator. Vol. 1, p. 3, § 2865. But a justice of the peace cannot take cognizance of a civil action against an executor or administrator, as such, nor of a civil action in which the people of the State are a party, except for one or more fines or penalties not exceeding \$200. Vol. 1, p. 2, § 2863. It was formerly held that a justice of the peace had no jurisdiction of an action against a foreign corporation. But no distinction between foreign and domestic corporations is now made by the statute conferring jurisdiction upon justices' courts; and

Jurisdiction of the person.—How and when acquired.

as will be seen hereafter, special provisions are made in the Code for the service of a summons upon foreign corporations. By the act to regulate the admission to this State of fire and marine insurance companies from other countries than the United States it is provided that suits may be brought against such companies in any District Court in the city of New York, or before any justice of the peace, or any other court where such suits or actions can be brought against companies organized under the laws of this State. Laws of 1880, chap. 428, § 4.

How parties shall appear and defend in these courts will be considered hereafter.

§ 2. **Jurisdiction of the person.** It is not only important that a justice should exercise his jurisdiction within its legal territorial limits but that he should also have jurisdiction of the persons of the parties to the action.

The law, which has conferred jurisdiction over the persons of parties, has declared with precision in what manner that jurisdiction is to be exercised. And since justices do not possess any authority but that which is conferred by the statute, if there is not a compliance with the statute, there will be no jurisdiction of the action.

No man is to be condemned unheard, and therefore process is given to courts to bring parties before them for the purpose of determining rights.

How and when acquired. Under the former practice it was often a matter of no small difficulty to determine which of the six different kinds of process authorized by the statute should be employed for the commencement of a particular action. If the wrong process was served the justice might fail in acquiring jurisdiction; and if the right process was served but without the observance of certain requirements of the statute, which were made conditions precedent to the right to issue that particular process, then the court might fail in acquiring jurisdiction. Under the present practice there is but one form of process for the commencement of an ordinary action, and that is a summons.

An ordinary action is commenced before a justice of the peace, either by the parties appearing voluntarily and joining issue or by the service of a summons. Vol. 1, p. 5, § 2876. Unless a defendant appears and joins issue voluntarily, jurisdiction of his person can be obtained only by the service of a summons upon him. Mere service by copy does not give a justice jurisdiction of the person of the defendant, nor the right to try the action or render judgment therein. *Sperry v. Reynolds*, 65 N. Y. 179. Nor will the justice acquire jurisdiction of the person of the defendant by the unauthorized appearance of some person pro-

How and when acquired.

fessing to act for him. *Ib.* So, if an action is brought before a justice of the peace of the wrong town, and personal service of the summons is made upon the defendant beyond the territorial jurisdiction of the court, the general appearance of the defendant in the action to raise the question of jurisdiction by answer will not give the justice jurisdiction of the person of the defendant or of the cause of action. See *Landers v. Staten Island R. R. Co.*, 53 N. Y. 450; S. C., 14 Abb. (N. S.) 346; *Wheelock v. Lee*, 74 N. Y. 495.

A proceeding to foreclose a mechanic's lien in a justice's court, although termed an "action" in the statute authorizing it, does not come within the definition of an action given by the Code. See vol. 1, p. 167, § 3333; *Hallahan v. Herbert*, 57 N. Y. 409; *Leavy v. Gardner*, 63 id. 624; *Kelsey v. Rourke*, 50 How. 315. In such a proceeding jurisdiction is acquired by the service, in the manner prescribed by statute, of a notice, combining the essential features of both a summons and complaint. See Laws of 1873, chap. 489, § 8.

There are certain special proceedings which may be brought in justice's court which are commenced by the service of a precept.

A justice does not take jurisdiction of an action at the time of *issuing* the summons, nor does he obtain jurisdiction of the action and of the person of the defendant at the time the summons is personally served. But when a legal summons issued by a justice has been duly served, giving to the defendant notice by such service of the time prescribed by law, and such service appears by the proper return of the constable indorsed thereon, the justice, having such summons and return before him, obtains jurisdiction of the person of the defendant after waiting one hour after the time named in the summons for the appearance of the parties, whether the defendant is present or not. *Sagendorph v. Shult*, 41 Barb. 102.

Mere presence of a defendant in the court-room is not such an appearance as will give the justice jurisdiction of a defendant who was not present for the purpose of appearing therein. See *Merkee v. City of Rochester*, 13 Hun, 157. To the fact of appearance must be added the further fact of joining issue to amount to a waiver of process. See vol. 1, p. 5. In one case a summons was served by copy, and afterward the parties appeared before a justice of the peace for the purpose of commencing an action, when, on the request of the defendant, the cause was adjourned without the joinder of issue; and it was held that this did not authorize the justice to proceed on the adjourned day with the trial of the case in the absence of the defendant, as no action had been

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commenced by the prior proceedings or was then pending before him. *Lester v. Crary*, 1 Denio, 81.

Where there is no appearance on the part of the defendant it may be stated generally that jurisdiction of his person can be acquired only by the personal service of a summons upon him within the territorial jurisdiction of the court, or by some other authorized form of service declared by statute to be equivalent to personal service. See *Hunt v. Hunt*, 72 N. Y. 217, 237; *Gibbs v. Queen Ins. Co.*, 63 id. 114; S. C., 20 Am. Rep. 513; *Jenkins v. Fahey*, 73 N. Y. 355.

As will more fully appear hereafter, some of the rights of parties may be the subject of adjudication, though such parties have not been brought before the courts, either by voluntary appearance or by service of process upon the person, and though jurisdiction has been acquired in no other way than by a substitute for personal service. Most frequently such adjudications are *in rem*, as in actions for the foreclosure of a mortgage or other lien upon property, or actions in which property is attached. In such cases a judgment *in personam* is not permitted against a non-resident of the State. *Hunt v. Hunt*, 72 N. Y. 217, 237; *Schwinger v. Hickok*, 53 id. 280; *Bartlett v. McNeil*, 60 id. 53; *Bartlett v. Spicer*, 75 id. 528; *People v. Baker*, 76 id. 78.

A void process is no process. And if a summons is served in which there was, at the time of its delivery to the constable for service, a blank as to date or otherwise, the process being void by statute, the justice will acquire no jurisdiction of the defendant by the service. See vol. 1, p. 83, § 3135; *Clapp v. Graves*, 26 N. Y. 418. It would be otherwise if the summons was simply irregular, and therefore capable of amendment. *Ib.*

Waiver of errors in proceedings to acquire jurisdiction. The right to object is given for the benefit of the defendant; and there is no rule of law more familiar than that which declares that every man is at liberty to renounce any benefit which the law has reserved for him. *Tombs v. Rochester and Syracuse R. R. Co.*, 18 Barb. 583; *Conkling v. King*, 10 N. Y. 446; *Buel v. Trustees of Lockport*, 3 id. 197; *Baker v. Braman*, 6 Hill, 47. This principle of law applies as well to the right to object to defects in process as to any other right.

The rule, that a defendant, by voluntarily appearing and joining issue, without objection, waives the objection so far that jurisdiction is obtained over his person, is sustained by a numerous and nearly unbroken series of cases in this State. *Day v. Wilber*, 2 Caines, 134; *Malone v. Clark*, 2 Hill, 658; *Onderdonk v. Ranlett*, 3 id. 323; *Bloodgood v. Overseers of Jamaica*, 12 Johns. 285; *Andrews v. Thorp*,

 Objection to want of jurisdiction, when and how taken.

1 E. D. Smith, 615; *Monteith v. Cash*, id. 412; *Aldrich v. Ketcham*, 3 id. 577; *Bray v. Andreas*, 1 id. 388; *Cunningham v. Phillips*, id. 417; *Hogan v. Baker*, 2 id. 22; *Paulding v. Hudson Manuf. Co.*, id. 38; *Gossling v. Broach*, 1 Hilt. 49; *Mahoney v. Penman*, 4 Duer, 603; *Dempsey v. Paige*, 4 E. D. Smith, 218; *Robinson v. West*, 1 Sandf. 19; *Pixley v. Winchell*, 7 Cow. 366; *Ballouhey v. Cadot*, 3 Abb. (N. S.) 122; *Sanborn v. Lefferts*, 58 N. Y. 179; *Clapp v. Graves*, 26 id. 418. And it is said that a defendant can never appear and join an issue of law or fact without waiving all objections to the regularity or sufficiency of the service of process upon him. *Ogdensburgh, etc., R. R. Co. v. Vermont, etc., R. R. Co.*, 63 N. Y. 176. But it has also been repeatedly held that a party may appear and object to the defects in the process; and, if his objections are overruled, he may then join issue on the merits without waiving his previous objections. *Wheeler v. Lampman*, 14 Johns. 481; *Shannon v. Comstock*, 21 Wend. 457; *Camp v. Tibbetts*, 2 E. D. Smith, 20; *Dewey v. Greene*, 4 Denio, 93; *Allen v. Stone*, 9 Barb. 61; *Resseguie v. Brownson*, 4 id. 541; *Cunningham v. Goelet*, 4 Denio, 71; *Belden v. N. Y. and Harlem R. R. Co.*, 15 How. 17; *Horton v. Fancher*, 14 Hun, 172; *Avery v. Slack*, 17 Wend. 85. In the last case, the court said, COWEN, J.: "But it is said that the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver." See *Mooney v. Hudson River R. R. Co.*, 3 Daly, 105, 108; *Nickerson v. Ruger*, 76 N. Y. 279, 283.

An appearance by putting in an answer protesting against the exercise of jurisdiction is not such an appearance as waives the objection to the jurisdiction of the court. *Sullivan v. Frazee*, 4 Rob. 616; *Wheelock v. Lee*, 74 N. Y. 495; S. C., 5 Abb. New Cas. 72. Objection to the jurisdiction over the person of a party may be expressly waived, or it may be waived by implication by means of any act, indicating a design of the person entitled to raise the objection, not to insist upon it. *People v. Brennan*, 6 Sup. Ct. (T. & C.) 120; S. C., 3 Hun, 666; *Allen v. Malcolm*, 12 Abb. (N. S.) 335.

Objection when and how taken. It is an elementary principle recognized in all the cases, that to give binding effect to the judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set up against a judgment when sought to be enforced, or when

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any benefit is claimed under it. *Ferguson v. Crawford*, 70 N. Y. 253; S. C., 26 Am. Rep. 589.

When an attempt has been made to commence an action before a justice of the peace, and there has been a failure to obtain jurisdiction of the person of the defendant, he is not bound to attend before the justice on the return day of the summons to object to the proceedings against him, or to take any other steps whatever. If the justice proceeds to render judgment as if jurisdiction had been acquired, the defendant may obtain a reversal of the judgment upon an appeal to the County Court. The objection may be taken under a general statement in the notice of appeal that the justice had no jurisdiction of the action or of the person of the defendant. *Sperry v. Reynolds*, 65 N. Y. 179.

A failure to appear before the justice on the return day of the summons to take objection to the jurisdiction of the court is always attended with considerable risk, and may necessitate no little expenditure of time and money to obtain relief from a judgment rendered perhaps in ignorance of the jurisdictional defect. The better practice, in the majority of cases, is to attend on the return day of the summons, and when the cause is called, to appear specially and object to the jurisdiction of the justice. The defendant should state the grounds of his objection clearly and fully. If the jurisdictional defect appears in the papers before the justice nothing further is needed. If it does not so appear, the facts should be set forth in an affidavit, which should be filed with the justice. If these objections are disregarded by the justice, they can be raised on appeal to the County Court, and must there be considered and passed upon even though frivolous and devoid of merit. *Maxon v. Reed*, 8 Hun, 618.

In courts of record, the objection to the jurisdiction of the court over the person of the defendant can be raised by demurrer if the defect appears upon the face of the complaint. But want of jurisdiction is not made a ground of demurrer in a justice's court.

A justice cannot acquire jurisdiction by merely deciding that he has it. When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact existed and that it has jurisdiction. But when general jurisdiction is given to a court over any subject, and that jurisdiction depends in the particular case, upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far

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as to protect its officers and all other innocent persons who act upon the faith of it. *Roderigas v. East River Savings Institution*, 63 N. Y. 460; S. C., 20 Am. Rep. 555; *Miller v. Brinkerhoff*, 4 Denio, 119; *Staples v. Fairchild*, 3 N. Y. 41; *People v. Sturtevant*, 9 id. 263; *Skinnion v. Kelley*, 18 id. 355; *Porter v. Purdy*, 29 id. 106; *Bumstead v. Read*, 31 Barb. 661; *Grignon's Lessee v. Astor*, 2 How. [U. S.] 319; *Holcomb v. Phelps*, 16 Conn. 127; *State v. Scott*, 1 Baily, [Law], 294; *Roburg v. Hammond*, 2 Har. & G. 42; *Brittain v. Kinnaird*, 1 Brod. & Bing. 432. In a number of cases the broad rule has been laid down that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person of the defendant by the means provided by law, the proceedings are void. *Bigelow v. Stearns*, 19 Johns. 39. And see *Mills v. Martin*, id. 7, 33.

The record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction although the record avers the contrary. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record. *Harrington v. People*, 6 Barb. 607; *Noyes v. Butler*, id. 613; *Hard v. Shipman*, id. 621; *Starbuck v. Murray*, 5 Wend. 158; *People v. Davis*, 61 Barb. 456, 467. And see *Ferguson v. Crawford*, 70 N. Y. 253; S. C., 26 Am. Rep. 589.

A docket-book of a justice of the peace is only presumptive evidence of the matters of fact stated therein, and the presumption may be repelled by proof. Code of Civil Procedure, §§ 3148, 3155. The return of a constable or sheriff is not conclusive as evidence. Code of Civil Procedure, §§ 932, 1734, 2970. And when the jurisdiction of a court or officer is made to depend on the return of process in a given form, or a proof of a particular fact, and the return is not substantially in the form prescribed, or the fact is not proved, the court or officer does not acquire jurisdiction, and the proceedings are utterly void. *Stone v. Miller*, 62 Barb. 430.

From what has been stated and from the authorities cited, it is apparent that the defendant may raise the question of jurisdiction of his person on the return day of the summons, on appeal, or whenever the judgment is sought to be enforced against him, or any right or benefit is claimed under it. He must raise the question before the justice if he appears in the case or he will be deemed to have waived the objection. Whether he will raise the question directly on the return day of the summons, or collaterally in an action for the wrongful taking of his property under execution issued upon the judgment ren-

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dered in the action or otherwise, is merely a question of good judgment and discretion.

§ 3. **Jurisdiction of the property.** Under the former practice a warrant of attachment was one of the many forms of process authorized by law for the commencement of an action. Under the present practice it is a mere provisional remedy ; and an action in which a warrant issues is commenced in the same manner as other actions, by the service of a summons in some of the modes prescribed by law, or by the voluntary appearance and joinder of issue by the parties. Personal service of the summons is dispensed with in case the defendant cannot be found within the county, and another form of service is authorized to meet the necessities of the case. See vol. 1, p. 15, § 2910. But it is by the service of the summons and not by the warrant of attachment that the action is commenced. The object of the attachment is to seize and hold the goods until the creditor shall have had opportunity to try the question of indebtedness with his debtor, and to obtain an execution upon the judgment, if one is rendered in his favor. After a levy has been made under an execution the officer holds the goods by virtue of the execution and not by virtue of the attachment, except so far as the priority of the levy under the attachment inures in favor of the execution. *Stone v. Miller*, 62 Barb. 430 ; *Lynch v. Crary*, 52 N. Y. 181 ; S. C., 14 Abb. (N. S.) 85. The warrant of attachment, therefore, merely gives control of the property of the defendant in the interim between the issuing of the summons and the levy of the execution in the action. If the summons has been personally served upon the defendant in the action, or if the defendant has appeared generally therein, or if a judgment may be taken against the defendant as being indebted jointly with another defendant, who has been thus summoned, or who has thus appeared, the justice may proceed to hear and determine the action, although he has vacated the warrant of attachment. But in every other case the justice on vacating the warrant of attachment against the property of the defendant must dismiss the action as to him. If the property of the defendant has been duly attached and the attachment is not vacated the justice must proceed to hear and determine the action, although the defendant has not appeared, and the summons has not been personally served upon him ; but the judgment will be only presumptive evidence of indebtedness, and the execution issued thereon can be satisfied only out of the property attached. See vol. 1, p. 17.

From what has been said it will be readily seen that a justice of the peace may acquire a temporary power over the property of a defendant without acquiring jurisdiction of his person by the personal service

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of a summons upon him. But to authorize an exercise of this power an affidavit must be made showing to the satisfaction of the justice the existence of the facts which authorize a resort to the remedy, and an undertaking must be executed to the defendant to the effect prescribed by the statute. Vol. 1, pp. 13, 15. There must be a strict compliance with every requirement of the statute in relation to obtaining jurisdiction. If the justice issues the warrant without any affidavit, he acts without jurisdiction, his proceedings are void, and he is liable as a trespasser. *Adkins v. Brewer*, 3 Cow. 206; *Vosburgh v. Welch*, 11 Johns. 175. And see *Donnell v. Williams*, 21 Hun, 216. So if the justice issues the warrant when no undertaking has been given as required by the statute, he will acquire no jurisdiction, and will be liable as a trespasser. *Davis v. Marshall*, 14 Barb. 96; *Kelly v. Archer*, 48 id. 68; *Homan v. Brinckerhoff*, 1 Denio, 184; *Tiffany v. Lord*, 65 N. Y. 310. And if both the affidavit and undertaking are wanting, the justice will clearly be without jurisdiction to issue the warrant. *Adkins v. Brewer*, 3 Cow. 206; *Davis v. Marshall*, 14 Barb. 96. So if a justice issues an attachment in an action to which the statute authorizing the warrant to issue has no application, he will acquire no jurisdiction, and this proceeding will be treated as a nullity when they come in question, either directly or collaterally. See *Risley v. Phoenix Bank of City of New York*, 83 N. Y. 318, 337. So if the warrant issues upon an affidavit, but the affidavit is wholly silent as to any material fact required by the statute to be stated therein, the act of the justice will be wholly without jurisdiction, and the warrant will be declared void in whatever form the question may arise. *Staples v. Fairchild*, 3 N. Y. 41; *Donnell v. Williams*, 21 Hun, 216; *Lyon v. Blakesly*, 19 id. 299; *Kelley v. Archer*, 48 Barb. 68. But in order to defeat the jurisdiction of the justice there must be a total want of evidence upon some essential point. *Schoonmaker v. Spencer*, 54 N. Y. 366. See *Steuben Co. Bank v. Alberger*, 78 id. 252, 258. If the proof presented to the justice has a legal tendency to make out a proper case, in all its parts, for issuing the warrant, then, though the proof may be slight and inconclusive, the warrant will be valid until it is set aside by a direct proceeding for that purpose. In the one case the court acts without authority; in the other it only errs in judgment upon a question properly before it for adjudication. In the one case there is a defect of jurisdiction; in the other there is only an error in judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight of evidence only makes the act erroneous and it will stand good until reversed. *Staples v. Fairchild*, 3 N. Y.

Jurisdiction of the subject-matter.

41. See *Easton v. Malavazi*, 7 Daly, 147; *Allen v. Mayor*, id. 229; *Skinnion v. Kelley*, 18 N. Y. 355; *Miller v. Brinkerhoff*, 4 Denio, 118; *Den v. Turner*, 9 Wheat. 541; *Kissock v. Grant*, 34 Barb. 144.

Jurisdiction of the person of a defendant and of the subject-matter of the action carries with it jurisdiction of the property of the defendant within reach of the process of the court so far as to render such property subject to the ordinary process of the court for the enforcement of the judgment which may be rendered in the action. Therefore, as has been stated if a warrant of attachment has been vacated, and the court has lost control of the property of the defendant during the time intervening between the vacating of the warrant and the issuing of an execution, the general property of the defendant, including that attached, is still subject to be taken upon an execution issued upon a judgment rendered against the defendant in the action, if the court has acquired jurisdiction of his person in one of the modes authorized by law. See vol. 1, p. 17. In such case the power of the court over the property of the defendant is the same as in an action in which no attachment has issued.

The proceeding by attachment is not the only one in which the court can acquire jurisdiction of the property of the defendant before judgment. In an action to foreclose a chattel lien, a warrant may be issued by the justice requiring the constable to seize the chattel and keep it safely to abide the judgment. Vol. 1, pp. 153, 154, § 1740. In an action to recover the possession of personal property, he may, at the time of issuing the summons, issue a requisition requiring the constable to replevy the property in suit. Vol. 1, p. 19, § 2921. But in whatever manner the justice proceeds against the property of the defendant, he must follow the procedure prescribed by the statute or he will act without jurisdiction.

§ 4. Jurisdiction of the subject-matter. Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising under that general question. It is not merely power to act upon a particular state of facts, but is the power to act upon the general or abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. *Hunt v. Hunt*, 72 N. Y. 217. It does not depend upon the ultimate existence of a good cause of action in the plaintiff in a particular case, but may exist where from the first to the last of the testimony in the case it was apparent that the plaintiff had no right of action. *Ib.*

Breach of contract.—Personal injuries.

A justice may exercise his judicial authority within the proper territorial limits, and he may issue process which is proper in form, but all that will not be of any avail if jurisdiction of the subject-matter of the action is wanting. And, in cases relating to the subject-matter of the action, the rule is, that there must be a clear and affirmative grant of jurisdiction or it does not exist. For, since there is no authority by which a justice can try a civil action unless the statute has conferred it, the want of authority will be as fatal if express jurisdiction is not given, as though there had been a prohibition of its exercise in the given case. *Dudley v. Mayhew*, 3 N. Y. 9; *Beach v. Nixon*, 9 id. 36. *Blin v. Campbell*, 14 Johns. 432; *Coffin v. Tracy*, 3 Caines, 129. In the one case there would be no jurisdiction because none was conferred by law, and, of course, none would exist; and, in the other case, there would be no jurisdiction because it was expressly prohibited; the result would be precisely alike in both cases, viz., a want of jurisdiction.

A justice of the peace has such jurisdiction in civil actions and special proceedings as is specially conferred upon him by statute, and no other. Vol. 1, p. 2.

Breach of contract. He has jurisdiction of a civil action to recover damages upon or for a breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed \$200. A different limitation as to amount is prescribed by statute for justices' courts of the cities of Albany and Brooklyn, for the municipal court of the cities of Buffalo and Rochester, and for the District Courts of the city of New York. See *ante*.

No action lies in a justice's court for a breach of a promise to marry.

Personal injuries. The statute in general terms gives a justice of the peace jurisdiction of a civil action to recover damages for a personal injury where the sum claimed does not exceed \$200, but also expressly provides that he shall not take cognizance of a civil action; to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction or malicious prosecution. Vol. 1, p. 2.

In *Rich v. Hogeboom*, 4 Denio, 453, it was held that trespass cannot be maintained in a justice's court for tearing and injuring the plaintiff's clothes, if it appears that the damage was done in connection with an assault on his person.

In *Bull v. Colton*, 22 Barb. 94, in an action brought before a justice of the peace, the complaint alleged that the defendant made an assault upon the horse of the plaintiff, while said horse was attached to a buggy wagon, "and while plaintiff was in said wagon, by willfully and ma-

Injuries to property.— Civil Damage Act.— Fraud.

liciously striking, whipping, beating and pounding said horse with a whip and hoe, and greatly injured, hurt and damaged said horse, and caused said horse to rear up, jump and run, *while said plaintiff was in said buggy wagon*, causing said horse to be greatly frightened, to plaintiff's damage \$100. *Held*, that the action was not one for an assault and battery upon the complaint as put in; but that it was proper for the justice to permit the plaintiff to amend the complaint by striking out the allegations relative to the plaintiff's being in the wagon at the time of the occurrence, and that after such amendment, the action was clearly an action for injuring property, which the justice had jurisdiction to try.

Any actionable injury to the person either of the plaintiff or of another is a "personal injury," within the meaning of the statute. Vol. 1, p. 169, § 3343, subd. 9. See *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585.

Injuries to property. So a justice has jurisdiction of an action to recover damages for an injury to property, where the sum claimed does not exceed \$200. Vol. 1, p. 2. The word "property" includes both real and personal property. Vol. 1, p. 169, § 3343, subd. 8. And an "injury to property" is defined as an actionable act whereby the estate of another is lessened, other than a personal injury, or a breach of contract. Id., subd. 10. This definition needs defining; but it is to be presumed that the word "another," as used in the definition, refers to a person other than the one committing the actionable act.

Civil Damage Act. A justice of the peace has jurisdiction of an action to recover damages under the "Civil Damage Act," where the amount of damages claimed does not exceed \$200; and a court composed of three justices of the county has jurisdiction of such action where the amount of damages claimed does not exceed \$500. Laws of 1873, chap. 646, § 2. Whether an action brought under this act is to be classified as an action for a personal injury or for an injury to property may not always be easy to determine.

Fraud. The old Code provided that a justice of the peace should have jurisdiction of an action for damages for fraud in the sale, purchase or exchange of personal property, if the damages claimed did not exceed \$200. Code of Proc., § 53, subd. 9. A similar provision is made applicable by statute to the municipal court of the city of Rochester, except that the limitation as to amount is \$500. Laws of 1880, chap. 14, § 245. The present Code does not contain any express provision as to the jurisdiction of a justice in an action based on fraud, but jurisdiction of such actions is nevertheless conferred by the pro-

Fines and penalties.— Bonds and judgments.

vision giving the justice jurisdiction of actions for personal injuries or injuries to property. See vol. 1, p. 2, § 2862, subd. 2; *Farrington v. Bullard*, 40 Barb. 512. A fraud of any character, by which a person has sustained legal injury, would fall within the definition of an injury to property, as an "actionable act whereby the estate of another is lessened."

Fines and penalties. A justice has jurisdiction of an action for a fine or penalty not exceeding \$200, and when the action is to recover the penalties given by the statutes relating to estrays, he has jurisdiction of the action without limitation as to the amount. See vol. 1, p. 66, § 3083.

A justice of the peace of the town or towns in which a village, incorporated under the act for the incorporation of villages, is located, has jurisdiction in all actions brought to recover fines or penalties for the violation of any provision of that act, or of the rules, by-laws, and ordinances of the village, or to recover any tax or assessment levied by the village. Laws of 1870, chap. 291, § 3, as amended by Laws of 1878, chap. 59, § 6.

A justice of the peace has jurisdiction of an action to recover penalties for a violation, within his county or an adjoining county, of the game laws of this State, when the amount of the penalties does not exceed his jurisdiction. Laws of 1879, chap. 534, § 33.

Bonds and judgments. He has jurisdiction also of an action upon a bond conditioned for the payment of money when the sum claimed does not exceed \$200, the judgment to be rendered for the sum actually due. He has also jurisdiction of an action upon a surety bond, taken by any justice of the peace, without regard to its amount; and upon any judgment rendered in a court of a justice of the peace, or in a District Court of the city of New York, or in a justice's court of a city being a court not of record. Vol. 1, p. 2. The statute specifies the courts which are not of record. See vol. 1, p. 104.

Under the former Code, a justice of the peace had jurisdiction of an action upon a judgment rendered in a court of justice of the peace or by a justice, or other inferior court in a city, where such action was not prohibited by the seventy-first section of that act. See Code of Proc., § 53, subd. 7. That section provided that no action on a judgment rendered by a justice of the peace should be brought in the same county within five years after its rendition except in certain cases specified. This limitation is still retained in an action upon a judgment of a justice of the peace in the municipal court of the city of Rochester. Laws of 1880, chap. 14, § 245. But the present Code does not

Replevin.—Liens.

contain this or any other equivalent limitation or prohibition. An action may now be brought upon a judgment rendered by a justice of the peace at any time after its rendition; but if it is brought within five years from the time the judgment was rendered, no costs can be recovered in the action, except in a case specified by the statute. See vol. 1, p. 87, § 3154.

Replevin. A justice of the peace has jurisdiction of an action to recover one or more chattels, with or without damages for the taking, withholding or detention thereof, where the value of the chattel or of all the chattels, as stated in the affidavit made on the part of the plaintiff, does not exceed \$200. Vol. 1, p. 2; and *see ante*, 21.

Liens. It must be remembered that the jurisdiction of a justice of the peace is not limited to the actions specified in section 2861 of the Code of Civil Procedure. That act enumerates and classifies the different courts of this State and then provides generally that "each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act." Vol. 1, p. 104, § 4. The word "now," in the section quoted, refers to the time when the section took effect. Vol. 1, p. 170, subd. 22. Therefore whatever jurisdiction was vested in a justice's court at the time the Code of Civil Procedure went into effect is still preserved, unless taken away by some other provision of that act. So, whatever jurisdiction has been conferred upon justices of the peace since the adoption of the present Code is, of course, to be exercised independent of any power or jurisdiction expressly given by that act.

A justice of the peace has jurisdiction of an action to foreclose a lien upon a chattel under the Code of Civil Procedure, when the amount for which the lien is claimed does not exceed \$200. Vol. 1, p. 153, § 1737. He has jurisdiction also of an action to foreclose a lien for the keeping, care and pasturage of animals under "act for the protection of livery-stable keepers and other persons keeping horses at livery or pasture." Laws of 1872, chap. 498, § 1; Laws of 1880, chap. 145. He has jurisdiction of an action to foreclose the lien of a boarding-house keeper. Laws of 1860, chap. 446; Laws of 1876, chap. 319. And he has jurisdiction of an action or special proceeding to enforce a mechanic's lien where the amount of the lien claimed is \$200 or under; Laws of 1873, chap. 489, § 8; of an action to enforce a lien for labor on an oil well; Laws of 1880, chap. 440; and of an action to enforce a lien of a railroad employee for labor performed. Laws of 1875, chap. 392, § 4.

Summary and special proceedings.— Actions expressly excepted.— Title to lands, etc.

Summary and special proceedings. A justice has jurisdiction of a summary proceeding to recover the possession of real property ; vol. 1, p. 157, § 2234 ; and of special proceedings against animals running at large in public streets, highways, etc. Vol. 1, p. 65.

Without attempting to enumerate the several actions or proceedings of which a justice of a peace has jurisdiction, it will be sufficient to say, generally, that he has jurisdiction only where jurisdiction is conferred by statute.

Actions expressly excepted. There are certain actions of which a justice of the peace is expressly prohibited from taking cognizance. Vol. 1, p. 2, § 2863.

A justice has no jurisdiction of an action where the people of the State are a party, except for one or more fines or penalties, not exceeding \$200 ; nor of any action or proceeding brought against an executor or administrator, as such ; nor of an action for assault, battery, false imprisonment, libel, slander, criminal conversation, seduction or malicious prosecution.

Title to lands in question. A justice of the peace cannot take cognizance of a civil action where the title to real property comes in question, either,

1. By a written answer, signed by the defendant, or his agent or attorney, and delivered to the justice with the undertaking described in section 2952 of the Code of Civil Procedure, setting forth facts showing that the title to real property will come in question ; or,

2. Where it appears upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant. See vol. 1, pp. 2, 29, 30.

The language of the statute is peculiar. It declares that a justice "cannot take cognizance of a civil action where the title to real property comes in question" in the manner above stated. But the justice must take cognizance of the action until the question of title is raised in the proceeding before him ; and when the question is raised, he must entertain jurisdiction of the action so far as to decide whether he has jurisdiction or not, and the decision of this question is necessarily an exercise of jurisdiction. See *King v. Poole*, 36 Barb. 242. In case the defendant sets forth in his answer facts showing that the title of lands will come in question, and gives the proper undertaking, the action is discontinued at the joinder of issue. If he does not give the undertaking, the justice has jurisdiction of the action and must proceed therein, and the defendant is precluded in his defense from drawing the title in question. Vol. 1, p. 30. If, however, it appears *upon*

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the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the justice must continue to exercise jurisdiction so far as to dismiss the complaint with costs, and to render judgment against the plaintiff accordingly. *Ib.*

The language of the statute is that "upon the delivery of the undertaking to the justice the action before him *is* discontinued." Vol. 1, p. 30, § 2954. But this is only the supposed equivalent of the language of the old Code which provided that in such case the action "shall be discontinued." See Code of Proc., § 57. If the plaintiff's complaint sets up two or more causes of action the defendant may interpose the defense that the title of land will come in question as to one or more of them and deliver the answer and undertaking to the justice, who must thereupon discontinue the action as to those causes, and proceed as to the remainder. Vol. 1, p. 31, § 2958. The discontinuance in both cases is effected by the act of the justice and not by operation of law; and the justice has the right to determine whether the question of title to land has been so raised as to oust him of jurisdiction and render a discontinuance necessary. The statute does not mean to deprive the justice of jurisdiction absolutely. It leaves him to judge whether the title is in question or not, and if he errs in his decision, it seems that the judgment is voidable for error, but not void for want of jurisdiction. *Koon v. Mazuzan*, 6 Hill, 44; *Bowyer v. Schofield*, 1 Abb. Ct. App. 177, 183; S. C., 2 Keyes, 628. But see *Gage v. Hill*, 43 Barb. 44; *Balja v. Rawley*, 37 How. 120. It cannot be said, however, that the question whether such judgment is void or merely voidable is free from doubt. In *Lamoure v. Caryl*, 4 Denio, 370, 372, it was said that when title is alleged in the answer and security given, the justice no longer has jurisdiction of the case, and should he proceed and render judgment, such judgment would be wholly void, but if the title to land comes in question on the plaintiff's own showing, and that title is disputed by the defendant, if the justice, notwithstanding, goes through with the cause, and renders judgment on the merits, his judgment, although erroneous, would not be in excess of jurisdiction. But this discussion was not necessary to the decision of the case, and is not binding as an authority. In *Lange v. Benedict*, 73 N. Y. 12, 36, it is said "a plea of title put in a court of a justice of the peace in accordance with the statute ousts of jurisdiction. That court had jurisdiction of the cause originally, and the power to pass upon the sufficiency of the plea and accompanying papers. If it should err, and hold that jurisdiction had not been taken away, when it had, would the magistrate be liable in a

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civil action, always allowing for the difference in the respect that that court is of limited and special jurisdiction?" The court cites in seeming answer to this question the case of *Striker v. Mott*, 6 Wend. 465. That case simply holds that a party against whom a judgment has been rendered in justice's court after a plea of title has been interposed, and security given or waived, is entitled to reverse the judgment, for the reason that there is no other way to avoid its being carried into effect, as the execution issued thereon would be valid on its face, and would protect the officer executing it.

The legislature, by requiring the defendant to set forth in his answer facts showing that the title to real property will come in question, evidently intended that the justice should look into the answer so far as to see that the facts set forth would raise the question of title, as otherwise a mere statement in the answer that the question would arise would be all that would be necessary. If the facts set forth do not show this, the justice will not be ousted of jurisdiction.

It becomes important then to consider when title to land is in question. In the first place it is clear that the title to land is not in question where the sole point to be determined is as to who is in *actual possession* of the land. *Fredonia, etc., Plankroad Co. v. Wait*, 27 Barb. 214; *Muller v. Bayard*, 15 Abb. 449; *Ehle v. Quackenboss*, 6 Hill, 587; *Townsend v. Bissell*, 5 N. Y. Sup. Ct. (T. & C.) 583; S. C., 3 Hun, 556; *Burnett v. Kelly*, 10 How. 406; *Squires v. Seward*, 16 id. 478. And it should be remembered that there is a broad distinction between an action of trespass to recover damages based upon *actual possession*, and an action which involves the *right to the possession* of land. In the latter case a question of title is involved. *Warren v. Buckley*, 2 Abb. N. C. 323; *Powers v. Conroy*, 47 How. 84; *Ehle v. Quackenboss*, 6 Hill, 537.

If, in an action of trespass upon land, the plaintiff sets out in his complaint the metes and bounds of his premises, and the defendant in his answer admits that the plaintiff is the owner of premises thus described, but denies that the alleged trespass was upon those premises, the question is simply one of location, depending upon the accuracy of measurement and does not involve the question of title. *Heintz v. Dellinger*, 28 How. 39. Where an action for trespass on lands is brought in justice's court after the title to the *locus in quo* has been conclusively determined as between the parties in an action of ejectment, the title cannot again come in question before the justice so as to deprive him of jurisdiction. *Haley v. Wheeler*, 8 Hun, 569. The

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question where a stream ought to run may or may not involve title to land. *Bowyer v. Schofield*, 2 Keyes, 628; S. C., 1 Abb. Ct. App. 177.

The question as to the right to flow lands is not within a justice's jurisdiction. *Kintz v. McNeal*, 1 Denio, 436. A claim to a prescriptive right to use a well on the premises of another involves a question of title. *Gage v. Hill*, 43 Barb. 44. The existence of a right of way over the land of another cannot be tried before a justice as it involves the question of title to lands. *Little v. Denn*, 34 N. Y. 452; S. C., 1 Keyes, 235; 34 How. 68; *Alleman v. Dey*, 49 Barb. 641; *Hall v. Hodskins*, 30 How. 15. An action for arrears of a perpetual rent reserved by a lease in fee brings in question the title to real estate. *Main v. Cooper*, 25 N. Y. 180; S. C., 26 Barb. 468. Where the plaintiff in his complaint alleged the ownership and possession of a certain piece of land, and alleged an entry thereon by the defendant, with teams and plows, and the plowing up and destroying the shrubbery, vines and trees growing thereon; and the defendant alleged, in his answer, that he entered and took the vines, etc., under and by virtue of an agreement made between the plaintiff and defendant on the sale of the premises by the defendant to the plaintiff, containing certain reservations, etc.; it was held that, under this issue, the title to land came in question. *Powell v. Rust*, 8 Barb. 567. In the case last cited, the defendant claimed to own the growing trees, etc., which were a part of the real estate while growing, and he based his defense on the ground of his ownership of the trees, etc.

If the action is one in the nature of waste, alleging a forfeiture and praying for the recovery of the possession of the land, title is in question, and a justice has no jurisdiction. *Snyder v. Beyer*, 3 E. D. Smith, 235. Where the defendant claims a right by prescription to plow the plaintiff's lands, title is in question. *Eustace v. Tuthill*, 2 Johns. 185.

An occupant of a house which is damaged by blasting rocks may maintain an action for the injury to his possession, whether he is owner or merely a tenant, and the title to land is not in question. *Hardrop v. Gallagher*, 2 E. D. Smith, 523. And so, in an action for obstructing a right of way, where the defendant answers by a general denial, the title to real estate cannot be said to be in question so as to oust a justice's court of jurisdiction, if the defendant, being called as a witness, in the course of his testimony proves on his own behalf the plaintiff's title. The defendant himself having shown the title, it cannot be regarded as disputed, within the meaning of the statute, so as to oust the justice of jurisdiction. *Hastings v. Glenn*, 1 E. D. Smith, 402. So, where a defendant had agreed to remove his fence, so as to open a road

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to its original width, title is not in question. *Storms v. Snyder*, 10 Johns. 109. If, in an action of trespass, the defendant pleads that the place where the trespass was committed was a public highway, the question of title will be involved. *Whiting v. Dudley*, 19 Wend. 373; *Willoughby v. Jenks*, 20 id. 96; *Randall v. Crandall*, 6 Hill, 342; *Dinehart v. Wells*, 2 Barb. 432. And the justice will not have jurisdiction to try the question whether it is a highway, even by the consent of both parties. *Ib.* But see *Learn v. Currier*, 15 Hun, 184.

There is a broad distinction between title and license. See *Babcock v. Utter*, 1 Abb. Ct. App. 27; S. C., 1 Keyes, 115. And it has been repeatedly held that a plea of license does not raise a question of title to land. *Turner v. Van Riper*, 43 How. 33; *Muller v. Bayard*, 15 Abb. 449; *Craven v. Price*, 53 Barb. 442; S. C., 37 How. 15; *Rathbone v. McConnell*, 21 N. Y. 466; S. C., 20 Barb. 311; *Mechl v. Schwieckart*, 67 id. 599; *Martin v. Houghton*, 31 How. 82; S. C., 45 id. 258; *People v. N. Y. Com. Pleas*, 18 Wend. 579; *Wickham v. Seely*, 18 id. 649; *Lavnits v. Barnum*, 4 Sandf. 637; *Dolittle v. Eddy*, 7 Barb. 75; 3 Kent's Com. 452, 453, orig. pag. And see the note to *Prince v. Case*, and *Rerick v. Kern*, 2 Am. Lead. Cases, 728 to 777.

Where the defendant cut down growing trees under a parol license and before its revocation, it was held that, though growing trees constitute an interest in land, yet a parol license was a good defense for acts done before its revocation. *Pierrepoint v. Barnard*, 6 N. Y. 279. So, where the defendant, by a parol license of the plaintiff, took gravel from the plaintiff's land to repair highways, before a revocation of the permission, it was held that the license was a good defense. *Syron v. Blakeman*, 22 Barb. 336. Title is not in question in such cases, for the license admits the title to be in the plaintiff, and that the action would lie were there no license.

O'Reilly v. Davies, 4 Sandf. 722, is an instructive case on this branch of the law. The complaint was in trespass for entering on the plaintiff's lot and blasting and carrying away rock and stone therefrom.

The answer stated that plaintiff contracted with the defendant to blast off the rock and stone, to enable cellars to be made and buildings erected on the premises, and, among other things, defendant was to have the rock obtained in blasting. The court, by SANDFORD, J., said: "We think, on consideration, that there was no 'claim of title to real property' made by the pleadings in this case. The answer admits the plaintiff's title unequivocally. It attempts to justify what has been done by a contract, made with the plaintiff, to blast the rock on his

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land, and remove it out of his way, so that he might build houses there, and, as a part of his reward for his labor, the rock removed was to be the defendant's. This sets up no title to the rock in the land, nor to any part of the freehold. It is a contract to do certain acts on the plaintiff's land, as his laborer or servant, and for his benefit. If there were such a contract, defendant had a right to enter on the land to do the work. If there were none, his entry was a trespass. His claim was no more than a license. It does not savor of title. His claim to the stone is not that he had right or title to them as stone or rock in the plaintiff's soil, or as being a part of the soil. Before they were blasted out, he could not mark out or designate any portion of the rock or stone which was his, or ever would become his under the contract. His claim of right to them was a mere corollary to the execution of his contract to do labor for the plaintiff, and arose from its execution. It was a claim to the rock after it was removed and blasted, not to the rock attached to the freehold."

From the principles stated and the illustrations given a justice may readily determine whether the answer interposed in the action before him sets forth the facts showing that the title to real property will come in question. If the answer shows that the title will come in question then one step has been taken toward ousting him of jurisdiction. But a plea of title, unaccompanied by the undertaking prescribed by the statute, is a nullity, and does not oust the justice of jurisdiction. Vol. 1, p. 30, § 2955; *Ryan v. Harrigan*, 9 Hun, 520; *Little v. Denn*, 34 N. Y. 452; S. C., 1 Keyes, 235; 34 How. 68. And if an undertaking is given, which does not comply with the requirements of the statute, the plea of title will be ineffectual to work a discontinuance and the justice will retain jurisdiction of the action. *Kohlbrenner v. Elsheimer*, 19 Hun, 88.

It is the intent of the law that a defendant relying upon his title as a defense shall set it up in his answer. If he neglects to do so he is precluded from drawing title in question by way of defense. But if the plaintiff cannot make out his case without showing title, the defendant may dispute that title, and the justice is then bound to dismiss the action. For although the defendant is not permitted to show title on his part, the statute permits him to dispute the title of the plaintiff, if he proves any on the trial, and if he does dispute that title, it is fatal to the plaintiff's action. The only effect, therefore, of an omission of the defendant to set up title is to deprive him of the right to show his title in his defense, for it does not in any manner deprive him of the right

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of disputing any title which the plaintiff may show on the trial in order to make out his case.

If the action is brought for a trespass on wild, uncultivated and unoccupied lands, the plaintiff is then compelled to prove his title to the lands, for the purpose of showing a constructive possession. *Hubbell v. Rochester*, 8 Cow. 115; *Aikin v. Buck*, 1 Wend. 466; *Van Rensselaer v. Radcliff*, 10 id. 639; *Jeffrey v. Owen*, 41 N. J. Law, 260. The defendant may object to such evidence, dispute the plaintiff's title, and insist on having the action dismissed on the plaintiff's own showing, and the justice is bound to dismiss the action. *Main v. Cooper*, 26 Barb. 468; S. C. affirmed, 25 N. Y. 468; *Balja v. Rawley*, 37 How. 120; *Gage v. Hill*, 43 Barb. 44. If the defendant does not object to the evidence, nor expressly dispute the plaintiff's title, the justice may receive the plaintiff's deed in evidence, and render a judgment in his favor, which will be entirely valid. *Koon v. Mazuzan*, 6 Hill, 44; *Adams v. Beach*, id. 271; *Bellows v. Sackett*, 15 Barb. 97; *Bowyer v. Schofield*, 1 Abb. Ct. App. 177; S. C., 2 Keyes, 628; *Eagle v. Swayze*, 2 Daly, 140. For the Code requires the justice to dismiss the action when title is in question, even on the plaintiff's own showing, only in case the title is *disputed* by the defendant. And it has been repeatedly held that the defendant is bound to dispute the title of the plaintiff before the justice by calling his attention to it, and disputing it, or the objection will be of no avail on appeal. *Koon v. Mazuzan*, 6 Hill, 44; *Adams v. Beach*, id. 271; *Ryan v. Harrigan*, 9 Hun, 520; *Browne v. Schofield*, 8 Barb. 239; *Adams v. Rivers*, 11 id. 390; *Bellows v. Sackett*, 15 id. 97.

Where a deed of land is offered in evidence by the plaintiff in a justice's court, to prove the mere fact of the purchase of the land as evidence of the performance of a condition precedent to defendant's liability upon a written instrument which is the foundation of the action, it is admissible, although the title is disputed by the defendant as insufficient to convey the premises. Its admission in such a case, and for such a purpose, does not draw the title to the premises in question in such a manner as to oust the justice of jurisdiction. *Nichols v. Bain*, 27 How. 286; S. C., 42 Barb. 353. When a deed is put in evidence in an action for a collateral purpose, it does not bring in question the title to land. *Clow v. Van Loon*, 4 Hun, 184; S. C., 6 N. Y. Sup. Ct. (T. & C.) 458; *Taylor v. Scoville*, 54 Barb. 34; S. C., 3 Hun, 301. It may sometimes be a question what is disputing the title within the meaning of the Code.

And it is sufficient to say, that whenever the defendant on the trial

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below distinctly asserts that the title is in question on the plaintiff's own showing, and he asks the justice to dismiss the action for that reason, this will be entirely sufficient as an objection to raise the question of title.

And where the parties actually litigate the title by the introduction of evidence of title on both sides, that is sufficient to raise the question of title. *Whiting v. Dudley*, 19 Wend. 373; *Striker v. Mott*, 6 id. 465. In an action of trespass for taking firewood, the defendant set up in his answer these facts, viz., that such wood grew and was cut upon the Tonawanda reservation in the county of Genesee; that such reservation is Indian lands, and is owned and occupied by the Seneca Nation of Indians; that such Indians reside thereon; that the defendants are Seneca Indians, and occupy and reside on the said reservation, and are members of said nation, and that in their own right as such Indians they took, carried away, etc. It was held that this raised a question of title to lands. *Smith v. Mitten*, 13 How. 325.

The fact that a defendant in an action for trespass on lands might plead title, give the statutory undertaking, and remove the cause to another court where the question of title could be litigated, but does not do so, will not prevent him from maintaining ejectment against the plaintiff in the action of trespass and litigating the question of title in that action. If all that was tried in the action before the justice was the question of actual occupation and the amount of damages sustained by reason of the trespass, a judgment against the defendant in that action will not bar an action of ejectment brought by him, or estop him from litigating the question of title in the latter action as that question was in no way involved or determined in the prior action. *Masten v. Olcott*, 24 Hun, 587. See *Gage v. Hill*, 43 Barb. 44.

The statute provides that the municipal court of Buffalo and the municipal court of the city of Rochester shall not have cognizance of any action where the title to real property shall come in question; but that when such question arises, the pleadings and practice shall be the same as are now provided by law for justices' courts in regard thereto. Laws of 1880, chap. 344, § 6; id., chap. 14, § 246.

Demands exceeding \$400. A justice of the peace cannot take cognizance of a civil action when, in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceed \$400. Vol. 1, p. 2.

In the justice court of the city of Albany and in the municipal court of the city of Buffalo the corresponding limitation as to amount is \$600, while in the municipal court of Rochester it is \$1,000. See

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vol. 1, p. 104, § 4; Laws of 1880, chap. 344, § 5; id., chap. 14, § 245. The construction of the general statute only will be considered in this connection, as the principles and decisions applicable to that statute are equally applicable to the others, due allowance being made as to the difference in jurisdiction as to amount.

* Although the statute provides that a justice of the peace shall not take cognizance of a civil action where, in a matter of account, the sum total of the accounts of both parties, proved to his satisfaction, exceed \$400, it does not deprive him of all jurisdiction of the action from its inception in a sense that all his proceedings therein are without jurisdiction and void in case the sum total of the accounts of both parties exceed that sum. The statute invests the justice with the power of adjudicating the question whether the accounts do in fact exceed that sum, and fixes the time when he may decide it, to wit, when the fact shall be proved to his satisfaction. This period cannot arrive until the trial has commenced, and the proof have been entered upon. Until he decides this question he has jurisdiction to act. *Glackin v. Zeller*, 52 Barb. 147. When this fact is proved to his satisfaction he must render a judgment of discontinuance against the plaintiff with costs. Vol. 1, p. 29, § 2950. The amount may be proved by the admission of the parties, or by oral or documentary evidence, but unless proved by some or all of these kinds of proof, the justice has jurisdiction and must proceed with the trial of the issues. *Bradner v. Howard*, 14 Hun, 420; S. C. affirmed, 75 N. Y. 417.

The first thing to be noticed is, that the statute does not apply unless the accounts or claims *litigated* exceed \$400. For, if the accounts have exceeded \$400, but the parties have settled and struck a balance, so that the amount in controversy is less than that sum, the justice will have jurisdiction. *Abernathy v. Abernathy*, 2 Cow. 413, 416. So where the accounts have exceeded \$400, and the amount has been reduced by *payments* to less than that sum, the justice has jurisdiction. *Matteson v. Bloomfield*, 10 Wend. 555, and note at the end of case; *Ward v. Ingraham*, 1 E. D. Smith, 538; *Crim v. Cronkhite*, 15 How. 250. See *Lund v. Broadhead*, 41 Id. 146.

In *Hoodless v. Brundage*, 8 How. 263, the plaintiff sued the defendant on a promissory note which, with interest, amounted to \$258.60, but claimed and demanded judgment for a balance only of \$95.85. The defendant, on the trial, proved his account to be \$253.48, and the referee reported a balance due the plaintiff of \$5.20. The question was, whether the plaintiff was entitled to costs on the ground that the demands of the parties allowed by the referee in the aggregate ex-

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ceeded \$400, and therefore deprived a justice of the peace of jurisdiction. *Held*, that he was not. The only claim proved was the defendant's claim, which, with the plaintiff's demand, was short of \$400. If the plaintiff's claim exceeded \$400, and the amount is reduced by a *set-off* to a sum less than \$100, the justice will not have jurisdiction even if the amount of the recovery does not exceed six cents. *Stillwell v. Staples*, 3 Abb. 365; S. C., 5 Duer, 691. If the pleadings show that the amount of the accounts on both sides exceeds \$400, and the parties on the trial admit the correctness of the items, and the balance recovered is less than \$100, the justice has no jurisdiction, for the admissions of the parties would be *proving* the accounts within the statute. *Stillwell v. Staples*, 3 Abb. 365; S. C., 5 Duer, 691.

In *Gilliland v. Campbell*, 18 How. 177, an action was brought upon a promissory note for \$186, given on a settlement of accounts between the parties, and a defense interposed on the ground of a mistake in fact as to any amount being due to the plaintiff, and the referee, on the trial, examined all the accounts between the parties, which exceeded \$2,000, and corrected the errors committed in their settlement, which reduced the amount of the note down to \$26.12, and thereupon reported his conclusions of fact, and added thereto his conclusion of law, "that the plaintiff recover of the defendant \$26.12, with costs." *Held*, that by the facts found a justice of the peace had no jurisdiction of the action.

Where the amount of the accounts, still subsisting open and unliquidated between the parties, is a question of fact, and the evidence is conflicting, the determination of the justice upon that point is necessarily as conclusive as upon any other question of fact where his jurisdiction is not affected by his finding. And if, under such circumstances, the justice decides that the accounts of the parties, as proved to his satisfaction, exceed \$400, and that he is, therefore, ousted of his jurisdiction, the County Court has no right to reverse his judgment, on appeal. *Parker v. Eaton*, 25 Barb. 122. And see *Sheldon v. Wright*, 5 N. Y. 497; *Skinnion v. Kelley*, 18 id. 355. If the defendant raises an objection to the jurisdiction of the court upon the ground that the accounts of the parties at issue exceed \$400, and procures a discontinuance of the action, he will be estopped from afterward asserting that the justice had jurisdiction of the action when sued in the Supreme Court, and the question of costs depends upon the question of the jurisdiction of the justice. *Bradner v. Howard*, 75 N. Y. 417. But whether a defendant would be concluded by a judgment of dismissal, rendered

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on the motion of the justice without the intervention of the defendant, is not so clear.

While a party may be estopped by his acts from questioning the jurisdiction of a justice of the peace as to the subject-matter of an action or special proceeding, he cannot, by his acts, confer jurisdiction upon the justice over the subject-matter. Consent can never confer jurisdiction of the subject-matter. *Henry v. Cuyler*, 17 Johns. 469; *McMahon v. Rauhr*, 47 N. Y. 67; *Kundolf v. Thalheimer*, 12 Id. 593, 600.

It is as essential that a justice of the peace should have jurisdiction of the subject-matter of a cause of action set up in an answer by way of counter-claim in an action pending before him, as of a cause of action set up in the complaint. A counter-claim cannot be interposed unless it is of such a nature that a justice's court has jurisdiction of a cause of action founded thereon. Vol. 1, p. 27, § 2947. If a counter-claim is interposed, setting up a cause of action of which a justice has no jurisdiction, he should disregard it and treat it as a nullity and refuse to receive any evidence in its support.

§ 5. **Personal disqualifications.** The administration of justice ought to be impartial. And there ought not to be the slightest cause for questioning the purity of the motives of the justice. The confidence of the people in any tribunal must be founded upon the intelligence and the integrity which it exhibits in the course of its proceedings. The circumstances which influence the mind are frequently very powerful, even when the person affected is unconscious of it. A juror who has heard the circumstances of a case, and has formed an opinion, is not permitted to sit as juror at the trial.

And a justice ought to be as far above suspicion as a juror; and, for that reason, a justice ought never to advise with either of the parties in relation to the law of the case on the merits, nor as to the manner of prosecuting the cause. It is impossible for a justice to counsel either party in relation to the cause, and then to feel entirely indifferent whether the advice given or the opinion expressed shall prove correct. And this is of the highest importance, since the justice must sit in judgment upon that opinion; for it would be most strange, indeed, if the opinion expressed did not produce any influence upon either the judgment or the feelings of the justice. But, however that may be, and however just the action of the justice might be under such circumstances, yet the opposite party could not fail to feel that there were just and reasonable grounds to question his impartiality. And, therefore, no justice ought to place himself in a position so questionable. Every one who has observed the action of the human mind must have seen

Interest of a justice, or a party to the record.

how naturally it sides with one party or the other, even when no part is taken in the controversy; and for that reason the justice should make impartiality his constant study in all his official acts. A justice cannot, like a juror, be challenged because he has expressed an opinion in the cause. *McDowell v. Van Deusen*, 12 Johns. 356. The only remedy of a party in such a case is to call for a jury, which is liable to challenges until an impartial one is obtained.

In one case in the Delaware County Court, it was held by GLEASON, county judge, that judgment must be reversed where it appeared that the justice who rendered it had himself acted as counsel for the plaintiff before another justice for the same claim; and that he refused to dismiss the action when pending before him although the defendant applied to him to do so. *Carrington v. Andrews*, 12 Abb. 348. See, also, *People v. Clark*, 21 Barb. 214. The Code expressly provides that a judge shall not sit as such in or take any part in the decision of a cause or matter in which he has been attorney or counsel. Vol. 1, p. 106, § 40. The word "judge" includes a justice of the peace. Vol. 1, p. 168, § 3343. See *Carrington v. Andrews*, 12 Abb. 348.

Interest of the justice, or a party to the record. There are cases, however, in which a justice, on account of reasons personal to himself, cannot sit as a judge or a justice in the cause even if he would. The statute declares that a judge shall not sit in or take part in the decision of a cause of matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. Laws of 1883, chap. 234, § 1. This statute applies to justices of the peace as well as to judges of courts of record. Every judgment rendered in violation of the statute is utterly void, and incapable of being made good by any omission, waiver or consent. *Chambers v. Clearwater*, 1 Abb. Ct. App. 341; S. C., 1 Keyes, 310; affirming 41 Barb. 200.

The present provisions of the Code in respect to disqualification for interest is a mere re-enactment of a former statute which had been the subject of judicial construction in a number of reported cases. These decisions are as applicable now as formerly, and will be cited here as if rendered under the present Code and in construction of that act.

It is scarcely possible to conceive of a case in which a justice of the peace would be named as a party to the record in an action brought before himself. But it has been held that the statute extends to the party beneficially interested as well as the real party. *Foot v. Morgan*, 1 Hill, 654. And where several persons are necessary to form a court,

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or to constitute a quorum of it, for the transaction of business, if any one of those members necessary to form a court, or a quorum thereof, are parties to the action, the judgment will be void. *Converse v. McArthur*, 17 Barb. 410; *Baldwin v. McArthur*, id. 414.

In these cases it is not important that the justice is not the only one interested; that his interest is remote and trifling; or, that it is in common with many others; for, when he is a party to the record, the statute declares that he cannot sit as a judge. And, where one of the justices who sat as a member of a court of sessions, was also, at the same time, a superintendent of the poor of the county who applied for and obtained an order for the maintenance of a poor person, it was held that the order was void. Last two cases cited. In these cases, the county judge and the other justice of sessions were as much interested in the event of the action of the court as the one who was named as a party to the proceeding; but the causes were not decided upon the question of *interest*, for the reason that the members of the court were remotely interested as tax payers; but upon the express ground that one of the members of the court was named as a party to the record.

An interest in the event of the action is equally a disqualification of a judge or a justice. But it must be an interest in the event of the action in which he sits as a judge or justice, or he will not be disqualified. That he is interested in similar causes is of no consequence, so long as he has no interest in the cause which he tries as a justice. It does not matter in what manner he may hold his interest; whether as a single individual, or as a member of a corporation; for, when a corporation is a party, either as a defendant or as a plaintiff, if the justice is a member of the corporation, he cannot sit as justice. The statute is to be so construed as to disqualify the justice in every case in which he has a pecuniary interest, which is directly involved in the determination of the action which is tried before him. *Washington Ins. Co. v. Price*, 1 Hopkins, 1. The test is, to determine whether he has a direct personal pecuniary interest in the event of the particular action, and whether the judgment directly affects that interest; if it does he cannot sit as a justice in the cause.

There is a partial qualification of the statute when a town is a party to the action. The statute provides: "Any action in favor of a town, which, if brought by an individual, could be prosecuted before a justice of the peace, may be prosecuted by such town, in like manner, before any such justice; but no action to recover a penalty given to a town shall be brought before any of the justices of the peace residing

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in the town for the benefit of which the same is prosecuted ; but all such actions may be brought before any one of the justices of the peace residing in any other town in the same county." 1 R. S. 837, § 5 (5th ed.). This section applies to those cases only in which the town sues in its *corporate* capacity for the recovery of a penalty. And, therefore, where an action was brought before a justice of the peace, in the names of the overseers of the poor, to recover a penalty for a violation of the excise law, in selling spirituous liquors without a license, it was held, that, although the penalty, when recovered, was to be applied to the use of the poor of the town in which the justice resided, he nevertheless had jurisdiction. *Wood v. Rice*, 6 Hill, 58 ; *Corwein v. Hames*, 11 Johns. 76. Therefore, in all actions brought by town officers, as such, in their own names, for the recovery of penalties, the justices of the same town will have jurisdiction, notwithstanding the penalties, when collected, are directed by statute to be applied to the use of the poor of the same town.

There is one important exception to the general statutory rule that a judge shall not sit in a case in which he is interested. If a judicial officer has not such an interest in a case that the result must necessarily affect his person or pecuniary interest, or where his interest is minute, and he has so exclusive a jurisdiction by Constitution or statute that his refusal to act in the case will prevent any proceeding in it, he may act so far as to prevent a failure of remedy. *Matter of Ryers*, 72 N. Y. 1.

Relationship to parties. But there are other personal disqualifications than those of being pecuniarily interested in the action, or of being a party to it.

Relationship, either by consanguinity or by affinity, to either of the parties to the action is a disqualification of the justice.

Impartiality in the administration of justice is one of its essential elements ; and, where there is partiality in that administration, there is also certain injustice to one of the parties.

Nothing is more likely to bias the judgment and the feelings of a justice than his relationship to one of the parties ; for that attachment which exists for relatives is founded in the best feelings and principles of our nature. And it is a wise provision of the law which forbids a justice from sitting in such a case, since it is important to the public interests that there should be implicit confidence in all courts, and in the belief that they will administer impartial justice alike to all, in whatever circumstances or condition.

But it must be remembered that, at common law, judges were not subject to the same disqualifications as jurors, and there are at the present

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time many grounds of challenge to a juror which are not applicable to judges. At common law, the only ground upon which a judge could be excluded from acting was interest in the cause. This disability was founded upon the maxim that no man can be a judge in his own cause. Consanguinity to either of the parties, though good cause for challenge to a juror did not disqualify a judge, for favor would not be presumed in a judge. And before the statute upon the subject in this State, although judges voluntarily withdrew from the bench in some cases by reason of consanguinity to parties, and the judgments of inferior magistrates were closely scrutinized where the relationship was near, it was not held that such relationship rendered those judgments void. *Eggleston v. Smiley*, 17 Johns. 133; *Pierce v. Sheldon*, 13 id. 191; *Matter of Dodge and Stevenson Manuf. Co.*, 77 N. Y. 101. And as the disqualification of a judge by reason of consanguinity depends upon the statute, the existence of the disqualification must be determined from the statute and cannot be extended beyond it. *Ib.*

The first question is, what is such a relationship by consanguinity or affinity as will disqualify a justice? *Affinity* properly means the tie which arises between the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband, in consequence of the marriage; and, therefore, while the marriage tie remains unbroken, the blood relatives of the wife stand in the same degree of *affinity* to the husband that they do in consanguinity to her. But there is no *affinity* between the blood relatives of the husband and the blood relatives of the wife. *Paddock v. Wells*, 2 Barb. Ch. 331; *Higbe v. Leonard*, 1 Denio, 186.

Consanguinity is that relation which subsists among all the different persons who descended from the same stock or common ancestor. Some portion of the blood of the common ancestor flows through the veins of all his descendants, and though mixed with the blood flowing from many other families, yet it constitutes the kindred or alliance by blood between any two of the individuals.

This relation by blood is of two kinds, lineal and collateral. *Lineal* consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in a direct ascending line; or the grandson, and so downward in a direct descending line.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches. The mode of

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computing the degrees is to discover the common ancestor, and beginning with him, to reckon downwards, and the degree of the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and this rule of computation is extended to the remotest degrees of collateral relationship. This is the mode of computation by the common and the canon law. Bouv. Law Dict., title Consanguinity. Chancellor KENT says, 4 Com. 412, original paging: "In the mode of computing the degrees of consanguinity, the civil law, which is generally followed upon that point, begins with the intestate, and ascends from him to a common ancestor, and descends from that common ancestor to the next heir, reckoning a degree for each person, as well in the ascending as descending lines. According to this rule of computation, the father of the intestate stands in the first degree, his brother in the second, and his brother's children in the third; or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series in genealogical order." The degree is now ascertained by ascending from the judge to the common ancestor; and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. Laws of 1883, chap. 234, § 1.

There are several cases which show what persons are so related to the justice as to disqualify him from acting. In *Edwards v. Russell*, 21 Wend. 63, the justice and the plaintiff were cousins, and the justice dismissed the action on account of relationship, but rendered judgment against the plaintiff for costs. It was held that the judgment must be reversed, because the justice had no authority to render any judgment whatever. In *Randall v. Hall*, Lalor's Sup. to Hill & Denio, 239, the justice and the defendant were second cousins. The justice dismissed the action, and rendered judgment against the defendant, for the costs of the justice and those of the constable, and nothing more. This judgment was reversed. In *Post v. Black*, 5 Denio, 66, the justice and the plaintiff were second cousins, and the judgment rendered was reversed. In *Foot v. Morgan*, 1 Hill, 654, it was held that a judgment was void where the plaintiff was a nominal party, and the real party in interest was a person who had married a sister of the justice's wife, and both wives were living at the time the judgment was rendered. And see *Cain v. Ingham*, 7 Cow. 478, and note *a*. In *Place v. Butternuts Woolen Co.*, 28 Barb. 503, the justice was a brother to one of the stock-

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holders in the defendant corporation. The corporation asked to have the action dismissed for that reason. The justice refused, and the plaintiff had judgment. This judgment was affirmed by the County Court, but was reversed by the Supreme Court on the ground that a brother of the justice was a stockholder of the company defendant. The decision of the Supreme Court rested mainly upon the authority of *Foot v. Morgan*, above cited. But the judgment of the Supreme Court was in turn reversed by the Court of Appeals in December, 1863, and the judgment of the County Court affirmed. See 26 How. 601. The determination of the Court of Appeals in this case has never been reported, the opinion in the case having probably been destroyed by fire. See note to *Jewett v. Albany City Bank*, Clark's Ch. 191; *Matter of Dodge and Stevenson Manuf. Co.*, 77 N. Y. 101, 108. The authority of *Foot v. Morgan* has been questioned, in the case last cited, and it is now authoritatively established, that to exclude a judge or justice from sitting in any cause by reason of kinship, such kinship must exist between him and some person who is actually a party to the cause; that it is not enough that he is related to some person, not a party, who is or may be interested in it, or affected by his judgment or order; that interest on the part of a judge disqualifies him from sitting, but interest on the part of a relative does not; that if a judge is a stockholder of a corporation which is a party to an action brought before him he cannot sit therein, because he is interested, but that the fact that a relative of the judge, within the prohibited degree, is a stockholder of such corporation does not disqualify the judge, because such stockholder, though interested, is not a party. *Matter of Dodge and Stevenson Manuf. Co.*, 77 N. Y. 101, 107; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759; *Bank of Lansingburgh v. McKie*, 7 How. 360; affirmed at General Term. See 14 id. 549. A stockholder of a corporation is not, by reason of his relation to the corporation, a "party" to an action brought by the corporation against a third person, or brought by a third person against the corporation, within the meaning of that term as used in the statute under consideration. *Ib.*

There are also some cases in which the justice was held not to be disqualified. In *Carman v. Newell*, 1 Denio, 25, it was objected that the justice could not sit, and it was proved that John Carman, a brother of the plaintiff, had married the widow of a deceased brother of the justice, and that the widow was then dead. It did not appear that there were any children of the widow living. It was held that the justice was not disqualified from acting by reason of affinity.

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In *Higbe v. Leonard*, 1 Denio, 186, a brother of the justice had intermarried with a sister of the plaintiff, and the parties were married before the commencement of the action, and at the time of the trial and the rendition of the judgment were still living. It was held that the justice was not disqualified. See the terms Affinity, etc., *ante*, 50.

The death of the husband, without issue, will sever the tie of affinity between the wife and a third person to whom she was related, in consequence of the husband's relationship to him by consanguinity only.

But if there be living issue of the marriage, who survives the husband, such issue will continue the relationship by affinity between the wife and the blood relatives of her deceased husband. *Paddock v. Wells*, 2 Barb. Ch. 331; *Cain v. Ingham*, 7 Cow. 478, and note *a*. And, of course, the death of the wife, without issue, will sever the tie of affinity between the husband and the blood relatives of the wife; though if there be issue of the marriage living, the relationship will be continued. *Ib*.

It has been made a question whether this statutory disqualification may not be waived by the consent of the parties. And in *Oakley v. Aspinwall*, 3 N. Y. 547, the Court of Appeals held that, where a judge is disqualified to sit in a cause by reason of consanguinity to one of the parties, he cannot sit even by the consent of both the parties. And, in this case, the judge participated in the decision at the request of the party who subsequently moved to have the judgment vacated, which motion was granted.

It is a matter of some importance to determine the character of the judgment, if such a one is rendered. In *Foot v. Morgan*, 1 Hill, 654, it was held that such a judgment was absolutely void, and that it could not be set off against another judgment. In other cases, where the question arose on appeal, the judgments were reversed because they were held erroneous. *Edwards v. Russell*, 21 Wend. 63; *Randall v. Hall*, Hill & Denio's Sup. 239; *Post v. Black*, 5 Denio, 66; *Place v. Butternuts Woolen Co.*, 28 Barb. 503. In the cases just cited, the question whether the judgments were absolutely void did not arise, although the judges said in some of these cases that the judgments were void. And, in view of the plain declaration of the statute that in such cases the judge shall not sit as such, it seems too plain for argument that the judgment is absolutely void; for it is by virtue of the statute that he has jurisdiction; and when he is by the statute prohibited from acting in a given case, he has no more authority to act in that case than a private citizen would have. It therefore follows, that such a judgment may be treated as a nullity in all places and for all

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purposes, either collaterally or on appeal. And it is now settled by authority, that judgment which is rendered by a justice who is related to one of the parties is absolutely void, whether the question arises directly or collaterally. *Schoonmaker v. Clearwater*, 41 Barb. 200; S. C. affirmed, 1 Keyes, 310; 1 Abb. Ct. App. 200. And see *People v. Tweed*, 50 How. 434; *Hayes v. Thompson*, 15 Abb. (N. S.) 220.

In an action against a justice of the peace and two others to recover damages sustained by the plaintiff by reason of his illegal imprisonment under an execution issued by the justice on a judgment in an action upon an account for goods sold and delivered, it appeared that a brother of the justice was interested in the claim litigated before the justice, although not a party to that action; and it was held that even though the justice was ignorant of the fact that his brother was interested in the claim, the judgment was void, and the justice was liable. *Birdsall v. Fuller*, 11 Hun, 204. This case is an authority on the point that a judgment rendered by a justice of the peace, who is disqualified under the statute from sitting as a magistrate, is void, and may be questioned collaterally, although the grounds upon which the judgment of the justice was held void are not sufficient, under the decision of the Court of Appeals before cited, to sustain that holding. See *Matter of Dodge and Stevenson Manuf. Co.*, 77 N. Y. 101.

In another action against two justices of the peace for false imprisonment, it appeared that an overseer of the poor commenced bastardy proceedings before a justice of the peace, who was his son-in-law, and whose wife was still living; that this justice associated another with himself, and, after the usual proceedings, the justices made an order of filiation; and on the failure of the party charged to comply with the order, committed him to jail. It was held that the overseer was a party to the proceeding in such sense that the proceedings were void, and the justices liable to an action for false imprisonment. *Rivenburgh v. Henness*, 4 Lans. 208. See, also, *Baldwin v. McArthur*, 17 Barb. 414; *Matter of Dodge and Stevenson Manuf. Co.*, 77 N. Y. 111.

The fact of the relationship of the justice to the party may be shown by the return of the justice on an appeal; and if it appears in the return, the judgment will be reversed. *Edwards v. Russell*, 21 Wend. 63; *Post v. Black*, 5 Denio, 66; *Randall v. Hall*, Hill & Denio's Sup. 239; *Place v. Butternuts Woolen Co.*, 28 Barb. 503.

The question may also be raised by assigning the relationship as *error in fact*, on an appeal. And the truth of the allegations may be determined in the County Court on affidavits, or by the oral evidence of witnesses sworn by the court. Code of Civil Pro., § 3057, vol. 1, p.

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57. This section of the Code is intended to permit the parties to determine every thing assigned as error in fact, upon affidavits, or upon oral evidence, if the facts are not within the knowledge of the justice; or if they cannot be properly made to appear in the return. *Cook v. Swift*, 18 How. 454; S. C., 10 Abb. 212; *Hurd v. Beeman*, 8 How. 254; *Adsit v. Wilson*, 7 id. 64; *Harvey v. Rickett*, 15 Johns. 87; *Roberts v. Failis*, 1 Cow. 238; *Rose v. Smith*, 4 id. 17; *Tiffany v. Gilbert*, 4 Barb. 320.

It is evident, from the cases cited, that no objection need be made before the justice, and that an appearance is not a waiver of it, since express consent cannot confer jurisdiction. And if any such judgment should be enforced by an execution, the justice and the plaintiff would both be trespassers. The proper course for the justice, when the question arises, is to dismiss the action and not to render any judgment whatever.

Innkeeper, district attorney, etc. A district attorney cannot act as a justice of the peace. Laws of 1852, chap. 304, § 5. And a justice of the peace who is an innholder, or tavern-keeper in fact, has no power or jurisdiction under any provision of chapter 19 of the Code of Civil Procedure; but if a judgment has been actually rendered by him before he became so disqualified, he may give a transcript thereof, or issue execution thereupon, or satisfy the judgment, upon payment thereof. Vol. 1, p. 3, § 2866.

If a justice should keep a tavern in fact, by keeping up a sign, receiving travelers and selling liquor, though he has no license, that is keeping a tavern in fact within the statute. *Clayton v. Per Dun*, 13 Johns. 218; *Schermerhorn v. Tripp*, 2 Caines, 108.

A justice of the peace who is a member of the senate or assembly is not obliged to take cognizance of a civil action or special proceeding, though he may do so in his discretion. Vol. 1, p. 3, § 2867.

CHAPTER III.

GENERAL PRELIMINARY CONSIDERATIONS.

Before any party can safely commence an action there are several particulars which require careful consideration by the party intending to institute the proceedings. Attention to this matter in the outset will frequently save the payment of large and useless bills of costs; and, in many cases, it may preserve a meritorious cause of action, which might be lost by a neglect of the plaintiff in not attending to his own interests, in due manner and season.

A party may have substantial and meritorious grounds for an action, although it may be that there is not a *present right* of action, on account of some preliminary act or thing necessary to be done. What constitutes a *right of action* will not be discussed in this place. But it will be assumed for the present that there may be good grounds for maintaining an action, if the necessary steps are taken in relation to it. It has been said, that, "in life, liberty and estate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrong-doer." 1 Com. Dig., Action, A. 1, page 216. A *right of action* may be defined to be a right of prosecuting in a regular and legal manner in an appropriate court, for the recovery of whatever may be legally a right due to the plaintiff; it exists wherever a legal claim to damages, or to the recovery of some specific thing, has accrued, the action itself being the formal and prescribed mode of procedure whereby the right is vindicated or enforced in a court of law. *Vide* Broom's Com. on Com. Law, 74. It follows at once, from the very terms of definition just given, that, before commencing an action in any given case, the plaintiff should carefully consider, in the first place, whether, upon all the facts which exist in the case, the law will give a right of action upon the merits, independent of all technicalities in the proceedings in relation to the action. If an action will not lie, then of course no other considerations are necessary; but, in case that question is answered affirmatively, other considerations will arise. And some general rules will be noticed in relation to these considerations, including those in relation to the existence of a right of action.

The most general division of civil actions is into those relating to *contracts*, and those relating to *torts*.

1. If the action is founded upon a right arising upon contract, it will be necessary to determine that the nature of the contract is not *illegal*, either by statute or at common law; that the contract has the legal assent of the party sued; that there was a sufficient legal consideration; that the assent is not invalid on account of infancy, insanity, duress, and the like; and that there has been a breach of the contract by the party sued.

2. If the right of action arises from some tort or wrong, it must be a tort for which an action is maintainable; not one of that class for which an action will not lie; and the party complaining must not have contributed to the result, or have caused the occurrence of the act claimed as the right of action. Vol. 2, pp. 590–594.

3. If the cause of action arises upon contract, has the plaintiff performed all the terms and conditions of it, which the contract and the law require of him before the opposite party can be put in default? Vol. 1, p. 222.

4. Has the plaintiff made a tender of performance, or of some act necessary for him to do before suing; or has the defendant made a tender, etc., which will defeat the action, or throw the costs of the action upon the plaintiff?

5. Has a notice been given, or a demand made, in those cases in which it is necessary?

6. Has the performance of the contract become illegal by act or operation of law; or has it become impossible by any acts or things which will legally excuse the performance thereof by either party?

7. Has the right of action, if once perfect, been in any manner destroyed, as by a release, by an accord and satisfaction, an arbitrament and award, or the like, or been discharged by operation of law?

8. Has there been a valid extension of the time for the performance of the contract; or a valid agreement not to sue before a given time which is yet unexpired; or, in other words, is the *cause of action complete*, at the *time of commencing* the action?

9. Is either party under a personal disability, such as infancy, coverture, lunacy, insanity, or the like, at the time of commencing the action; and if so, what steps are necessary to be taken to pursue the remedy regularly and legally?

10. Is the claim or demand barred by the statute of limitations either as to those cases which are some of them limited to six years, and others to less time; or is the case within some of the exceptions of

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the statute; or have there been payments of principal or interest; or has a written, signed promise been given, etc.?

11. Is there sufficient legal evidence to maintain an action, independently of any proof offered by the defense; or to rebut any supposed defense that can be made; and is that evidence attainable so as to be available at the trial?

12. Who are the proper parties to the action, either as *plaintiffs* or as *defendants*; do they sue in their own right; or as trustees of an express trust; or as officers of some corporation, such as town or county officers, and the like; or, as infants who must have a guardian, etc.; and how many plaintiffs ought to be joined, etc.? Or, secondly, as defendants, are they sued as the original parties to the agreement, etc.; are they town or county officers, etc.; or are there several defendants who ought to be joined, etc.; or is the defendant an executor, administrator, etc., who cannot be sued as such executor, etc., before a justice; or is there any reason why the plaintiff may elect as to whom to make defendants; or have the parties been changed by an assignment of rights, by death, or in any other manner? And let care be taken to select the proper parties to the action, either as plaintiffs or as defendants, since the right of the justice to correct this mistake, without consent, has been questioned.

13. Have justices of the peace jurisdiction of the *subject-matter* of the action; or is it one of that class of actions which is excluded from their jurisdiction, such as assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction; or do the accounts of both parties exceed \$400; or is the action of that kind that title to real property will come in question, either by the plaintiff's own showing, or by the answer of the defendant?

14. Has the justice, before whom the action is to be commenced, jurisdiction of the person of the party named as defendant, viz., is the defendant a non-resident of the county, and is he sued in the town in which he may be at the time he is sued; or if the defendant is a resident of the county, does he reside in a town which is so remote from the justice, that he cannot compel the defendant to appear before him in favor of a resident plaintiff; or is there any other reason why the defendant may not be sued before the justice named?

15. Is the justice personally disqualified, viz., is he in any manner a party to the action; interested in the event of it; related to either party by consanguinity or by affinity; a tavern-keeper, or a resident in a town which sues in its corporate capacity for a penalty?

16. Has the plaintiff a choice of remedies, and if so, which remedy

is best calculated to secure the relief desired? Are the facts such as will authorize a resort to a provisional remedy, and if so, can the plaintiff furnish the proof necessary to authorize the justice to issue the order of arrest, the warrant of attachment, or requisition to replevy; and can the plaintiff furnish the security required in case the order, warrant or requisition should issue? Is it necessary to prevent a failure of justice that the property of the defendant should be seized at once and held to await the result of the action, and if so, will the facts of the case justify the seizure? Is it proper or advisable, in consideration of all the facts of the case and the pecuniary responsibility of the defendant, to waive any right to proceed in tort, and resort instead to an action upon an implied contract?

17. Does the action arise on contract, and is the relief desired merely the recovery of a sum of money? Or is the action brought upon an account? And if so, is it of any advantage to serve a verified complaint with the summons?

18. Is the summons correct in form and substance, and perfect and complete when issued? Are the accompanying papers, if any, properly made out; and is the officer who is to make the service provided with the necessary copies for service, and does he understand the nature of his duties in respect to their service?

CHAPTER IV.

PARTIES TO ACTIONS

SECTION 1. Who should be made plaintiffs. The party prosecuting a civil action is styled the plaintiff; the adverse party is styled the defendant. Vol. 1, p. 168, § 3338.

The determination of the question who are the proper or necessary parties to a proposed action necessarily precedes its commencement and is ordinarily free from serious difficulty. The Code of Civil Procedure has provided generally who shall be the parties to actions, whether plaintiff or defendant. It provides that every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. Vol. 1, p. 119, § 449. The general rule, therefore, is that the action must be brought in the name of the "real party in interest," and the first question to be determined is who are the real parties in interest in the subject-matter of the proposed action.

Real party in interest. In the preceding volumes an attempt has been made to state generally what acts of omission or commission will give a right of action, and no further discussion of that subject will be attempted. A breach of a contract by one of the parties to it, without the fault of the other, gives to the latter a right of action to recover the damages arising from the breach, unless he has transferred his interest in the contract to a third person, or unless such third person has succeeded to his interest in the contract by operation of law. So an innocent person who has been injured by the wrongful act of another has a right of action to recover damages for the injury sustained unless by his act or by the operation of law that right has been transferred to another. In all such cases there can be no question as to who is the real party in interest or who should be made plaintiff in the action. Where a legal liability has been created by a subscription to a paper requesting certain persons named therein as trustees to purchase certain lands, etc., and promising to pay a sum specified toward a fund to be raised for the purposes mentioned

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therein, an action against a subscriber to the paper should be brought in the name of such trustees, as they are the real parties in interest. *Hutchins v. Smith*, 46 Barb. 235. And where the parties to a subscription paper have designated some person therein as treasurer of the fund to be raised, and have promised to pay to him the sums set opposite their respective names, such treasurer is the proper person to bring an action on the promises of the several subscribers. *Presbyterian Society v. Beach*, 74 N. Y. 72.

Assignees. The provision of the Code that an action must be prosecuted by the real party in interest, except in the cases specified, was intended to abolish the common-law rule which prohibited an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest in the bond or covenant to another. *Allen v. Brown*, 44 N. Y. 228. If a specific claim has been assigned, and the assignee, by virtue of the assignment, has acquired the whole title to the claim, he is legally the real party in interest, and is entitled to maintain an action upon the claim under this provision of the Code, although other persons may have an ultimate beneficial interest in the recovery, and even though he may be liable to others as a debtor upon his contract for the collection he may make. *Ib.* In an action upon a promissory note, it is sufficient to make the plaintiff the real party in interest, that he has the legal title, either by written transfer or delivery, whatever may be the equities between him and his assignor. *Hays v. Hathorn*, 74 N. Y. 486. As against the debtor, a person holding a written assignment of a claim to himself, which is valid on its face, obtains the legal title and is the real party in interest, notwithstanding the fact that the assignment was without consideration, and merely colorable as between him and the original claimant. Such an assignment would protect the debtor against a subsequent suit by the assignor. *Sheridan v. Mayor*, 68 N. Y. 30. So the indorsee and holder of a note, to whom it has been transferred absolutely and in good faith, may sue the maker upon it, notwithstanding the fact that the consideration for the transfer is not to be paid until the note is collected. In such case the transferee has an absolute right to the money due upon the note and to receive and appropriate it to his own use when recovered. He is the real party in interest, although the payee of the note may be interested in the event of the suit in the sense that if the note is not collected he will not receive any thing as its price, or by reason of his indorsement and sale of it. *Cummings v. Morris*, 3 Bosw. 560; S. C., 25 N. Y. 625. So where a note, payable to bearer, is delivered by the payee to a third person upon the undertaking of

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the latter to collect it at his own expense and pay to the payee upon its collection a certain sum of money, the person to whom it is so delivered is the real party in interest within the meaning of the Code and is entitled to maintain an action upon the note. *Eaton v. Alger*, 47 N. Y. 345. But to entitle a person to sue upon an obligation to which he is not an original party, he must have the right of possession and ordinarily be the legal owner. Such ownership may be as equitable trustee, it may have been acquired without adequate consideration, but it must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor. *Hays v. Hathorn*, 74 N. Y. 486. In one case it was held that where the owner and holder of a promissory note, payable to bearer, delivered it to a third person to sue in the name of the latter, taking from the transferee his promissory note, for the amount of the note transferred payable at a future day, but with the understanding that in case the note transferred was not collected, then the note given for it was to be returned to the maker, that the original owner of the note transferred, and not the person to whom it was transferred, as above stated, was the real party in interest within the meaning of the Code, and that the transferee could not maintain an action upon it. *Killmore v. Culver*, 24 Barb. 656. So far as this case is in opposition to the doctrine of the cases above cited it must be deemed of no authority in this State. The assignee of a cause of action by an absolute assignment in writing is "the real party in interest" within the meaning of the statute, although it may appear that his assignor expects to get the money recovered in the action. *Meeker v. Claghorn*, 44 N. Y. 349. And see *Greene v. Niagara Fire Ins. Co.*, 6 Hun, 128.

The Code of Civil Procedure provides that "where a claim or demand can be transferred; the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim, in his own name, as the transferor might have done, subject to any defense or counter-claim existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred." Code of Civil Procedure, § 1909. This section was intended to apply not only to transfers by assignment, but also to every other form of transfer by which the title to property is changed from one person to another. The general principles relating to assignments and the rights of assignees

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have been discussed in a preceding volume. See vol. 1, p. 812. It is, therefore, unnecessary to repeat the discussion in this place. But a few of the reported cases relating to the right of action by assignee will be given in this connection for convenience of reference.

When several persons are interested in a claim or demand they must all join in an assignment of it, or the transfer will not carry any other interest than that of the person who executes the assignment; and if the whole interest is not assigned, the person to whom a portion of the claim is assigned cannot maintain an action in his own name alone on the demand. *Mills v. Pearson*, 2 Hilt. 16.

A joint demand which belongs to several persons cannot be split up by them and assigned to several different persons, so as to authorize an action to be brought by each assignee for his interest in the demand, because the law will not tolerate that a defendant shall be subjected to the costs of several different actions in such a case. *Coster v. N. Y. and Erie R. R. Co.*, 6 Duer, 43, 44.

If the whole interest in the demand is transferred, it is not important whether it is the legal title that passes, so long as the equitable title and the whole interest passes, for in that case the assignee will be the real party in interest. *Hastings v. McKinley*, 1 E. D. Smith, 273.

A promissory note, which is guaranteed, may be assigned so as to authorize an action in the name of the assignee against the guarantor. *Small v. Stone*, 1 Bosw. 352.

An assignee named in an assignment for the benefit of creditors may sue in his own name for demands which were due to the assignor, without joining the persons for whose benefit the assignment was made. *Mellen v. Hamilton Fire Ins. Co.*, 5 Duer, 101.

Claims for unliquidated damages for a breach of a contract may be assigned and the assignee may sue in his own name; as where a landlord agreed in a lease to allow the tenant certain privileges in the use of Croton water, etc., and he afterward deprives the tenant of the use thereof. *Munson v. Riley*, 2 E. D. Smith, 130. So, where there is a contract to employ and pay a laborer, and the contractor refuses to perform his agreement. *Monahan v. Story*, 2 E. D. Smith, 393. So, of a contract to deliver a quantity of merchandise of a certain quality, which is not done. *Dana v. Fiedler*, 1 E. D. Smith, 464. So, where a landlord let land on shares, and he agreed with the tenant to keep certain fences in repair, which was not done; the tenant assigned his interests in the crops, which were damaged by cattle in consequence of the non-repair of the fences, it was held that the landlord was liable to

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an action by the assignee in his own name. *Parmelee v. Dann*, 23 Barb. 461.

A contract to pay a certain person, or his wife, annually, a given sum during the life of the longest liver of them gives a right of action to the survivor, which is assignable after the death of one of the parties, and the assignee may sue in his own name. *Prindle v. Caruthers*, 15 N. Y. 425.

Where money is loaned, and it is claimed by the lender that the loan was procured by fraudulent representations, the claim is one arising upon contract, and it may be assigned, and the assignee sue in his own name. *French v. White*, 5 Duer, 254; *Byxbie v. Wood*, 24 N. Y. 607; *Brady v. Bissell*, 1 Abb. 76.

The owner of a promissory note can maintain an action on it, under the Code, in his own name, against the makers, although not so indorsed that he can sue as indorsee by the rules of the common law. *Houghton v. Dodge*, 5 Bosw. 326. And where a promissory note is payable to order, and has been sold and delivered, previous to its becoming due for a full and valuable consideration, the owner may sue in his own name, without alleging an indorsement of the note to him, since the right to the note will pass by an assignment without indorsement, and the owner will be the real party in interest. *Billings v. Jane*, 11 Barb. 620; *Houghton v. Dodge*, 5 Bosw. 326; *White v. Brown*, 14 How. Pr. 282. The complaint ought to state the facts as they really are in this respect. The fact that a plaintiff has not the actual possession of the note sued on does not affect his right to recover upon it. It is sufficient that he has the right to the money due upon it, although the instrument has been deposited with a third person, in pursuance of an agreement between the parties. *Selden v. Pringle*, 17 Barb. 458.

Where a note, not negotiable, is sued on by a person other than the payee, the possession of the note in court, at the trial, by the plaintiff's counsel, is not *prima facie* evidence, as in case of commercial paper, negotiable in terms, that the note was transferred to plaintiff before the commencement of the action, and before the maturity of the note. *Barrick v. Austin*, 21 Barb. 241. In such cases the plaintiff should allege and prove the facts which show him to be the real party in interest, by sale, assignment or otherwise.

To maintain an action on contract, it must appear that the plaintiff is the only person possessed of any ownership or interest in the demand, so that, on a recovery and subsequent payment, all rights of action in respect to it will be barred as against the defendant. And where the plaintiff sued as the assignee of a demand which originally accrued to

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two persons as partners, but the assignment which was proved was executed by but one of the partners, and purported to transfer only *his* "right, title and interest" in the claim, and there was no proof that the partnership had been dissolved, or that the claim was ever vested in the partner making the assignment, or that the other partner had ever done any act which would estop him, or would vest his interest in the assets of the firm in his partner, it was held that the plaintiff could not maintain an action. *Mills v. Pearson*, 2 Hilt. 16. In most of the actions which are brought upon contracts, the action is brought by one of the parties to it, or by some person to whom the right of action has been assigned. But there are some cases in which a person may sue for the recovery of damages for the breach of a contract to which he was not a party, and to whom there has not been any assignment of the right of action. When one person pays money or delivers property to another, and the latter, in consideration thereof, promises to pay a certain sum of money to some third person, such third person may maintain an action in his own name to recover the sum specified, although no consideration moves from the party who brings the action. *Barker v. Bucklin*, 2 Denio, 45; *Hale v. Boardman*, 27 Barb. 82; *Earle v. Crane*, 6 Duer, 564; *Lawrence v. Fox*, 20 N. Y. 268; *Union Ind. Rub. Co. v. Tomlinson*, 1 E. D. Smith, 364; *Muller v. Maxwell*, 2 Bosw. 355; vol. 1, p. 209.

Executors and administrators. The first exception to the general rule that an action must be prosecuted in the name of the real party in interest is in favor of executors and administrators. They may sue without joining with them the person or persons for whose benefit the action is prosecuted. Vol. 1, p. 119, § 449. Actions may be brought by executors or administrators in justices' courts, although they cannot be sued, as such, in them. Vol. 1, pp. 2, 3. An action or special proceeding commenced by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought by him in that capacity. Code of Civil Procedure, § 1814. This rule was introduced by the section of the statute cited, and renders obsolete numerous decisions holding that an executor can maintain an action, either in his own name, or as executor, upon a note given to him as executor, for a debt due to his testator at the time of his decease. *Merritt v. Seaman*, 6 N. Y. 168; *Bright v. Currie*, 5 Sandf. 433; *Eagle v. Fox*, 8 Abb. 40. One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding in favor of the executors in

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their representative capacity. Code of Civil Procedure, § 1818. See *Moore v. Willett*, 2 Hilt. 522.

The next of kin cannot maintain an action or prosecute a claim for a distributive share of the personal property of the deceased in their character of next kin. Letters of administration must be taken out, and the action brought in the name of the administrator. *Woodin v. Bagley*, 13 Wend. 453; *Beecher v. Crouse*, 19 id. 306. But when the owner in fee of lands demised for a term of years dies intestate before the expiration of the lease, one of his heirs at law can sue alone to recover his aliquot part of the subsequently accruing rent. *Jones v. Felch*, 3 Bosw. 63; *Cruger v. McLaurry*, 41 N. Y. 219, 225; 3 R. S. (5th ed.) 169, 170, §§ 6 and 7; 1 R. S. 747, § 23.

Where the payee of a promissory note is in possession of it about eight days before her death, a third person cannot maintain an action upon it, after the payee's death, without showing title to the note derived from personal representatives of the payee, if there are circumstances showing an intention of the payee to cancel the note sufficient to rebut the presumption of its sale. *Edwards v. Campbell*, 23 Barb. 423. And see *Loundsbury v. Depew*, 28 id. 44; *Heidenheimer v. Wilson*, 31 id. 636.

Trustees of an express trust. The second exception to the general rule that every action must be prosecuted in the name of the real party in interest is made in favor of a trustee of an express trust. Such trustee may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this provision. Vol. 1, pp. 119, 449. A trustee of an express trust can sue upon a contract made by him in that capacity. *Arosemena v. Hinckley*, 11 Jones & Sp. 43.

Under the general term "trustee of an express trust" are included committees of the person and estate of a lunatic; *Person v. Warren*, 14 Barb. 488; *Fields v. Fowler*, 2 Hun, 400; S. C., 4 N. Y. Sup. Ct. (T. & C.) 598. But see *Burnet v. Bookstaver*, 10 Hun, 481; general guardians of infants, appointed by the surrogate; *Thomas v. Bennett*, 56 Barb. 197; the trustee of a wife in articles of separation between husband and wife; *Dupre v. Rein*, 56 How. 228; a receiver or sequestrator, appointed by the courts of this State; *Donnelly v. West*, 17 Hun, 564, and assignees for the benefit of creditors, etc., *Lewis v. Graham*, 4 Abb. 106.

An assignee for the benefit of creditors can maintain an action in his

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individual character to recover a claim due the assignor. He is not obliged to sue as trustee. *Hogland v. Trask*, 48 N. Y. 686.

One to whom a contract for the payment of money is assigned, in trust for one who had made advances to the assignor, may sue upon the contract as a trustee of an express trust. *Cummins v. Barkalow*, 1 Abb. Ct. App. 479; S. C., 4 Keyes, 514.

Where a non-resident executor has given a bond to the people of the State of New York, conditioned for the faithful discharge of the duties of his office, the people may maintain an action for a breach of the bond, as they are trustees of an express trust within the meaning of the Code. *People v. Struller*, 16 Hun, 234.

An agent of a mowing machine company, who contracts and sells mowing machines for the company, is a trustee of an express trust, and may sue on the contract in his own name. *Davis v. Reynolds*, 48 How. 210; S. C. affirmed, 5 Hun, 651. And generally, a factor or other mercantile agent who contracts in his own name on behalf of his principal is a trustee of an express trust, within the meaning of the Code, and is the proper party to bring an action in his own name upon the contract. *Grinnell v. Schmidt*, 2 Sandf. 706.

The agent of a foreign corporation may maintain an action in his own name upon a subscription note payable to the plaintiff, "as executive agent of the company," for stock of the corporation to be issued to the signer. The contract is to be deemed made with the agent, and he the trustee of an express trust, though he is mentioned in respect to his representative character, and not as promisee individually, and nothing appears to show that he has any interest apart from his principal, or that there was any motive for interposing him as the formal contracting party between the promisor and the party equitably entitled to the benefit of the contract. *Considerant v. Brisbane*, 22 N. Y. 389.

Agents. We have seen that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of the provision allowing such trustee to sue without joining the person for whose benefit the action is prosecuted. This of course includes an agent who contracts in his own name for the benefit of his principal. See vol. 1, p. 453.

In certain cases an action on a contract executed by an agent must be brought by the agent and cannot be maintained by the principal. Thus, if an agent enters into a contract under seal for an undisclosed principal, and it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing it, who desig-

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nates himself as agent, and not that of his principal, the agent only, as between the two, can maintain an action for a breach of the contract. *Schaefer v. Henkel*, 75 N. Y. 378; *Briggs v. Partridge*, 64 id. 357; S. C., 21 Am. Rep. 617.

But when an executory contract, not under seal, is executed by an agent within the scope of his authority, it may be enforced by the principal although executed in the name of the agent. *Nicoll v. Burke*, 78 N. Y. 580. And this is the rule whether the agent describes himself as agent or not, or whether the principal is known or unknown. *Ib.*

Where a lease was executed for a landlord by an agent in his own name, with the additional words, "for the owner," and the other party, as tenant, executed the lease in his own name, it was held that the agent might sue in his own name to recover the rent. *Morgan v. Reid*, 7 Abb. 215. So the landlord might sue in his own name if he chose. *Erickson v. Compton*, 6 How. 471. Of course both principal and agent could not sue at the same time, and an action brought by one would determine the right of the other to sue while such action was pending; and a recovery by one would bar an action by the other, and so of a defeat in the action.

A public auctioneer who sells goods for another may maintain an action for the price, although he has received his advances and commissions and has no interest in the property or its proceeds. *Minturn v. Main*, 7 N. Y. 220; *Bogard v. O'Regan*, 1 E. D. Smith, 590; *Brown v. Cherry*, 38 How. 352, 359. The right of an agent to sue as a trustee of an express trust has been already noticed. See *ante*, 67. And see vol. 1, p. 453.

Persons expressly authorized by statute. The third exception to the general rule, that every action must be prosecuted in the name of the real party in interest, embraces the numerous classes of persons expressly authorized by statute to sue. It would be idle to attempt to enumerate all the various persons or classes of persons who have been authorized by statute to maintain actions in their own names. Some of these classes of persons will be noticed in the following pages.

Joint-stock associations, etc. A joint-stock association falls within the exception to the general rule last noticed. The Code of Civil Procedure provides that an action or special proceeding may be brought by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. Code of Civil Pro., § 1919.

By county, town or municipal officers.—Corporations.

Any partnership, or other company of persons, which has a president or treasurer is deemed an association within the meaning of this section. *Ib.*

Thus when a promissory note is the property of a company or association, composed of not less than seven persons, having a treasurer, an action upon the note may be brought in the name of the treasurer. *Tibbetts v. Blood*, 21 Barb. 650. See, also, *Austin v. Searing*, 16 N. Y. 112; *Nash v. Russell*, 5 Barb. 556; *Wells v. Gates*, 18 id. 554; *New York Marbled Iron Works v. Smith*, 4 Duer, 362.

By county, town or municipal officers. An action or special proceeding may be maintained by the trustee or trustees of a school district, the commissioner or commissioners of highways of a town, the overseer or overseers of the poor of a town, village or city, the supervisor of a town, the county superintendent or superintendents of the poor, or the supervisors of a county, upon a contract lawfully made with those officers or their predecessors in their official capacity; to enforce a liability created or a duty enjoined by law upon those officers, or the body represented by them; or to recover a penalty or a forfeiture given to those officers or to the body represented by them; or to recover damages for an injury to the property or rights of those officers or the body represented by them; although the cause of action accrued before the commencement of their term of office. Code of Civil Pro., § 1926. The officer by whom the action or special proceeding is brought, must be described in the summons or other process by which it is commenced, and in all subsequent proceedings, by his individual name with the addition of his official title. Code of Civil Pro., § 1929. Section 1926 above quoted does not apply to a case where it is specially prescribed by law that an action may be maintained by the body represented by an officer designated in that section. But in that case the prosecution of the action must be conducted by the persons then in office who represent that body. Code of Civil Pro., § 1928. Thus, an action cannot be maintained by the supervisor of a town in his name of office against his predecessor, for omitting to render an account of town moneys and securities in his hands in his last accounting, and for a conversion of such moneys and securities. This cause of action is expressly given by statute to the town in its corporate capacity. *Hagadorn v. Rarux*, 72 N. Y. 583. See *Town of Guilford v. Cooley*, 58 id. 116.

Corporations. Suits by corporations should be brought in their corporate name. Where a religious society has been duly and legally incorporated, all suits in behalf of the corporation should

Penalties and forfeitures.— Violation of duty.

be brought in the corporate name or title of the society and not in the name of the trustees. *Bundy v. Birdsall*, 29 Barb. 31; *Van Deuzen v. Trustees of Presbyterian Congregation*, 4 Abb. Ct. App. 465; S. C., 3 Keyes, 550; 3 Trans. App. 39; *Lowenthal v. Wiseman*, 56 Barb. 490. Where there is a breach of a contract made with a religious corporation in its corporate name, an individual member of the corporation cannot maintain an action on the contract in his own name for the benefit of the corporation, although he adds to his name a statement of his relation to the corporation; and the president of the corporation has no more right, in such case, to sue in his own name than any other corporator; and cannot give himself that right by designating himself as president of the corporation. He is not a trustee of an express trust, as no contract has been made with him or in his name. *Ib.*

Penalties and forfeitures. When real or personal property has been forfeited, or a penalty incurred to the people of the State, or to an officer to their use, pursuant to a provision of law, the attorney-general or the district attorney of the county in which the action is triable must bring an action to recover the property or penalty, in a court having jurisdiction of the action. When the Supreme Court and a justice's court have concurrent jurisdiction of the action it may be brought in either at the election of the prosecuting officer. Code of Civil Pro., § 1962.

Where a penalty or forfeiture is given, by a statute, to a person aggrieved by the act or omission of another, the person to whom it is given may, if it is pecuniary, maintain an action to recover the amount thereof; or, if it consists of the forfeiture of a chattel, he may maintain an action to recover the chattel, or its value, or other damages, as the case requires. Code of Civil Pro., § 1893.

Where a penalty or forfeiture is given, by a statute, to any person who sues therefor, an action to recover it may be maintained, by any person, in his own name; but the action cannot be compromised or settled, without the leave of the court in which it is brought. *Id.*, § 1894.

Violation of a duty. It is a general rule that whenever one owes another a duty, whether such duty is imposed by voluntary contract or by statute, a breach of such duty causing damage gives a right of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach of such duty

Lunatics, etc., actions by.—Infants, actions by.

causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Willy v. Mulledy*, 78 N. Y. 310; *Hover v. Barkhoof*, 44 id. 113; *Jetter v. N. Y. Central, etc., R. R. Co.*, 2 Abb. Ct. App. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 Ell. & Bl. 402. In Comyn's Digest (Action upon Statute, F.), it is laid down as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Lunatics, etc., actions by. "Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the Supreme Court, may sue in their own names for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee." 3 R. S. 135, § 11 (5th ed.); Laws 1845, chap. 112, § 2; *Person v. Warren*, 14 Barb. 488. The committee of the person and estate of an habitual drunkard may bring actions on promissory notes he received, as such committee, in his own name, without describing himself as committee. *Davis v. Carpenter*, 12 How. Pr. 287.

When no receiver or committee has been appointed in the manner prescribed by the statute, the action must be brought in the name of the lunatic. *Lane v. Schermerhorn*, 1 Hill, 97; *Petrie v. Shoemaker*, 24 Wend. 85. And, in all cases, the action must be brought in the name of the lunatic, unless the case is within the provisions of the statute which has been cited. *McKillip v. McKillip*, 8 Barb. 552; *Burnet v. Bookstaver*, 10 Hun, 481.

A defendant *non compos mentis*, but of full age, and not an idiot from nativity, may appear by attorney; and the court, on motion, will appoint an attorney for him. *Faulkner v. McClure*, 18 Johns. 134. The same rule is equally applicable to a plaintiff. But, in all such cases, the party ought to appear in court, in person, so that an appearance may be entered as a personal one because, if a person is of unsound mind, he cannot properly select an attorney to act for him, even if it were conceded that he has legal capacity for that purpose. And, in all such cases, the justice will be careful to see that some competent person is intrusted with the cause, so that the rights of the party will be safe.

Infants, actions by. An action to recover a debt due to an infant may be brought either by an infant, by his guardian *ad litem*, duly appointed, who may be his general guardian, *Segelken v. Meyer*, 14 Hun,

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593, or the action may be brought by the general guardian in his own name. *Ib.*; *Thomas v. Bennett*, 56 Barb. 197. The right of the general guardian appointed by the surrogate to sue for a debt due to his ward is not exclusive; and its existence does not deprive the ward of his right of action. *Segelken v. Meyer*, 14 Hun, 593. But a guardian in *socage* or a guardian by nature cannot maintain the action *Thomas v. Bennett*, 56 Barb. 197.

The Code provides that where an infant has a right of action, he is entitled to maintain an action thereon; and that the same shall not be delayed or deferred on account of his infancy. Vol. 1, p. 121, § 468. But it also requires that before a summons is issued in behalf of an infant plaintiff, or before he joins issue without a summons, the justice shall appoint a competent and responsible person, nominated by the plaintiff or his general guardian, to appear as his guardian for the purpose of the action. The written consent of the person so appointed must be filed with the justice, before his appointment. The guardian so appointed is responsible for the costs. Vol. 1, p. 8, § 2887.

A mere oral application by the infant or his guardian is sufficient to authorize the justice to act, if the application is accompanied by the written consent of the proposed guardian. But an application in writing is the better practice as it will form a part of the record of the proceedings before the justice, and bear evidence upon its face of the regularity of the preliminary proceedings. The application may be in the following form, or in any other equivalent form.

Application by Infant Plaintiff.

To DAVID KENNEDY, Esq.; a justice of the peace of the town of *Mayfield* in the county of *Fulton* :

The undersigned, an infant nineteen years of age, being about to commence an action against Richard Roe, respectfully requests the appointment of Richard Hansen as his guardian for the purposes of said action.

Dated *May* 27, 1882.

SANFORD HANSEN.

Consent of Guardian.

I hereby consent to be appointed guardian of Sanford Hansen for the purposes of the action mentioned in the annexed application.

Dated *May* 27, 1882.

RICHARD HANSEN.

Married women, actions by.

Appointment by Justice.

Sanford Hansen having made application to me in writing for the appointment of Richard Hansen as his guardian for the purposes of an action against Richard Roe, and it appearing that such proposed guardian is a competent and responsible person; that the applicant is an infant and about to commence such action, and the said Richard Hansen having executed a written consent to such appointment, now on filing such application and consent, I do hereby appoint Richard Hansen guardian of Sanford Hansen, for the purpose of said action.

Dated *May 27*, 1882.

DAVID KENNEDY,

Justice of the Peace.

The application is in effect an *ex parte* motion, and the appointment is in effect an order, although it does not come within the definition of an order as given by the Code of Civil Procedure, not being a written direction of a judge made in an action or special proceeding for the reason that the appointment must precede the summons. The failure to procure the appointment of a guardian for an infant plaintiff is an irregularity, and not a jurisdictional question.

Wolford v. Oakley, 43 How. 118; *Fitch v. Fitch*, 18 Wend. 513; *Fellows v. Niver*, id. 563; *Rutter v. Puckhofer*, 9 Bosw. 638; *Smart v. Haring*, 14 Hun, 276. The defendant by pleading to the merits will waive the irregularity. *Ib.*; *Parks v. Parks*, 19 Abb. 161; *Graham v. Pinckney*, 7 Rob. 149; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Treadwell v. Bruder*, 3 E. D. Smith, 596. The infancy of the plaintiff is not a ground for a nonsuit on the trial. The objection must either be taken by answer, or by motion to set aside the proceedings for irregularity. *Ib.*

Married women, actions by. The Code of Civil Procedure, in a single sentence, sweeps away all that was peculiar in the old practice relating to suits by married women, and places them upon the same footing as other parties to actions. It provides that "in an action or special proceeding, a married woman appears, prosecutes or defends alone, or joined with other parties as if she was single." Vol. 1, p. 119, § 450. In view of this statute, it is idle to cite authorities, or to inquire what was the rule before this enactment.

The rights of married women under the enabling acts have been considered in a preceding volume. See vol. 2, p. 300.

Joinder of plaintiffs.

Joinder of plaintiffs. The Code of Civil Procedure provides that "all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs except as otherwise expressly prescribed in this act." Vol. 1, p. 119, § 446. We have seen that an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. *Ante*, 60.

When a married woman brings an action or special proceeding affecting her separate property it is neither necessary nor proper to join her husband with her as a party. Vol. 1, p. 119, § 450.

All these statutory provisions apply to actions in a justice's court. Vol. 1, p. 172, § 3347, subd. 3. Under the former Code, all the provisions of that act relating to parties to actions were made applicable to justices' courts. See Code of Procedure, § 64, subd. 15. By that act it was provided that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Code of Pro., § 119. But the Code of Procedure has been repealed, and the section of the present Code, which takes the place of the section quoted, has not been made applicable to justices' courts; and the rule requiring the joinder of all persons who are united in interest as parties plaintiff in an action pending before a justice of the peace can no longer be supported upon the authority of that statutory provision. See Code of Civil Pro., § 448, and § 3347, subds. 3 and 4. But the section of the old Code above quoted was merely declaratory of a very ancient rule. See *McCotter v. Lawrence*, 4 Hun, 107; S. C., 6 N. Y. Sup. Ct. (T. & C.) 392. And the provision of the present Code declaring that each court shall continue to exercise the jurisdiction and powers now vested in it by law according to the course and practice of the court, except as otherwise prescribed in that act, may preserve the rule independently of the statute. See vol. 1, p. 104, § 4.

The section of the present Code requiring the prosecution of every action in the name of the real party in interest, except in certain specified cases, applies to justices' courts. Code of Civil Pro., §§ 449, 3347, subd. 3. This section is imperative and is subject to no excep-

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tions other than those therein stated. It requires that the action shall be prosecuted in the name of *every* real party in interest, unless in one of the excepted cases. Thus, under this section, every partner, whether active or dormant, is a necessary party plaintiff in an action for the recovery of a partnership debt, founded upon a partnership contract, and no one member of the firm can maintain such action. A partner is not a trustee of an express trust within the meaning of that section. See *Secor v. Keller*, 4 Duer, 416; *Brainerd v. Bertram*, 5 Abb. N. C. 102. This rule is not confined to partners alone but is applicable to all persons similarly interested. The law will not tolerate a suit to enforce a contract by piece-meal. *McCotter v. Lawrence*, 4 Hun, 107. On the other hand, persons having adverse or conflicting rights in relation to the subject-matter of a litigation ought never to be joined as plaintiffs. *Struppmann v. Muller*, 52 How. 211; *Grant v. Van Schoonhoven*, 9 Paige, 255.

It is a general rule that tenants in common of personal property must join in an action for its conversion. But it may be doubted whether that rule can apply to a case of the conversion of an undivided interest in a chattel, and not of the whole of it, where the defendant has done no act which can be construed as a trespass upon the rights of the owners of the remaining interests, and only claims to be a joint owner with them. *Maxwell v. Pratt*, 24 Hun, 448. See *Tripp v. Riley*, 15 Barb. 333.

A single demand or claim cannot be split up into several, so as to authorize several different actions in a court of law, and in the name of each party interested. *Coster v. New York & Erie R. R. Co.*, 6 Duer, 43, 44. A court of equity will protect the rights of a party to whom a portion of a demand has been assigned, but it will require all the parties interested to be joined in the action either as plaintiffs or defendants. *Field v. Mayor of New York*, 6 N. Y. 179; *Cook v. Gen. Mut. Ins. Co.*, 8 How. 514. If one member of a firm has been adjudged a bankrupt, and has executed an assignment to his assignee, the solvent partner and the assignee must join in an action to collect a claim due to the firm. *Browning v. Marvin*, 22 Hun, 547; *Graham v. Robertson*, 2 Durnf. & East, 282; *Eckhardt v. Wilson*, 8 id. 140; *Murray v. Murray*, 5 Johns. Ch. 60. The principle is briefly and concisely stated in the case last cited that the solvent partner and the assignee of the bankrupt cannot sue alone, but must unite in actions at law. Id. 70.

Where the owner of premises in fee, having demised the same for a term of years, dies intestate before the expiration of the lease, one of

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his heirs at law can sue alone to recover his aliquot part of subsequently accruing rent, or the heirs at law may all join as plaintiffs. *Jones v. Felch*, 3 Bosw. 63; *Cole v. Patterson*, 25 Wend. 456; *Jackson v. Topping*, 1 id. 388; *Bowen v. Bowen*, 18 Conn. 535; *Cruger v. McLaurry*, 41 N. Y. 219, 223; affirming *Cruger v. McClaughry*, 51 Barb. 642. See *Porter v. Bleiler*, 17 id. 149. But if several tenants in common of land join in a lease of it, they must all join as plaintiffs in an action to recover the rent, as they are jointly interested.

When two firms have one common member, and one firm performs work and labor for the other, no action at law will lie in favor of the creditor firm against the other, nor in favor of the partners therein who have no interest in the debtor firm; nor will it lie although the common partner assigns his interest in the claim to his copartners. *Engliss v. Furniss*, 4 E. D. Smith, 587. But where two firms, of which A. was a partner, stated an account of their mutual dealings, and the partners in the creditor firm, with the exception of A., who declined to be a plaintiff and was made a defendant, brought their action against the members of the debtor firm, it was held that, upon proof of these facts, the plaintiffs were entitled to judgment for the balance thus ascertained. *Cole v. Reynolds*, 18 N. Y. 74. While it may be admitted as a general rule that a person cannot sue himself and be both plaintiff and defendant, there are exceptions to the rule. A person who is administrator of an estate, having a demand against another estate, may sue as administrator of the creditor estate, although he is also one of the administrators of the debtor estate and a party defendant to the action. In such case the plaintiff does not sue himself. It is simply estate against estate. *Neilly v. Neilly*, 23 Hun, 651. Of course, such an action could not be brought in justice's court, as the justice, while having jurisdiction to hear and determine an action brought by a plaintiff as administrator, would have no authority to take cognizance of one brought against an administrator although the administrator was both plaintiff and defendant in the action. The cases are extremely rare in which a person can be both plaintiff and defendant in an action brought in justices' court.

Where one or more of the partners of a firm dies, an action to recover a debt due to the partnership firm must be brought in the name of the surviving partner. *Bernard v. Wilcox*, 2 Johns. Cas. 374; *Murray v. Mumford*, 6 Cow. 441; *Homes v. D'Camp*, 1 Johns. 34.

Two persons who have been induced by the fraudulent representations of another to execute, as sureties, a joint undertaking given on an appeal from a judgment against the latter, and who have jointly paid the amount for which they were liable upon the undertaking, may

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maintain a joint action to recover the damages they have sustained by reason of the fraud. *Bates v. Merrick*, 2 Hun, 568; S. C., 5 N. Y. Sup. Ct. 701. And it has been repeatedly held that if two or more sureties pay their principal's debt out of their joint funds, they may maintain a joint action against their principal. *Enos v. Leach*, 18 Hun, 139; *May v. May*, 1 C. & P. 44; *Osborne v. Harper*, 5 East, 255; *Day v. Swann*, 13 Me. 165; *Jewett v. Cornforth*, 3 id. 107; *Fletcher v. Jackson*, 23 Vt. 581; *Johnson v. Allen*, 67 Ill. 317; *Steward v. Vaughn*, 1 Rice (S. C.), 33.

In case of the refusal of a necessary party plaintiff to join in an action with the other parties in interest to enforce their joint demand, it would probably be the proper practice to make the person so refusing a defendant in the action and to state in the complaint the reason for thus making him defendant, although the statute authorizing such procedure does not apply to justices' courts. To hold that a person must join with him, as a party to an action, another person who refuses to be made such party, and to refuse to permit the action to proceed in some form without such joinder, would in many cases amount to a denial of justice, and would result in a greater evil than that which the rule was designed to prevent.

Misjoinder of plaintiffs. In an action pending in a court of record a defendant may demur to the complaint when it appears upon its face that there is a misjoinder of parties plaintiff. Code of Civil Pro., § 488. When it does not so appear the objection may be taken by answer. *Id.*, § 498. Before the enactment of the Code of Civil Procedure a demurrer upon the ground of misjoinder of parties plaintiff was not authorized in courts of record. *People v. Crooks*, 53 N. Y. 648; *Allen v. City of Buffalo*, 38 id. 280; *Richtmeyer v. Richtmeyer*, 50 Barb. 55; *Enos v. Leach*, 18 Hun, 139. It is not now a ground of demurrer in justice's court. Vol. 1, p. 26, § 2939. But in all the courts, whether of record or not of record, the failure of the complaint to state a cause of action is, and always has been, a ground of demurrer. A brief examination of the mode of taking an objection to the misjoinder of plaintiff in an action pending in a court of record before a demurrer upon that specific ground was authorized by the statute, will aid in determining the proper mode of taking a similar objection in actions pending before a justice of the peace.

Before the present Code, if in an action pending in a court of record there was a misjoinder of plaintiffs, that is, if the facts stated in the complaint showed no cause of action against the defendants in favor of one of the plaintiffs, the defendant might demur as to such plaintiff

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upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and as to such plaintiff, the complaint was dismissed. If the objection was not raised by demurrer, or it did not appear in the complaint it might still be raised upon the trial, and the complaint dismissed as to the plaintiffs in whose favor no cause of action was shown, but not as to the plaintiffs in whose favor a good cause of action was shown. The statute authorized a judgment "for or against one or more of several plaintiffs," and under this provision a judgment was rendered against the plaintiff who had no cause of action, and in favor of the plaintiff who had a good cause of action. *Palmer v. Davis*, 28 N. Y. 242; *Rumsey v. Lake*, 55 How. 339; *Simar v. Canaday*, 53 N. Y. 298; S. C., 13 Am. Rep. 523; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Lammond v. Volans*, 14 Hun, 263.

Under the present practice, when it appears upon the face of the complaint in an action pending before a justice of the peace, that there is a misjoinder of parties plaintiff, the defendant may demur, as to the plaintiff improperly joined, upon the ground that the complaint does not state facts sufficient to constitute a cause of action in his favor.

If the justice considers the objection well taken, he must permit the plaintiff to amend his complaint. Vol. 1, p. 26, § 2939. This may be done by striking out the name of the plaintiff improperly joined or by adding an allegation connecting the plaintiff with the cause of action set forth in the complaint. Vol. 1, p. 122, § 723; id., p. 172, § 3347, subd. 6. See *Lapham v. Rice*, 63 Barb. 485; 55 N. Y. 472; 66 Barb. 487; *Ackley v. Tarbox*, 31 N. Y. 564. If the plaintiff fails to amend after the decision of the demurrer, the defective pleading must be disregarded. Vol. 1, p. 122, § 723.

If the complaint does not disclose this misjoinder, the defendant, instead of demurring, may take the objection by answer. *Corey v. Rice*, 4 Lans. 141. If two persons, having each a several interest in a demand, commence a joint action upon the demand, the defendant may by answer deny the right of the plaintiffs to maintain the action jointly, and defeat a recovery by either unless an amendment is allowed by which the name of one of the plaintiffs is stricken out. *Lapham v. Rice*, 55 N. Y. 472. The justice has power to allow such an amendment. *Ib.*; vol. 1, p. 122, § 723.

A misjoinder of parties is also a ground of nonsuit at the trial, and the defendant is not bound to set up the defense in his answer, or to demur to the complaint. See *Lapham v. Rice*, 55 N. Y. 472; *Ackley v. Tarbox*, 31 id. 564, 567. But it is held that the joinder of too many persons as plaintiffs is not a ground of dismissing the

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complaint as to all the plaintiffs, if any one of them has shown a good cause of action. See *Simar v. Canaday*, 53 N. Y. 298; *Fuller v. Fuller*, 5 Hun, 595. In such case the justice should strike out the name of the plaintiff in whose favor no cause of action has been shown, and proceed with the trial of the cause as if he had never been made a party. See *Ackley v. Tarbox*, 31 N. Y. 564. It is clear under all the cases, that two plaintiffs, who are separate owners of property, and have no joint interest therein, cannot have a joint recovery for injuries to the property if the objection to the misjoinder is properly taken. The provision of the Code authorizing a judgment for or against one or more plaintiffs in an action is not made applicable to justices' courts; but the section of the Code allowing an amendment of a process, pleading or proceeding, in the furtherance of justice, and on such terms as shall be just, by striking out the name of a person as a party, either upon the trial, or at any other stage of the action before or after judgment, is applicable to those courts, and conveys an equivalent remedy. The justice may impose such terms upon allowing the amendment as he deems proper, and thus as effectually require the payment of costs for the misjoinder, as if a formal judgment for costs was entered up against the person whose name is stricken from the complaint.

Non-joinder of plaintiffs. Under the old Code, a defendant in an action brought before a justice of the peace could take the objection that a person, who was a necessary party plaintiff, had not been joined as a plaintiff in the action, in one of two ways. If the defect appeared upon the face of the complaint he could demur for the defect of parties. If it did not so appear, he could take the objection by answer. If he did not take the objection in either way, the defect was waived; and although a cause of action belonged to several parties, a less number than the whole might recover, unless the defendant chose to set up the non-joinder as a defense in his pleading. *Frazier v. Gibson*, 15 Hun, 37; *Maxwell v. Pratt*, 24 id. 448. This was so held upon the assumption that the provisions of the old Code in respect to objections to defects of parties in courts of record were applicable to justices' courts. But the corresponding provisions of the Code of Civil Procedure are not applicable to justices' courts. See vol. 1, p. 172, § 3347, subd. 4. Therefore, the rules of practice in courts of record no longer control the practice as to objections to defects of parties in an action pending before a justice of the peace.

In a justice's court no demurrer is allowed for a defect of parties where there is a good cause of action stated in the complaint. See vol. 1, p. 26, § 2939. A demurrer, therefore, is not the remedy for a de-

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fect of parties plaintiff. Under the practice before the adoption of the former Code the non-joinder of parties as plaintiffs in actions on contract could be taken advantage of by a plea in abatement, or the defendant might avail himself of it under the general issue as a ground for nonsuit at the trial. Under the present system of pleadings all matters constituting a defense are to be raised in some form by the answer. But the Code has not attempted to define what defenses may be proven on the trial under a general denial or what defenses must be specially set forth in the answer. This is to be determined by the settled principles of pleading which existed before and have continued since the Code, and are applicable to all courts of common-law jurisdiction. There are no provisions in the Code requiring an objection to a defect of parties plaintiff to be specially set up in the answer in a justice's court, or declaring that if it is not so set up that it will be waived. But it will be safe practice to take the objection by an answer specifically pointing out by name the parties who should have been joined as plaintiffs. See *Fowler v. Kennedy*, 2 Abb. 347; *Kingsland v. Braisted*, 2 Lans. 17; *Maxwell v. Pratt*, 24 Hun, 448; *Wigand v. Sichel*, 3 Keyes, 120; *Wooster v. Chamberlin*, 28 Barb. 602. The objection may, however, be taken advantage of at the trial by motion for a nonsuit. *Armine v. Spencer*, 4 Wend. 406; *Rice v. Hollenbeck*, 19 Barb. 664; *Dob v. Hasley*, 16 Johns. 34.

When the objection is taken, and it appears that a necessary party plaintiff has not been joined, the justice may permit an amendment adding the name of the omitted party, if substantial justice will be promoted thereby, upon such terms as may be just. Vol. 1, p. 27, § 2944; *id.*, p. 122, § 723.

Where an action is brought by a town, county or municipal officer, pursuant to section 1926 of the Code of Civil Procedure, an objection growing out of an omission to join any officer who ought to be joined with the plaintiff must be taken by answer, or, in a special proceeding before the close of the case on the part of the defendant. If not so taken, the objection is waived. Code of Civil Pro., § 1929.

§ 2. **Who should be made defendants.** As a general rule an action for a breach of contract should be brought against the parties who entered into it as principals and who have been guilty of a breach of it. When the contract is made by the defendant in person there can be no doubt as to the proper party. But when the contract is not made by the person beneficially interested in its subject-matter, the question as to who should be sued thereon may depend upon its character and form.

Action on contracts by agents.—Executors, etc.—Corporations.

Action on contracts by agents. If a contract is under seal, is executed by an agent in his own name and does not purport to be executed on behalf of a principal, it can be enforced against the agent only, although the fact of the agency is recited in the instrument. *Kiersted v. Orange & Alexandria R. R. Co.*, 69 N. Y. 343; S. C., 25 Am. Rep. 199; *Taft v. Brewster*, 9 Johns. 334; *Stone v. Wood*, 7 Cow. 453; *Guyon v. Lewis*, 7 Wend. 26; *Briggs v. Partridge*, 64 N. Y. 357. So if the contract is a negotiable instrument, and is executed by an agent in his own name, although in fact for his principal, the agent only can be made defendant in an action on the contract. *Ib.*; *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 id. 271; *De Witt v. Walton*, 9 N. Y. 571; *Merchants' Bank v. Hays*, 7 Hun, 530. Thus, if a promissory note is executed by the agent of the widow and heirs of a deceased person, and the agent annexes to his signature the words "attorney for the estate of A., deceased," the widow and heirs are not so named as to render them liable upon the note, and the agent only should be made defendant in an action upon the instrument. *Ib.* But these are exceptions to the general rule that a principal, though undisclosed, is liable on a contract executed in the name of his agent, and is the proper party defendant in an action for a breach of the contract. *Inglehart v. Thousand Island Hotel Co.*, 7 Hun, 547; *Porter v. Talcott*, 1 Cow. 359; *Taintor v. Prendergrast*, 3 Hill, 72; *Coleman v. First National Bank of Elmira*, 53 N. Y. 388. As a general rule, an agent is not liable on a contract for a known principal where he acts within the scope of his authority. *Morrison v. Currie*, 4 Duer, 79. See vol. 1, p. 456.

Executors, etc. In the case of the death of the parties to a contract who, if living, would have been the proper parties defendant in an action for its breach, no action can be maintained in a justice's court, because executors and administrators cannot be sued, as such, before a justice of the peace. Vol. 1, p. 2, § 2863.

Corporations. Actions against corporations must be brought against them in their corporate names. The fact that the defendant is a corporation, foreign or domestic, will appear by the complaint, and need not be proved upon the trial unless that fact is put in issue by an affirmative allegation, in a verified answer, that the defendant is not a corporation. Code of Civil Pro., §§ 1775, 1776. A mistake in the statement of the corporate name of the defendant will be deemed waived, unless the misnomer is pleaded by the defendant. *Id.*, § 1777. This mistake may be corrected by an amendment on the trial, or at any other stage of proceedings before or after judgment, in the fur-

Joint-stock associations.—County, town and municipal officers.

therance of justice, and on such terms as may be just. Vol. 1, p. 122, § 723.

Joint-stock associations. When an action to recover any property can be maintained against all the associates of an unincorporated association, consisting of seven or more members, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or when an action upon any cause can be maintained against such associates by reason of their liability thereafter, either jointly or severally, such action may be brought against the president or treasurer of the association. Special proceedings may be brought in the same manner under the same circumstances. Code of Civil Pro., § 1919. Any partnership or other company of persons having a president or treasurer is deemed an association within the meaning of this section. *Ib.* The action may, in the first instance, be brought against all the members of the association. *Id.*, § 1923. But when the action has been brought against the president or treasurer of the association, another action for the same cause cannot be brought against the members of the association, or any of them, until after final judgment in the first action and the return of an execution thereon, wholly or partly unsatisfied or unexecuted. *Id.*, § 1922. But after such return, the party in whose favor the execution was issued may maintain an action against the members of the association, or in a proper case, against any of them, as if the first action had not been brought. *Id.*

County, town, and municipal officers. An action or special proceeding may be maintained against the trustee or trustees of a school district, the commissioner or commissioners of highways of towns, the overseer or overseers of the poor of a town, village or city, the supervisor of a town, the county superintendent or superintendents of the poor, or the supervisors of a county, upon any cause of action, which accrues against them or has accrued against their predecessors, or upon a contract made by their predecessors, in their official capacity, and within the scope of their authority. Code of Civil Pro., § 1927. The officer against whom the action or proceeding is brought must be described in the summons or other process by which it is commenced, and in all the subsequent proceedings by his individual name with the addition of his official title. *Id.*, § 1929. Notwithstanding these general statutory provisions, where it is specially prescribed by law that an action may be maintained against the body represented by an officer above designated, the defense of such action must be conducted by the persons then in office who represent that body. Code of Civil Pro., § 1928. A person who has been injured in person or property by reason

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of defective highways or bridges, in any town in this State, except in the county of Dutchess, must now bring his action to recover damages for such injuries against the town, where formerly the action would have been properly brought against the commissioner or commissioners of highways. Laws of 1881, chap. 700, § 1. If the defect in the highway or bridge was caused by the misconduct or neglect of the commissioner of highways of the town, and a judgment has been recovered against the town for injuries sustained by reason of the defect, the town may bring an action against the commissioner or commissioners of highways to recover the amount of the judgment. *Id.*, § 3. The action against the town must be brought against the town by name. See 3 R. S. [5th ed.] 774, § 108. An action against a county, when such action will lie, must be brought against the board of supervisors of the county as a body. The individual supervisors should not be named. *Hill v. Board of Supervisors, etc.*, 12 N. Y. 52; *Chase v. County of Saratoga*, 33 Barb. 603. And see *People v. Tweed*, 13 Abb. (N. S.) 25, 67; *Newman v. Board of Supervisors of Livingston Co.*, 45 N. Y. 676; *De Grauw v. Supervisors of Queens Co.*, 13 Hun, 381, 383.

The action of a board of supervisors in issuing a warrant for the collection of taxes is not the act of the several members as supervisors of the several towns, but is the corporate act of the county; and if illegal tax is collected and paid into the treasury of the county, an action for money had and received will lie against the county for its recovery. The county in such case should be sued in the name of the board of supervisors. *Newman v. Supervisors of Livingston Co.*, 45 N. Y. 676. But when a town or county officer has been guilty of misfeasance or malfeasance in his office and the wrongful act or omission was not done or omitted by the officer as the agent of the town or county, an action to recover damages for the act or omission should be brought against the officer and not against the town or county. See *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 id. 113; *Olmsted v. Dennis*, 77 id. 378, 382; *People v. Town Auditors*, 74 id. 310; *De Grauw v. Board of Supervisors of Queens Co.*, 13 Hun, 381; *Lorillard v. Town of Munroe*, 11 N. Y. 392.

Partners. As a general rule, in an action against an existing co-partnership on a contract which relates to the business of the firm, all the partners must be joined as defendants.

But to this rule there are several exceptions. Where a person enters into a contract with two others, by name, without knowing, or having at the time reason to suspect, that they have a partner in the business to which such contract relates, such two persons may be sued without

Partners.

joining such third person, and he may be regarded as to such transaction, and under such circumstances, as a dormant partner, although the fact of his connection with the firm came to the knowledge of the plaintiff before bringing the suit. *Hurlbut v. Post*, 1 Bosw. 28; *N. Y. Dry Dock Co. v. Treadwell*, 19 Wend. 525; *North v. Bloss*, 30 N. Y. 374; *Farwell v. Davis*, 66 Barb. 73; *Arnold v. Morris*, 7 Daly, 498; *Lefferts v. Silsby*, 54 How. 193. So where a person, in ignorance of the existence of a partnership, is induced by the fraudulent representations of a person claiming to act as the agent of a single member of the firm, to purchase partnership property, he may maintain an action to recover back the purchase-money for the fraud against the assumed principal, who has ratified the acts of the pretended agent, without joining the other partners, although they in fact received their share of the purchase-money. *Leslie v. Wiley*, 47 N. Y. 648. But if the agent of a firm, assuming to act as the agent of an individual member of it, purchases property of one who is ignorant of his real authority, and the property is received and used by the firm, the vendor cannot maintain an action for the purchase-price against the partner for whom the agent assumed to act, without joining the other partners. *Marvin v. Wilber*, 52 N. Y. 270. The distinction between the cases is this: in the one case the individual partner ratified the act of his assumed agent, making his act his own, and his liability became fixed at the moment of ratification without regard to the subsequent division of the proceeds of the fraud among the other partners who were strangers to the transaction; and in the other case, there was no individual ratification of the act of the assumed agent by which the partner could be held individually liable as a principal, but merely an adoption by the firm of the act of their agent.

A plaintiff may, if he chooses, make a dormant partner a party defendant; and he may also make a retiring partner a defendant in an action on a contract entered into with the firm while such partner was an actual member. *Briggs v. Vose*, 15 N. Y. 471. The general rule is that a dissolution of the partnership does not affect the liability of the firm upon existing contracts. But if the firm is dissolved by the death of one of the partners, an action at law upon a firm liability must be brought against the survivor or survivors alone, without joining the personal representatives of the deceased partner. *Richter v. Poppenhausen*, 42 N. Y. 373; *Carrere v. Spafford*, 46 How. 294; S. C., 15 Abb. (N. S.) 47. But if the survivor is insolvent, the creditor may allege and prove that fact, and enforce payment from the estate of the deceased partner without bringing an action against the survivor,

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or he may exhaust his legal remedy against the survivor, and then proceed against the estate of the deceased debtor. *Pope v. Cole*, 55 N. Y. 124; S. C., 14 Am. Rep. 198; *Haines v. Hollister*, 64 N. Y. 1. The latter action would not be within the jurisdiction of a justice of the peace.

In case a partnership partakes of the nature of a joint-stock association, is composed of seven or more members, and has a president or treasurer, it may be sued in the name of the president or treasurer, or in the name of the individual members of the co-partnership, as the plaintiff may elect. See *ante*, 82.

Married women. A married woman, under existing statutes, should be made a party defendant in the same cases and under the same circumstances that would justify making her a party if she were unmarried. She defends alone or joined with other parties as if she was single, and it is not necessary or proper to join her husband with her in an action or special proceeding affecting her separate property. Vol. 1, p. 119, § 450.

Infants, actions against. Most of the contracts which an infant may make are voidable at his election, but they are not absolutely void, for they may be ratified when he arrives at adult age. *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill, 120; *Taft v. Sergeant*, 18 Barb. 320. Infancy is a personal defense, and no one can interpose it but the defendant himself. *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 id. 160. If no such defense is made by the infant, and a guardian is legally appointed for him, a judgment against him will be valid. *Phillips v. Dusenberry*, 8 Hun, 348.

An infant is liable for necessities furnished to him, or for money to purchase necessities, if the money is so applied. *Randall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sandf. 306. When a contract has been made by several persons, and one of them is an infant, he must, nevertheless, be joined as a defendant in an action. *Slocum v. Hooker*, 13 Barb. 536; *Hyde v. Van Valkenburgh*, 1 Daly, 416.

If the infant defendant pleads infancy and establishes the defense, the action may be discontinued as to him, and judgment may be rendered against the other defendants, if a cause of action is proved against all the defendants, but for the defense of infancy interposed by such defendant. *Slocum v. Hooker*, 13 Barb. 536; *Butler v. Morris*, 1 Bosw. 329; *Bank of Attica v. Wolf*, 18 How. 102.

The correct practice is to make the infant party a defendant, and if he does not plead infancy, but has a guardian appointed, then proceed

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in the action as though he were an adult ; but if the infant pleads infancy and establishes it on the trial, then the action must be dismissed as to him, and proceed against the other parties in the same manner as though there never had been such a party to the contract as an infant.

All natural persons are liable for their torts, whether infants or adults, sane or insane. *Conklin v. Thompson*, 29 Barb. 218 ; *Fish v. Ferris*, 5 Duer, 49 ; *Campbell v. Stakes*, 2 Wend. 137. See *Moore v. Eastman*, 1 Hun, 578 ; S. C., 4 N. Y. Sup. Ct. (T. & C.) 37 ; *Krom v. Schermerhorn*, 3 Barb. 649 ; *Hewett v. Warren*, 10 Hun, 560, and cases cited. See, also, vol. 2, p. 662, title "INFANCY."

From what has been stated it is apparent that the fact that a person is not twenty-one years of age does not prevent his being made sole defendant, or being joined with others as one of several defendants, if an adult might be separately sued or proceeded against jointly with others under similar circumstances. But the Code provides that after the service and return of a summons against an infant defendant, no other proceeding shall be taken in the action until a person has been appointed to appear as his guardian for the purpose of the action. Vol. 1, p. 8, § 2888. It is held that a justice has no jurisdiction to proceed in an action against an infant defendant after the service and return of process, even to receive the pleadings, until a guardian has been appointed for him. *Harvey v. Large*, 51 Barb. 222. The purpose of this statute is to put the infant upon the same footing as an adult, in respect to his defense ; to require him to interpose it at once ; and when he has, by his guardian, interposed an answer in the action, to conclude him by the result of the issues thereby raised. *Phillips v. Dusenberry*, 8 Hun, 348. The statute also secures the safety of the infant by requiring the court to appoint a proper person to look after his interest in the action, who will be liable to the infant for all damages he may sustain by reason of any neglect of duty whereby the infant's rights are prejudiced or sacrificed. *Knickerbacker v. DeFreest*, 2 Paige, 304. A failure to appoint a guardian for an infant defendant is something more than an irregularity. *Harvey v. Large*, 51 Barb. 222 ; *McMurray v. McMurray*, 60 id. 117 ; S. C., 41 How. 41 ; 9 Abb. (N. S.) 315. The justice must appoint a proper person guardian of the infant upon the nomination of the defendant. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the justice may, on the application of the plaintiff, appoint any proper person as his guardian. Vol. 1, p. 9, § 2888. If the infant does not apply for the appointment of a guardian, the plaintiff should apply, and see to it that a guardian is properly ap-

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pointed. *Harvey v. Large*, 51 Barb. 222. If this is not done and a judgment is rendered against the defendant, he may reverse the judgment for error. *Mockey v. Grey*, 2 Johns. 192; *Alderman v. Tirrell*, 8 id. 418; *Duncan v. Sandford*, 14 id. 417; *De Witt v. Post*, 11 id. 460. It has been held that the infant cannot waive the objection that a guardian has not been appointed to protect his rights in the manner prescribed by law, and that there is no difference in this respect between an action upon a contract, made by the infant, and an action for a tort committed by him. *Fairweather v. Satterly*, 7 Rob. 546. But see *Howard v. Dusenbury*, 44 How. 423. But a judgment recovered against an infant defendant for whom no guardian has been appointed and who has not appeared in the action is not absolutely void but merely voidable. *McMurray v. McMurray*, 66 N. Y. 175. And the surest way to dispose of the judgment is by an appeal.

Whenever a plaintiff is uncertain whether the defendant is an infant, and such infant does not apply for the appointment of a guardian, it will be the best course for the plaintiff to see that such guardian is appointed. It can do no harm in any case, and if the defendant is an infant it is indispensable to the validity of the judgment against him. *Harvey v. Large*, 51 Barb. 222, 225. If the defendant does not plead his infancy, but proves it on the trial, the judge should either dismiss the action, stating as the reason that the defendant is an infant, and that no guardian has been appointed, or he should at once arrest the trial, appoint a guardian, and commence the trial anew from the beginning. *Ib.* A decision against an infant on an issue of infancy is conclusive upon appeal. *Ingersoll v. Wilson*, 3 Johns. 437.

The defendant may make his application for the appointment of a guardian either orally or in writing. A written application may be in the following form:

Application for guardian.

JUSTICE'S COURT — FULTON COUNTY, ss.:

John Doe <i>agst.</i> Richard Roe.	}	DAVID KENNEDY, <i>Justice.</i>
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TO DAVID KENNEDY, Esq.:

The undersigned, who is an infant, of the age of twenty years, hereby applies to you for the appointment of James Roe, as a guardian for him in the action above entitled.

Dated *November 28*, 1864.

RICHARD ROE.

Parties severally liable.

The written consent of the person to be appointed guardian must be filed with the justice before his appointment. Vol. 1, p. 9, § 2888. This may be in the following form :

Consent to act as guardian.

JUSTICE'S COURT — FULTON COUNTY, ss. :

John Doe <i>agst.</i> Richard Roe.	}	DAVID KENNEDY, <i>Justice.</i>
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I hereby consent to be appointed as guardian for Richard Roe, in pursuance of the annexed application,

Dated *November* 28, 1864.

JAMES ROE.

Appointment of guardian.

JUSTICE'S COURT — FULTON COUNTY, ss. :

John Doe <i>agst.</i> Richard Roe.	}	DAVID KENNEDY, <i>Justice.</i>
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In pursuance of the annexed application and consent, I hereby appoint James Roe as a guardian for the defendant Richard Roe, in said action.

Dated *November* 28, 1864.

DAVID KENNEDY, *Justice of the Peace.*

The guardian so appointed is not liable for costs. Vol. 1, p. 9, § 2888.

Parties severally liable. Two or more persons severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, may all or any of them be included as defendants in the same action at the option of the plaintiff. Vol. 1, p. 119, § 454.

A joinder of a person as defendant in an action with another person as prescribed in the last section does not affect his right to any order or other relief to which he would have been entitled if he had been separately sued in the action. Id. 120, § 455. See *Kelsey v. Bradbury*, 21 Barb. 531; *Farmers' Bank of Amsterdam, v. Blair*, 44 id. 641.

The makers and indorsers of a note are not joint debtors. The contract of an indorser is independent and distinct from that of a maker,

Parties severally liable.

and except by force of some statute, they cannot be sued on the note in the same action. *Ib.*

The contract of a principal, and the contract of the guarantor of the performance of the contract of the principal, are independent and distinct contracts. They may be included in the same instrument, as for example, where the lessor, lessee and guarantor of the payment of rent unite in a tri-party lease or agreement for the letting of premises; and when so united the lessee and guarantor may be joined in an action upon the lease to recover the rent reserved. *Carman v. Plass*, 23 N. Y. 286. See, also, *Decker v. Gaylord*, 8 Hun, 110. But when the contract of the principal and that of the guarantor are not included in the same instrument, the guarantor and the principal debtor cannot be joined as defendants in an action on the contract of the principal. *Mowery v. Mast*, 9 Neb. 445; *Phalen v. Dingee*, 4 E. D. Smith, 379; *Allen v. Fosgate*, 11 How. 218; *Brewster v. Silence*, 8 N. Y. 207; *Barton v. Speis*, 5 Hun, 60; *Gould v. Moring*, 28 Barb. 444; *De Ridder v. Schermerhorn*, 10 id. 638; *Tibbits v. Percy*, 24 id. 39; *Harris v. Eldridge*, 5 Abb. N. C. 278. The fact that the guaranty is indorsed upon the principal contract or attached to it does not affect the rule. *Ib.*

It has been held that where a lease under seal is signed by the lessor and lessee, and also by a third party not named in the body of the instrument, who adds to his signature the words "security for F. S. G., the lessee," the contract of the latter is one of suretyship or guaranty, and that a joint action upon the lease could be maintained against both the lessee and the surety or guarantor. *Decker v. Gaylord*, 8 Hun, 110. It was also said in the opinion in the case last cited, that the cases of *Gould v. Moring*, and *Brewster v. Silence*, above cited, so far as they held a contrary doctrine, were overruled by the case of *Carman v. Plass*, 28 N. Y. 286. In this we think the court was in error, and that the cases are not necessarily in conflict as they stand reported.

Where two persons execute a joint and several promissory note, and one of the parties adds the word "surety" to his signature, both may be joined as defendants in an action upon the note. *Hoyt v. Mead*, 13 Hun, 327. The addition of the word "surety," while giving notice to the payee of the note of the relation of principal and surety between the persons signing it, in no way affected their liability to him upon their contract. *Hubbard v. Gurney*, 64 N. Y. 457. A surety contracts with his principal for the performance of the same thing, and ordinarily may be joined with his principal in an action upon their contract. It is otherwise in cases of guaranties.

In an action upon a joint and several bond of an administrator, exe-

Joint debtors.

cuted by the administrator and a number of sureties, the plaintiff may join all or a part of the obligors as defendants at his option. *Cridler v. Curry*, 66 Barb. 336; S. C., 44 How. 345.

At common law, where a liability arose upon contract, and was also *joint and several*, the plaintiff might proceed against all the parties jointly; or sue each separately. If more than two persons were liable, he was compelled to sue them all jointly or each of them separately. Two of the parties so liable, or any greater number less than the whole, could not have been sued in the same action. *Ib.*; *Quigley v. Walter*, 2 Sweeny, 175; *Dean v. Whiton*, 16 Hun, 203. But this rule was modified by statute when applied to actions upon commercial paper (Laws of 1832, chap. 276), and still further by the Code of Procedure. By that act it was provided that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." Code of Pro., § 120. This was construed to include persons jointly and severally liable upon the same obligation or instrument. But the common-law rule has not been changed except with respect to the parties severally liable upon the same instrument; and where the liability does not arise out of any instrument, but is purely statutory, the plaintiff must now, as formerly at common law, sue each of the parties separately or join them all in one action. *Dean v. Whiton*, 16 Hun, 203.

Joint debtors. Where the liability of two or more persons is joint and not joint and several, they must as a general rule be joined as defendants. But as it is not always possible to serve process upon all the parties in justices' courts, since some of them may be non-residents of the county, or some other reason may prevent complete service upon all, the statute has provided that in an action where the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons is served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served unless the court otherwise directs, and if he recovers final judgment it may be taken against all the defendants thus jointly indebted. Vol. 1, pp. 45, 46, §§ 3020, 1932. The statute also declares the effect of such judgment, and provides for its enforcement.

The plaintiff, after recovering a judgment as above mentioned, may maintain an action against one or more of the defendants who were not summoned in the original action, to procure a judgment charging

Joinder of defendants in actions for torts.

his or their property with the sum remaining unpaid upon the original judgment. Id. 47, § 1937.

These provisions of the statute, while they recognize and preserve the rule that all persons jointly indebted upon contract must be joined as defendants in an action upon the contract, relieve the holder of such demand from the necessity of delaying his action until all the joint debtors come within the reach of the process of a justice's court, and protect equally the rights of the creditor and his debtors.

Joinder of defendants in actions for tort. In an action for a tort unconnected with contract, where the wrong was committed by several persons, the plaintiff has his election to sue them all jointly, or to sue one or more of them separately. *Livingston v. Bishop*, 1 Johns. 290; *Rose v. Oliver*, 2 id. 365; *Marsh v. Berry*, 7 Cow. 344; *Osterhout v. Roberts*, 8 id. 43; *Wehle v. Butler*, 3 Jones & Sp. 1; 43 How. 5; 12 Abb. (N. S.) 139; S. C. affirmed, 61 N. Y. 245; *Hun v. Cary*, 82 id. 65; *Roberts v. Johnson*, 58 id. 613. But there can be but one satisfaction from several persons for the same cause of action; that is, there can be but one satisfaction for a single injury though there may be several recoveries. *Thomas v. Rumsey*, 6 Johns. 31; *Livingston v. Bishop*, 1 id. 290; *Wood v. Pangburn*, 75 N. Y. 495, 498. Two may join in one wrongful act, and the injury is single, though their act is joint; and there can be but one satisfaction therefor, though there may be two actions brought and a recovery in each. *Woods v. Pangburn*, 75 N. Y. 495, 498.

If an action is brought against one of several trespassers who were all concerned in the wrongful act, and a judgment recovered against him is paid, such payment will bar an action against any of the other wrong-doers for the same injury. *Dexter v. Broat*, 16 Barb. 337; *Osterhout v. Roberts*, 8 Cow. 43; *Kasson v. People*, 44 Barb. 347. But until the plaintiff elects to collect a judgment, or until the amount of one of the judgments is tendered to him, he may sue each defendant separately, and then elect which judgment he will collect. He may collect costs in each case, but he can have but one satisfaction for the injury. *Livingston v. Bishop*, 1 Johns. 290; *Osterhout v. Roberts*, 8 Cow. 43; *Kasson v. People*, 44 Barb. 347. Nothing short of full satisfaction or that which the law must consider as such can constitute a bar to an action against another joint tort-feasor who was not a party to the first judgment. *Lovejoy v. Murray*, 3 Wall. 1; *Cohn v. Goldman*, 11 Jones & Sp. 436.

Where a person has sustained injuries through the negligence of an employee of a firm, he may bring his action against any one or more,

Joinder of defendants in actions for torts.

or all of its members. *Roberts v. Johnson*, 58 N. Y. 613. And if an employee of two or more persons or corporations operating a railroad sustains an injury resulting from the defective machinery furnished by them for his use in the course of his employment, he may maintain an action to recover damages for such injuries against each or all of them. The liability of his employers in such case is several as well as joint. *Kain v. Smith*, 80 N. Y. 458. So two railroad companies operating intersecting lines of track are jointly and severally liable for injuries received by a passenger in a collision resulting from their joint negligence, although one company may have been more negligent than another. The injured passenger may sue one company or both at his election. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Webster v. Hudson River R. R. Co.*, 38 id. 260; S. C., 7 Trans. App. 98; *Colegrove v. N. Y. and New Haven and New York and Harlem Railroad Companies*, 20 N. Y. 492. And see *Slater v. Mersereau*, 64 id. 138.

From these principles it is evident that there can be no misjoinder or non-joinder of defendants in actions *ex delicto*, if all of the defendants joined in any way participated in the wrongful act and contributed to the injuries resulting therefrom.

But the reason which makes the one liable who personally joins in or aids and abets the wrong done by another does not apply in case of injuries done by animals belonging to different owners, although the animals acted in concert in doing the injury, and the precise damage done by each cannot be ascertained. Thus if the dogs of several persons do mischief together, each owner is liable only for the mischief done by his own dog, and a joint action against the several owners for the damage done by all the dogs will not lie. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Carroll v. Weiler*, 1 Hun, 605; S. C., 4 N. Y. Sup. Ct. (T. & C.) 131. And see *Salter v. Mersereau*, 64 N. Y. 138, 147; *Partenheimer v. Van Order*, 20 Barb. 479; *Chipman v. Palmer*, 9 Hun, 517; S. C. affirmed, 77 N. Y. 51. But under the statute authorizing a special proceeding against animals straying from the highway, the rule is reversed, and all the damages done by the animals seized are regarded as done jointly, and the remedy therefor as entire, to be enforced against all the animals. Vol. 1, p. 74, § 3109. If, however, the petitioner does not allege that the animals were trespassing upon real property owned or occupied by him, and different persons own different animals seized, he may institute a separate special proceeding against each owner, or against two or more owners, with respect to the animals owned by him

Misjoinder of defendants.

or them, or he may take the proceeding against all the owners jointly. Vol. 1, p. 75, § 3110.

Under the statute of 1873, known as the "Civil Damage Act," a joint action may be maintained against the landlord and his tenant; but a joint action will not lie against two or more persons who separately, at different times, and at different places have sold to the same person, liquor which has contributed to produce the intoxication that caused the injury complained of. *Jackson v. Brookins*, 5 Hun, 530; See *Morenus v. Crawford*, 15 id. 45.

Misjoinder of defendants. Having briefly considered the cases in which parties may or may not be joined as defendants, the next step is to consider the remedy for a misjoinder.

If the complaint fails to show a cause of action against one of the defendants he may take the objection to the misjoinder by a demurrer upon the ground that as to him the complaint does not state facts sufficient to constitute a cause of action. See vol. 1, pp. 26, 27, § 2939. If the justice deems the demurrer well founded, he must give the plaintiff an opportunity to amend his complaint by striking out the name of the party or parties against whom no cause of action is alleged, or inserting allegations showing a cause of action against them. See vol. 1, p. 122, § 723. If the plaintiff refuses to amend, his pleading will be disregarded. Vol. 1, pp. 26, 27, § 2939.

If the misjoinder does not appear upon the face of the complaint the objection may be taken by answer. The objection is to be taken by the person improperly joined; and when it appears that the plaintiff has no cause of action against him, the justice should dismiss the action as to him and proceed with the action against the other defendants. A plaintiff who has a good cause of action against one or more of the defendants cannot be dismissed from the court as to him or them, though he has joined one or more defendants against whom he has no cause of action. *Palmer v. Davis*, 28 N. Y. 242. If a plaintiff should sue two defendants upon an alleged joint note, and on the trial should offer in support of his complaint to prove two separate notes, one made by one defendant, and one made by the other, the evidence could not be received although the defendants had not set up a misjoinder in their answer. It is possible that the plaintiff might be allowed to elect, and to recover against one or the other of the defendants, but he clearly could not recover against both without an amendment of his complaint striking out one of the parties and setting up a several liability as to the other. Without such an amendment he would be unable to prove a cause of action against either and would be necessarily nonsuited as

Misjoinder of defendants.

against both. If allowed to introduce the proof and to recover against both defendants the judgment would be reversed. *Morenus v. Crawford*, 15 Hun, 45. A party cannot even now recover upon facts not only not stated in the pleadings, but which contradict those which are stated. *Neudecker v. Kohlberg*, 81 N. Y. 296.

Under the practice before the Code a misjoinder of defendants was a ground for nonsuit at the trial. *Manahan v. Gibbons*, 19 Johns. 109. It was a rule of the common law that where the subject of the suit was a joint contract, the recovery must be against all the defendants or neither. But in courts of record, under the provision of the Code allowing a judgment in an action against two or more defendants to be taken against any or either of them severally, etc., it is held that the common-law rule has been changed, and that when in an action upon a joint contract one or more of the defendants is proven not liable, and one or more of the others is proven to be liable, a separate judgment may be given against those who are liable, whether their liability be joint or several, and the other defendants may be dismissed. *McIntosh v. Ensign*, 28 N. Y. 169; *Speyers v. Fisk*, 3 Hun, 706; S. C., 6 N. Y. Sup. Ct. (T. & C.) 197. And see *Quigley v. Walter*, 2 Sweeny, 175. But see *Perry v. Chester*, 53 N. Y. 240. But the section of the Code authorizing judgment to be given for or against one or more of the defendants has not been made applicable to actions in justices' courts by any express provision of that act. See Code of Civil Pro., § 1204; Id., § 3347, subd. 8. But a justice has power to amend any process, pleading or proceeding by striking out the name of a party. Vol. 1, p. 122, § 723. And he is required to hear, try and determine an action, of which he has jurisdiction, brought before him, according to law and equity, and for that purpose, where special provision is not otherwise made by law, he is vested, as a court, with all the necessary powers possessed by the Supreme Court. Vol. 1, p. 3, § 2868. Under this general grant of power, he could undoubtedly dismiss the complaint as to one or more of the defendants, and render judgment against the others; and under the decisions as to the duty of a court of record in case of a misjoinder of defendants, it would seem to be his duty to make that disposition of the case when an objection to a misjoinder of defendants is properly taken. In certain cases an objection to a misjoinder or non-joinder of defendants cannot be raised in an action pending in any court. "In an action brought against one or more persons engaged as a joint-stock association, partnership or otherwise, in the periodical transportation of passengers or property, an objection to any of the proceedings cannot be taken by a person properly made a defendant, on the

Non-joinder of defendants.— Parties prosecuting or defending as poor persons.

ground that the plaintiff has joined with him, as a defendant, a person not jointly engaged with him in that business, or on the ground that the plaintiff has failed to join with him a person so jointly engaged, unless the persons so engaged have, at least thirty days before the commencement of the action, filed in the clerk's office of each county in which they transport passengers or property, a statement showing the names of all of them. A statement so filed is conclusive for the purposes specified in this section, as against the person filing it, until thirty days after filing, in like manner, a new statement showing a change of interest." Code of Civil Proc., § 1945.

Non-joinder of defendants. The Code does not specifically provide any remedy for a non-joinder of defendants in an action in a justice's court. If the complaint states facts sufficient to constitute a cause of action against the persons made defendants a demurrer for non-joinder is unauthorized. But it is a good ground of defense, and the non-joinder of a person jointly liable with the defendant in an action may be set up in an answer, and if it is established it will be a perfect defense to the action. *Mason v. Wells*, 2 Hun, 518; S. C., 5 N. Y. Sup. Ct. (T. & C.) 714; *Wooster v. Chamberlin*, 28 Barb. 602; *Sweet v. Tuttle*, 14 N. Y. 465; *Van Slyke v. Newton*, 10 Hun, 554. It is not a ground of nonsuit at the trial. See *Gay v. Cary*, 9 Cow. 44; *Williams v. Allen*, 7 id. 316. The defendant knows or ought to know who should be joined with him as co-defendants; and if he does not plead their non-joinder he has no ground of complaint. If the defendants are severally liable, or jointly and severally liable, the defendant has no ground of objection, since the plaintiff has a right to sue all or a portion of those liable. And it is only in case of a joint liability, not of a joint and several liability, that an answer setting up the non-joinder is necessary or proper.

§ 3. **Parties prosecuting or defending as poor persons.** The provisions of the Code of Civil Procedure authorizing a poor person, who has not the ability to sue, to apply to the court by petition for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his case, have been given in full in a preceding volume. Vol. 1, p. 120. A repetition of the matter there given would be a waste of space needed for the discussion of other matters.

The application should be made to the court in which the action is then pending, or if it has not been commenced, to the court in which it is intended to be brought. *Id.*, § 458. The statute does not in terms require that the petition should be entitled; but if the action is already commenced it would be proper to entitle the petition in that action.

Parties prosecuting or defending as poor persons.

If the action is not commenced, it would be improper to entitle it in the action proposed to be brought. In that case the title may be wholly omitted, or the petition may be entitled "In the matter of the application of A. B., for leave to prosecute as a poor person," etc. But these are mere matters of form, and a defect in the title or the want of a title will not impair the petition, if it intelligibly refers to the action. See vol. 1, p. 122, § 728; id. 169, § 3343, subd. 11.

The petition may be in the following form :

Petition for leave to prosecute as a poor person.

JUSTICE'S COURT.

John Smith <i>agst.</i> Jacob Plantz.	}	Before RICHARD MURRAY, <i>Justice, etc.</i>
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The petition of John Smith, the plaintiff in the above-entitled action, respectfully shows to this court :

1. That he has a cause of action against Jacob Plantz, the defendant above named, for work, labor and services rendered and performed by your petitioner for said defendant at his request, during the year last past; that the above-entitled action has been brought to recover the value of such work, labor and services; and that said action is now pending in this court.

2. That your petitioner is not worth \$100, besides the wearing apparel and furniture necessary for himself and his family and the subject-matter of this action.

Wherefore, your petitioner prays that this court will make an order granting him leave to prosecute said action as a poor person, and assigning him an attorney and counsel to conduct said action for him.

Dated *January 3, 1882.*

JOHN SMITH.

This petition must be verified by the petitioner. Vol. 1, p. 120, § 459. The verification may be in the following form :

Verification.

STATE OF NEW YORK, }
County of Fulton, } ss. :

John Smith, being duly sworn, says, that he is the petitioner named in and who subscribed the foregoing petition; that said petition is true to his own knowledge, except as to the matters therein stated to be

Parties prosecuting or defending as poor persons.

alleged upon information and belief, and as to those matters he believes it to be true.

JOHN SMITH.

Subscribed and sworn to before me, }
this 3d day of January, 1882. }

RICHARD MURRAY, *Justice of the Peace.*

The statement of the nature of the cause of action may be varied to meet any case. The petition must be supported by a certificate of a counselor at law, to the effect that he has examined the case, and is of the opinion that the petitioner has a good cause of action. Vol. 1, p. 120, § 459.

If the justice is satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, he may make the order desired. Id., § 460. The petitioner is required to state in his petition the nature of his action, and not the facts upon which he relies to establish it upon the trial. The certificate of a reputable counselor at law that the petitioner has a good cause of action should be sufficient to satisfy the mind of the justice upon this point. A decent respect for the rights of the defendant should deter the justice from holding an *ex parte* trial of the issues involved in the action upon an application of this nature. The order may be in the following form :

Order granting leave to prosecute, etc.

JUSTICE'S COURT.

John Smith

agst.

Jacob Plantz.

} Before RICHARD MURRAY, *Just. of the Peace, etc.*

On reading and filing the petition of the plaintiff in this action, bearing date January 3, 1882, and the certificate of..... counselor at law, in support of the same, and it appearing to the satisfaction of the court that the plaintiff is a poor person, not being of ability to sue, and that he has a good cause of action against the defendant above mentioned,—

Ordered, That said plaintiff be and hereby is permitted to prosecute this action as a poor person, and that..... Esq., of..... N. Y., be and hereby is assigned as his attorney, and..... Esq., of..... N. Y., be and is hereby assigned as his counsel, to conduct and prosecute said action for him.

Dated *January 3, 1882.*

RICHARD MURRAY,
Justice of the Peace.

Parties prosecuting or defending as poor persons.

The person so authorized to prosecute is not required to pay fees to any officer, and is not liable for costs in case of defeat. But in case he is guilty of improper conduct in the prosecution of his action, or of willful or unnecessary delay, the court may annul the order and deprive him of all further privileges under it. If he is defeated in the action he cannot take an appeal as a poor person under the order; but if he succeeds in the action, and the defendant appeals, the plaintiff may proceed under the order as respondent in the appeal.

The attorney and counsel assigned to the plaintiff must act in the case without compensation; but if costs are awarded in favor of the plaintiff, they must be paid over to his attorney, when collected from the defendant, and distributed between the attorney and counsel as the court directs.

A defendant in an action involving his right, title or interest in or to real or personal property may petition the court in which the action is pending for leave to defend the action as a poor person, and to have an attorney and counsel assigned to conduct his defense. Vol. 1, p. 121, § 463.

The requisites of the defendant's petition, the general nature of the order made by the justice, and the rights and privileges conferred thereby are sufficiently and clearly detailed in the statute authorizing this proceeding. See vol. 1, p. 121.

The forms given can be readily adapted to an application on the part of the defendant.

CHAPTER V.

GENERAL VIEW OF ACTIONS AND MANDATES.

SECTION 1. **Actions generally.** Whenever a person is satisfied that another person has deprived him of a legal right, or has done or is about to do him an injury, he naturally seeks for a legal remedy either for the enforcement and protection of the right, or the redress or prevention of the wrong. In some cases he may lawfully assert his rights or redress his wrongs without resort to the courts. Thus, if he has been deprived of his property by another, he may retake it, if he can do so peaceably. So if he is injured in person or property by what the law terms a nuisance, he may abate the nuisance if he can do so without committing a breach of the peace, doing no unnecessary damage to the property of another. But if he resorts to judicial proceedings and seeks in his own behalf the enforcement or protection of a right, or the redress or prevention of a wrong, by an *ordinary* prosecution against another party in a court of justice, the prosecution thus instituted is termed a civil action, and is governed by the general rules of practice prescribed by the Code of Civil Procedure for the prosecution of such actions. Vol. 1, p. 167, § 3333. If, however, while seeking the same relief in a judicial proceeding, he conducts the prosecution in accordance with certain statutory provisions authorizing and requiring a departure from the ordinary mode of procedure prescribed for the commencement and conduct of a prosecution in a court of justice, the prosecution so instituted and conducted is termed a "special proceeding," and is governed by the special rules of practice devised for the prosecution of such proceedings. *Id.*, § 3334.

A proceeding in a court of record for the foreclosure of a mortgage, commenced by the service of a summons upon all the necessary parties in some one of the modes of service authorized by law, and conducted to judgment and sale according to the general rules of practice, furnishes an illustration of a civil action; while a proceeding to foreclose a mortgage by advertisement, commenced and conducted according to the statutory regulations peculiar to that proceeding, is a familiar illustration of a special proceeding.

There are also certain statutory proceedings, termed "actions" in the statutes to which they owe their existence, which differ so widely from ordinary prosecutions in a court of justice, as to fall within the Code definition of special proceedings, rather than that of actions. A proceeding for the foreclosure of a mechanic's lien is a good illustration of this class of proceedings. See *Hallahan v. Herbert*, 57 N. Y. 409; *Leavy v. Gardner*, 63 id. 624; *Kelsey v. Rourke*, 50 How. 315.

Actions are of two kinds, civil and criminal. A criminal action is prosecuted by the people as a party, against a person charged with a public offense for the punishment thereof. Every other action is a civil action. Vol. 1, p. 167, §§ 3335-3337. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished. Id., p. 168, § 3339. The practice in criminal actions is no part of the plan of this work; and when an action is spoken of in the following pages, a civil action will be referred to, unless the contrary is expressly stated.

§ 2. Actions, how and when commenced. An action is commenced before a justice of the peace, either by the voluntary appearance and joinder of issue by the parties, or by the service of a summons. Vol. 1, p. 5, § 2876. It can be commenced in no other way. Either of these events will mark the time of the *actual* commencement of the action. An action is commenced against a defendant, within the meaning of any provision of the Code, *which limits the time for commencing an action*, when the summons is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. Vol. 1, p. 115, § 398. So an attempt to commence an action, in a court not of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of the Code *which limits the time for commencing an action*, when the summons is delivered, with the intent that it shall be actually served, to an officer authorized to serve the same, within the city or town in which that defendant, or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, reside; or, if the defendant is a corporation, when it shall be delivered with intent that it shall be actually served, to an officer authorized to serve it, within the city or town in which the corporation is established by law, or wherein its general business is or was last transacted, or wherein it keeps, or last kept an office for the transaction of business, *provided*, in either case, that actual service of the summons is made, with due diligence. Vol. 1, p. 115, § 400. But an attempt to commence an action, by

the delivery of the summons to the proper officer for service, is not the commencement of the action in any case. It is the final actual service of the summons that commences the action; and the attempt to serve it is made the statutory equivalent of actual service for the purpose only of defeating the bar of the statute of limitations, and then only where the attempt has been followed by actual service.

§ 3. **Process and mandates generally.** The form and requisites of a summons, and the mode of its service and return will be the subject of the next chapter. There are, however, some general matters relating to the process and mandates which may issue out of a justice's court which need no separate discussion.

The word "mandate," as used in the Code of Civil Procedure, includes a writ, process or other written direction issued pursuant to law out of a court, or made pursuant to law by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board or other body, or an officer or other person named or otherwise designated therein, to do or to refrain from doing an act therein specified. Vol. 1, p. 168, § 3343, subd. 2. In this broad definition would be included every summons, order of arrest, warrant of attachment, requisition to replevy, subpoena, order for the production of books of account, venire, execution and nearly every other paper which a justice of the peace is authorized by law to place in the hands of or issue to an officer for service. It is important, therefore, to consider the requisites of a mandate.

A mandate issued by a justice of the peace must be signed by him, but need not be sealed. Vol. 1, p. 83, § 3135. See *Millett v. Baker*, 42 Barb. 215. It must be entirely filled up at the time when it is delivered to an officer to be executed, so as to have no blank either in its date or otherwise, except that in case of a subpoena, a blank may be left for the name of any or all of the witnesses. A mandate issued and delivered to an officer to be executed, which does not conform to these requirements, is void. Vol. 1, p. 83, § 3135. The provision requiring process to be filled up before issuing was intended to guard against an abuse which at one time was too common. Justices put blank process into the hands of constables and others to be filled up by them as they saw fit, in the same manner as attorneys of courts of record issue process. To such cases the statute is applicable; but it does not interfere with the power of amendment in clerical mistakes in process issued properly by the justice himself. *Near v. Van Alstyne*, 14 Wend. 230. The power to amend will be noticed hereafter. See *Bradbury v. Van Nostrand*, 45 Barb. 194; *Arnold v. Maltby*,

4 Denio, 498 ; *Stanton v. Leland*, 4 E. D. Smith, 88 ; *Brace v. Bensen*, 10 Wend. 213.

It is not necessary that the justice should fill up and sign the process with his own hand. This may be done by any other person if it is done at the request of the justice, in his immediate presence, and by his express and explicit directions. A constable is required to sign his return to a summons. But that may be done by the justice before whom the summons is returnable, if done at the request of the constable, in his presence and by his direction. *Reno v. Pinder*, 20 N. Y. 298 ; *Ellis v. Francis*, 9 Ga. 325. See *Borrodaille v. Leek*, 9 Barb. 611. Any person may fill up a summons or other process, whether in the presence of the justice or not, and if the justice sees fit to sign it, this will be a sufficient compliance with the statute, for by adopting what has been done, the justice makes the act of the other his own.

Although the statute declares that a justice of the peace is guilty of a misdemeanor if he issues and delivers to an officer for service a mandate which is not entirely filled up, and contains a blank either in its date or otherwise, yet this statute is to be construed as all other similar statutes are. If a justice should by mistake leave a blank in the date of a mandate, should give it a wrong date, or commit any other clerical error he would not be liable to the penalties mentioned in the statute. It was not mistakes of that kind that the statute was directed against, and if there was no intention to omit filling up the process, there would be no offense. The intent is essential to the crime. But it must not be understood that a justice may sign a blank mandate and deliver it in violation of the statute and then escape the consequences by a plea of ignorance of the existence of the statute. Every man is presumed to know the law, and ignorance of it is no excuse. The intendment of the law will be in favor of innocence, and if the case is open to two constructions, one of innocence, and another of guilt, then innocence will be presumed. *People v. Smith*, 20 Johns. 63.

In certain municipal courts having clerks, the process may be signed by a judge of the court, or by a clerk or deputy clerk. Laws of 1879, chap. 230, § 6 ; Laws of 1880, chap. 344, § 6 ; *id.*, chap. 14, § 246. A clerk of a justice of the peace of the city of Brooklyn is required by law to issue a summons, a subpœna, or an execution upon the request of a person entitled thereto. Vol. 1, p. 78, § 3120, subd. 4.

Except where it is otherwise specially prescribed by law, a writ or other process must be in the name of the people of the State ;

How directed.

and each writ, process, record, pleading or other proceeding in a court or before an officer must be in the English language, and unless it is oral, made out on paper or parchment in a fair, legible character, in words at length, and not abbreviated. But the proper and known names of process and technical words may be expressed in appropriate language as now is and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures or Roman numerals, in the customary manner. Vol. 1, p. 106, § 22.

How directed. A summons, a warrant of attachment against the person of a defaulting witness, a warrant for the arrest of a defaulting witness, an execution for the collection of a fine imposed upon such witness, a venire, and an execution issued by a justice of the peace against the person or property must be directed generally to any constable of the county. Vol. 1, p. 5, § 2877; id., p. 35, §§ 2971, 2975; id., p. 36, § 2977; id., p. 40, § 2991; id., p. 48, § 3025. An order of arrest should be directed to the constable, who serves the summons. Id. p. 11, § 2897. A warrant of attachment against property, or a requisition to replevy, should be directed to the constable to whom the summons is delivered. Id., p. 14, § 2907; id., p. 19, 20, § 2921.

A direction is an essential part of the mandate. See *Abbott v. Booth*, 51 Barb. 546; *Russell v. Hubbard*, 6 id. 654; *Merritt v. Read*, 5 Denio, 352.

Where a warrant of commitment, issued by a justice of the peace upon a conviction for petit larceny, was not directed to any officer, class of officers, or other person by whom it was to be executed, it was held to be void, and a constable who executed it was held liable to an action for an assault and battery and false imprisonment. *Russell v. Hubbard*, 6 Barb. 654. A magistrate who issues void process is liable for the injury inflicted upon the party against whom it issued. But this is so in those cases only in which the process is executed according to its mandate. And, therefore, where a justice of the peace issued an attachment without jurisdiction, *directed*, according to the statute, *to any constable of the county*, but the party who sued it out placed it in the hands of a *deputy sheriff*, with directions to execute it, which he accordingly did, — it was held, in an action of trespass by the party against whom the attachment was issued, that the justice was not liable. *Merritt v. Read*, 5 Denio, 352. The court said: “It is a *direction* to the particular officer or class of officers named, and not to a different one; and if a person *not men-*

Statement of the names of parties.

tioned or *referred* to in it, undertake to execute it, he is considered not only as having volunteered but as having *intended* to act *officially*, without the consent of the magistrate and against his express direction, as contained in the process." *Id.* 353, 354. And see *Fregard v. Barnes*, 7 Exch. 827.

Statement of the names of parties. As a general rule whenever it is necessary to state the name of a party in a mandate, the name should be truly and accurately given. The name should be stated in full, both Christian and surname, unless the party has several Christian names, and in that case one of these should be stated and the others may be expressed by the initials.

The law, however, does not recognize but one Christian name, and the addition or the omission of the other names will be of no consequence. *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102. If there are several parties plaintiffs, the names of each of them must be stated in the same manner as those of single plaintiffs; the names of partners, or others jointly interested, must be stated separately and in full, and not in the firm name. *Bentley v. Smith*, 3 Caines, 170. The same rule is equally applicable to the statement of the names of the defendants. The general rules as to who should be made parties, and in what name such parties should sue or be sued have been given in a preceding chapter. See *ante*, 60.

A plaintiff may be ignorant of the name or of part of the name of a defendant. In that case the defendant may be designated in the summons, and in any other process or proceeding in the action by a fictitious name, or by so much of his name as is known, adding a description, identifying the person intended. The person so designated will be regarded as the defendant in the action and as sufficiently described for all purposes. When his name or the remainder of his name becomes known, the justice before whom the action is pending must amend the proceedings already taken by the insertion of the true or full name in place of the fictitious name or part of a name, and all subsequent proceedings must be taken under the name so inserted. Vol. 1, p. 7, § 2884.

It will be observed that the statute cited applies to all process and proceedings in an action; and is in that respect much broader than the corresponding provisions of the Revised Statutes, which applied only to a summons or civil warrant. See *McCabe v. Doe*, 2 E. D. Smith, 64; *Davenport v. Doady*, 3 Abb. 409.

In an action brought by or against a corporation, a mistake in the

corporate name will be waived unless the misnomer is pleaded by the defendant. Code of Civil Pro., § 1777. And see *id.*, §§ 1813 and 1924.

§ 4. **By whom served.** An explanation of the proper mode of serving and returning a mandate issued by a justice of the peace will be considered, to some extent, hereafter in connection with the general discussion of the process issued. But there are some general provisions of statute applicable to the service of all mandates which will be here considered to avoid repetition.

A constable to whom a mandate is directed and delivered for service must execute it. He cannot shake off the burden of discharging his duty by substituting another constable in his place. He is not gifted with the power of substitution. *Downs v. McGlynn*, 2 Hilt. 14; S. C., 6 Abb. 241. The statute requires him to execute it in person according to its tenor, and prohibits him from acting by deputy. Vol. 1, p. 87, § 3157. But he cannot be compelled to render any service for which he is allowed a fee without the previous payment or tender of his fee. Vol. 1, p. 102, § 3228.

The question as to the proper person to execute a mandate issued by a justice of the peace is in nearly every case answered by the statute requiring its execution by the person to whom it is directed and delivered. But in rare and exceptional cases the mandate may be executed by the sheriff of the county, or by some one specially deputized to make the service. If the constable has reason to apprehend that resistance will be made to the execution of the mandate, he may deliver it to the sheriff of the county with a written certificate, stating the facts, and requiring the sheriff to execute it. The sheriff must thereupon execute it, and is subject to all the liabilities attaching to a constable in executing it. Vol. 1, p. 88, § 3158. If the sheriff finds or has reason to apprehend that resistance will be made to the execution of the mandate, he may command all the male persons in the county, or as many as he thinks proper, and with such arms as he directs, including any military organization armed and equipped, to assist him in overcoming the resistance. *Id.*, § 104.

A justice of the peace who issues any mandate authorized by chapter 19 of the Code of Civil Procedure, except a venire, may at the request of the party, whenever he deems it expedient, empower any proper person of full age, and not a party to the action, to serve or otherwise execute it. This will be done by a written authority indorsed upon the mandate. Vol. 1, p. 87, § 3156.

Refusal to execute process.

Form of Deputation.

FULTON COUNTY, ss.:

The plaintiff within named having requested that some proper person be empowered to execute the within mandate, and it being by me deemed expedient that such authority be given, I do therefore hereby authorize and empower (*here insert name*), a person of full age and not a party to this action, to execute the within mandate.

Dated *January 3*, 1882.

DAVID KENNEDY, *Justice*.

The form above given shows a strict compliance with the requirements of the statute. A shorter form would undoubtedly be held sufficient. Thus if after the statement of the venue, the justice should add, "at the request of the plaintiff I hereby authorize and empower (*naming the person*), to execute the within mandate," adding date and official signature, this would probably be held sufficient. It is not necessary that he should certify that the person deputized to execute the mandate is of age and not a party to the action, as it is not presumed that he selects an incompetent person. *Buel v. Duke*, 38 Mich. 167.

For the purpose of executing the mandate the person so empowered has all the power and authority and is subject to all the obligations and liabilities of a constable; and his return is evidence in like manner as a constable's. But he is not entitled to any fee for his services. Vol. 1, p. 87, § 3156. See *Jackson v. Sherwood*, 50 Barb. 356.

§ 5. **Refusal to execute process.** We have seen that a constable must execute any mandate directed and delivered to him on payment or tender of his lawful fees for such service. For a refusal or neglect to perform his duty in this respect, he is liable to the party aggrieved for the damages sustained by him in addition to any fine or other punishment or proceeding authorized by law. Vol. 1, p. 109, § 102. If a mandate which a justice of the peace is authorized by law to issue in a special proceeding is so issued and delivered to a constable for service, or execution, and the constable willfully neglects to execute it, he may be fined by the justice in a sum not exceeding \$25, and is liable to the party aggrieved for the damages sustained through such neglect. *Id.*, § 103. Any *intentional* neglect to execute the mandate is to be deemed willful. See *People v. Brooks*, 1 Denio, 457.

There are, however, instances in which a refusal would not be willful. If the constable is sick and unable to serve the process, or if his health is such that a service of such process would be attended with great

When to be served.—Officer, when and when not protected.

danger to him, the law would not be violated, since such a refusal would not be regarded as willful. So, if a member of the constable's family is so sick as to require his constant attention, the law would *excuse* him from serving process which would cause him to be long absent, and besides that such a refusal would not be willful. Again, if a constable is engaged in other official duties, he is not bound to leave those before they are discharged.

The effect of taking a reward for omitting to perform a duty pertaining to his office, or for delaying performance has been already noticed. *Ante*, 10.

When to be served. No writ, process, warrant, order, judgment, decree, or other proceeding of any court or officer of justice shall be served or executed on the first day of the week, called Sunday, except in case of breach of the peace, or apprehended breach of the peace, or for the apprehension of persons charged with crimes and misdemeanors, or the violation of any of the provisions of this and the preceding article, and except where such service shall be specially authorized by law. The service of any such process or proceeding in all other cases shall be utterly void, and shall subject the party offending to damages at the suit of any person aggrieved. 1 R. S. 675, § 69 ; 1 Edm. ed. 628. No civil process can be legally served on Sunday. *Rob v. Moffatt*, 3 Johns. 257 ; *Vanderpoel v. Wright*, 1 Cow. 209. And no civil process can be legally issued on that day. *Van Vechten v. Paddock*, 12 Johns. 178.

The statute also makes it a misdemeanor knowingly and maliciously to cause or procure any process issued from a justice's court in a civil suit to be served on the seventh day of the week, commonly called Saturday, upon a person whose religious faith and practice is to keep that day as a day set apart by divine command as the Sabbath of rest from labor, and dedicated to the worship of God. Laws of 1847, chap. 349 ; *Marks v. Wilson*, 11 Abb. 87.

Whenever a town meeting shall be held in any town, no civil process shall be served in such town on any elector entitled to vote therein on any day during which such town meeting shall be held. 1 R. S. 342, § 10. And see Laws of 1842, chap. 130, § 4 ; Laws of 1878, chap. 354, § 1.

Officer, when and when not protected. A mere ministerial officer will always be protected in executing process if it is regular and legal on its face ; and if the process is such as the court or officer issuing it has general jurisdiction to issue in the proper cases. The officer need not look behind his process to know that there was authority to issue it.

Officer, when and when not protected.

Savacool v. Boughton, 5 Wend. 170; *Cornell v. Barnes*, 7 Hill, 35; *Parker v. Walrod*, 16 Wend. 514; *Fulton v. Heaton*, 1 Barb. 552; *Bullis v. Montgomery*, 50 N. Y. 352, 355; *Sheldon v. Van Buskirk*, 2 id. 473; *Bovee v. King*, 11 Hun, 250; *Field v. Parker*, 4 id. 342; *Arrex v. Brodhead*, 19 id. 269; *Shaw v. Davis*, 55 Barb. 389. Cases without number might be cited in support of this proposition. But if the process shows on its face either that it was issued without authority, or that the person who issued it had no jurisdiction to issue such process, then the process will not afford any protection to the officer executing it. *Stroud v. Butler*, 18 Barb. 327; *Parker v. Walrod*, 16 Wend. 514; vol. 2, p. 433, 551.

Again, if process is regular and legal on its face, and is issued by a court or a person who is authorized to issue such process, it will protect the officer although it is alleged and proved that he knew of a want of jurisdiction in issuing it. In such cases the general rule is still enforced, that the officer need look only to his process. *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Arrex v. Brodhead*, 19 Hun, 269, 270; *Bovee v. King*, 11 id. 250, 253. But though an officer *may*, he is not bound to execute process which he knows to be void. *Cornell v. Barnes*, 7 Hill, 35; *Earl v. Camp*, 16 Wend. 562; *Forsyth v. Campbell*, 15 Hun, 235; *Josuez v. Conner*, 7 Daly, 448; *Bradley v. Ward*, 58 N. Y. 401. If, however, there is merely some irregularity in the issuing of the process which merely renders it voidable, but not void, the officer will not be excused from serving it. *Bacon v. Cropsey*, 7 N. Y. 195, 199; *Forsyth v. Campbell*, 15 Hun, 235; *Ames v. Webbers*, 8 Wend. 545; *Parmelee v. Hitchcock*, 12 id. 96; *Josuez v. Conner*, 7 Daly, 448. Thus, it is no defense to an action for not returning an execution against the person that the execution was irregular. If an execution is voidable for any defect or irregularity it is no excuse to the officer, as that is a matter of which the party alone can take advantage. It is voidable whenever it is amendable, and it is not amendable if there was no authority whatever in the law to issue execution against the person. No execution can issue for the arrest of a person except in the cases provided by law; and if such an execution be issued upon a judgment in an action where the defendant is not and could not be subjected to arrest, it is not merely voidable, but void. *Ib.*

An officer, acting under process apparently valid but actually void, may avail himself of the process for defense but not for aggression. *Clearwater v. Brill*, 63 N. Y. 627.

 Process, when set aside for fraud.

Process, when set aside for fraud. The law condemns every species of fraud and unfair practice. And whenever there is an attempt to pervert and prostitute the process of the law to the purposes of base men, in their unjust designs, it is the duty of every court to enforce a proper remedy, by promptly setting aside such process as may have been fraudulently obtained. No justice who is fit to hold his office will tolerate an abuse of his process by any man who would employ it for an unlawful purpose. And where an unlawful use is made of his process, or where there is a gross abuse of it, in the commencement of actions, the justice has the same power to correct that wrong that is possessed by a court of record. Vol. 1, p. 3, § 2868; *Babcock v. Lipe*, 1 Denio, 139; *Mosher v. Lawrence*, 4 id. 419; *Robbins v. Gorham*, 26 Barb. 586, 592; S. C., 25 N. Y. 588; *Fulton v. Heaton*, 1 Barb. 552; *Brace v. Benson*, 10 Wend. 213. In one case the defendants moved to set aside a warrant because they were not liable to arrest; and they offered to prove the facts, which were conceded by the plaintiffs. The justice refused to set the warrant aside; and after judgment in favor of the plaintiffs, which was affirmed by the County Court of Washington county, the judgment of the justice and that of the County Court were both reversed by the Supreme Court. It was conceded that the defendants were not liable to arrest by warrant; but the plaintiff's affidavits made a *prima facie* case, and it was insisted that the defendants could not controvert their truth. Judge Cowen delivered the opinion of the court, and said: "Upon the motion to quash the warrant, the plaintiffs, before the justice, admitted that the defendants were residents of Granville, in Washington county, and had been so for more than thirty days before the warrant was taken out. The justice had jurisdiction of the process, and the affidavit on which the warrant was issued made it regular in the first instance. But certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit; or, to speak more technically, he should have set aside the proceedings for irregularity." *Shannon v. Comstock*, 21 Wend. 457, 459. It will readily be seen that if this is the rule when process is obtained by mistake, a far more cogent reason exists for its exercise in cases of fraud. No court will sanction any attempt by fraud or misrepresentation to bring a party within its jurisdiction.

And if a party has been induced by a false statement to come within the jurisdiction of the court, and is there served with process, the service and the process will be set aside. *Carpenter v. Spooner*, 2

 Process, service by constable in his own favor.—Amendment of process.

Sandf. 717. See *Stanton v. Crosby*, 9 Hun, 370; *Townsend v. Smith*, 47 Wis. 623. And if he has been arrested under such circumstances the court will set aside the service and discharge the defendant from arrest. *Goupil v. Simonson*, 3 Abb. 474; *Metcalf v. Clark*, 41 Barb. 45; *Benninghoff v. Oswell*, 37 How. 235; *Matter of Lagrave*, 45 id. 301. See *Adriance v. Lagrave*, 59 N. Y. 110; S. C., 17 Am. Rep. 317; *Browning v. Abrams*, 51 How. 172; *Slade v. Joseph*, 5 Daly, 187. And if a person, for the purpose of serving process, unlocks the door and enters the house of another without permission, the service will be set aside for the irregularity. *Mason v. Libby*, 51 How. 436; S. C., 1 Abb. N. C. 354.

Process, service by constable in his own favor. It has been held that a constable may serve a summons when he is plaintiff in the action. *Putnam v. Man*, 3 Wend. 202; *Tuttle v. Hunt*, 2 Cow. 436. See *contra*, *Morton v. Crane*, 39 Mich. 526. But the plaintiff in an action cannot be deputed by a justice to serve a mandate in his own favor, as the statute authorizing the justice to empower another person to serve a mandate impliedly prohibits the grant of such power to a party to the action.

Amendment of process. The court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect. Vol. 1, p. 122, § 723.

CHAPTER VI.

AFFIDAVITS AND PETITIONS.

SECTION 1. Affidavits. The general rules of practice relating to mandates and their service have been noticed in the preceding chapter. For the purpose of obtaining a summons for the commencement of an action, an informal application to the justice is all that is necessary. When, however, a party desires to commence a special proceeding in a justice's court a more formal application, based upon a sworn statement of facts, is generally necessary to authorize the justice to issue the precept, which in a special proceeding performs substantially the office of a summons in an action. So, too, where a provisional remedy is desired in an action, a sworn statement of facts, showing that the case is one in which the remedy may properly be allowed, must be presented to the justice at the time of applying for the summons. These are only illustrations of the many instances in which such statements of facts are required in actions or proceedings before justices of the peace. In each case a different statement of facts may be required to authorize the justice to issue the process or to grant the remedy or relief sought, so that no general rule can be given as to what particular facts shall be stated in the moving papers; yet, there are certain general rules firmly established by law as to the manner in which the required facts shall be stated in the moving papers, and as to the form of such papers, that are applicable to all cases alike. These general rules will be considered in this place, leaving the discussion of the particular facts necessary to be established to entitle a party to a particular remedy or relief to its appropriate place in this volume.

An affidavit is a sworn statement in writing, or a declaration or statement in writing, signed and made upon oath before an authorized magistrate. See *Bac. Abr.*, title *Affidavit*. As used in the Code of Civil Procedure the word "affidavit" includes a verified pleading in an action or a verified petition or answer in a special proceeding. Vol. 1, p. 169. But verified pleadings and petitions have certain peculiarities of form which will be noticed hereafter.

Frequently an affidavit is required before an action is commenced; and as no action is then pending before the justice, it would seem that

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the affidavit should not be entitled in the proposed action. Before the adoption of the Code of Procedure, the entitling of an affidavit in an action not then commenced might be fatal to the proceeding. The reason assigned for the rule was, that as the affidavit purported to be made in a suit, where in fact no suit was pending, an indictment for perjury could not be sustained if the affidavit should prove to be false. See *Pindar v. Black*, 4 How. 95; *City Bank v. Lumley*, 28 id. 397. But since the Code the practice has generally prevailed of entitling all affidavits, whether in an action actually commenced or in one about to be commenced; and this practice may be safely followed. But the want of a title or a defect in the title of an affidavit will not impair it if it intelligibly refers to the action or special proceeding in which it is made. Vol. 1, p. 122, § 728. After an action is commenced it is proper to entitle all the subsequent papers in the action.

The title of an action includes the name of the court, the name of the parties, and usually the name of the justice before whom the action is pending. Thus:

JUSTICE'S COURT.

John Smith <i>agst.</i> George White.	}	Before JOHN FROTHINGHAM, Esq., <i>Justice</i> .
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Following the title of the affidavit is the statement of the venue. The term "venue" relates to the place where the affidavit was made, and the reference is to the county in which it is sworn to. It is expressed in this manner: "FULTON COUNTY, ss." The venue is an essential part of every affidavit, and is *prima facie* evidence of the place where the affidavit was taken. An affidavit without a venue is a nullity, although sworn to before an officer, whose residence is mentioned in the jurat. *Cook v. Staats*, 18 Barb. 407; *Lane v. Morse*, 6 How. 394; *Vincent v. People*, 5 Park. 83; *Thompson v. Burhans*, 61 N. Y. 52, 63; *People v. De Camp*, 12 Hun, 378. Every affidavit should show upon its face that it was taken within the jurisdiction of the officer who certifies it. *Thompson v. Burhans*, 61 N. Y. 52, 63. An affidavit which states the venue in one county will be defective if the jurat shows that it was sworn to before a justice of the peace of another county. *Davis v. Rich*, 2 How. 86; *Sandland v. Adams*, id. 127; *Snyder v. Olmstead*, id. 181.

Immediately after the venue should be placed the name of the person making the affidavit and a statement of the fact that he was duly

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sworn. Thus, "John Smith, being duly sworn, says," etc. If it is essential to establish the identity of the person making the affidavit, as for example, that he is the plaintiff in the action, the fact that he is the plaintiff should be stated affirmatively in the body of the affidavit and not merely by way of recital. In some cases the statute requires that a particular affidavit shall be made by the party or his agent; and if the affidavit is made by the agent, it is not sufficient that he should merely be described as agent in the recital, as for example, "John Doe, agent for Richard Roe, being duly sworn, says," etc., but the fact of agency should be directly stated as follows: "John Doe, being duly sworn, says that he is the agent of Richard Roe." See *Cunningham v. Goelet*, 4 Denio, 71; *Ex parte Bank of Monroe*, 7 Hill, 177; *People v. Johnson*, 1 N. Y. Sup. Ct. (T. & C.) 578. So where the residence of the deponent is a material fact, the affidavit will be insufficient if it merely recites the residence of the deponent. Thus, an affidavit commencing with the words "Giles Sanford, of the city of Albany, being duly sworn, says," is not sufficient to establish the fact that Giles Sanford is a resident of the city of Albany. *Staples v. Fairchild*, 3 N. Y. 41. And generally when the affidavit to be effectual must be made by one having a certain character or personal capacity, wherein he acted or is to act in doing the matters averred therein, the paper ought to state that the deponent has that character or capacity. In such case it is manifest that the name of the deponent must be stated to apply to him by that name the statement of his capacity. But when such is not the case, it is not absolutely indispensable to the validity of an affidavit that the name of the deponent should appear in the body of the paper, if it is signed and sworn to before an officer authorized to take the oath, and the jurat states that fact. *People v. Sutherland*, 81 N. Y. 1. It frequently happens in practice that affidavits are drawn by persons who have no means of knowing the name of the person who will ultimately make oath to the facts stated, and blanks for the name of the deponent are therefore left in the instrument, to be filled at the time it is sworn to. An affidavit of the service of a paper attached to the paper to be served and mailed to a client who cannot himself make the service, but is instructed to procure some other person to make the service, and to return the original with proof of service to the attorney, is a familiar example of such an affidavit. If by inadvertence the blank left for the name of the person making the service should not be filled at the time the affidavit of service was signed and sworn to, and the paper, in that imperfect form, is presented to the justice as proof of service, the question as to whether the affidavit *could* be received,

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as proof of the facts stated therein, would depend upon the question whether, if it was willfully false, an indictment for perjury would lie upon the paper against the person who signed and swore to it. It seems that an indictment would lie, and that the omission of the name of the deponent, although a sufficient ground to justify the justice in a refusal to receive the paper in its imperfect form, would not be a fatal defect. *People v. Sutherland*, 81 N. Y. 1. Such an affidavit is irregular but not void.

After the statement of the matters above mentioned, the party should proceed to set forth the *facts* upon which he relies to establish a right to the relief sought. The object of the affidavit is to present to the justice a certain state of facts from which he may determine judicially whether the application should be granted or denied. It is the province of the justice to draw the conclusions from these facts; and as a general rule a mere statement of the conclusions of the party making the affidavit, without a statement of the facts upon which those conclusions are based, will be insufficient to entitle the party to the relief sought. See *Dreyfus v. Otis*, 54 How. 405; *Vanderpoel v. Kissam*, 5 Sandf. 715; *Stewart v. Brown*, 16 Barb. 367.

Facts within the personal knowledge of the deponent should be stated positively. *Whitlock v. Roth*, 5 How. 143; S. C., 10 Barb. 78. If the party making the application has no personal knowledge of the material facts, he should, if possible, obtain the affidavit of some other person who has such knowledge. If he is unable to obtain the affidavit of any person having personal knowledge of such facts, he should state them upon information and belief, and also set forth the sources of his information and the grounds of his belief, and give a satisfactory reason why a positive statement of the facts cannot be procured. *Whitlock v. Roth*, 5 How. 143; S. C., 10 Barb. 78; *City Bank v. Lumley*, 28 How. 397; *Crandall v. Bryan*, 15 id. 48; S. C., 5 Abb. 162; *De Weerth v. Feldner*, 16 id. 295; S. C., 25 How. 419; *Dreyfus v. Otis*, 54 id. 405; *Blason v. Bruno*, 21 id. 112; S. C., 33 Barb. 520; 12 Abb. 265; *Cook v. Roach*, 21 How. 152; *Sotow v. Risenberger*, 25 id. 164; *Bell v. Mali*, 11 id. 254. But unless the sources of the deponent's information, the grounds of his belief, and a satisfactory reason why the best evidence is not given are stated in the affidavit, the mere statement of the essential facts upon information and belief will be wholly insufficient to authorize the justice to act upon the affidavit. *Ib.*; *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Dewey v. Greene*, 4 Denio, 93; *Tallman v. Bigelow*, 10 Wend. 420. If the information of the person making the affidavit is derived from docu-

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mentary evidence or other written papers, the documents or papers should be set out in some way. *City Bank v. Lumley*, 28 How. 397; *De Weerth v. Feldner*, 16 Abb. 295; S. C., 25 How. 419. The object of requiring these statements in an affidavit is to place before the justice something from which he may judge whether the party making the affidavit is justified by the facts in entertaining the belief to which he deposes, or whether such belief is merely assumed, or is at most but an ill-founded suspicion. If, however, the deponent states the facts positively, and not upon information and belief, he is not required to state the source of his knowledge or his means of information. *Pier-son v. Freeman*, 77 N. Y. 589.

In some cases it is impossible that the party making the affidavit could have actual knowledge of facts to which he is required to make affidavit to obtain an order or relief. In such cases it is always allowable to make the affidavit upon belief. Thus, where the *intent* of another person is a material fact, this must necessarily be stated upon belief, as no man can know the actual intent of another, except so far as that intent may be inferred from his acts. For this reason the law permits a person to swear to his belief as to the intent of another if he states positively the facts and circumstances upon which that belief is founded. *Johnson v. Moss*, 20 Wend. 145; *Fulton v. Heaton*, 1 Barb. 552; *Hall v. Munger*, 5 Lans. 100.

Great care should be taken in the statement of facts in an affidavit both as to the matter and the manner of the statement. Every material fact should be fully yet concisely stated, and any ambiguity of statement capable of being construed as an intentional evasion of a direct affirmation of a fact should be carefully avoided. The distinction between quantity and quality should not be overlooked, nor should it be forgotten that a fact gains no additional force by being twice sworn to in the same affidavit.

After the statement of facts should follow the signature of the deponent and the jurat. In the definition of an affidavit given on a preceding page, the signature of the deponent is an essential element.

But the Supreme Court of this State has held that the writing is an affidavit in law, although not signed by the deponent, if his name appears in the body of it, and it is duly sworn to. *Haff v. Spicer*, 3 Cai. 190; *Jackson v. Virgil*, 3 Johns. 539; *Millius v. Shafer*, 3 Denio, 60. And see *Soule v. Chase*, 1 Rob. 222; S. C., 1 Abb. (N. S.) 48. The opposite doctrine was laid down by Chancellor WALWORTH, based upon the ground that without the subscription of the deponent at the foot of the affidavit, it would be difficult if not impossible to base a prosecu-

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tion for perjury upon it. *Hathaway v. Scott*, 11 Paige, 173. The fact that an affidavit may be sufficient without the signature of the deponent is, however, no excuse for the omission.

The jurat is that part of an affidavit which states the time when, the place where, and the person before whom it is sworn to; thus, "Subscribed and sworn before me this 14th day of November, 1864. John Frothingham, justice of the peace, in and for Fulton county." Every affidavit should show upon its face that it was taken within the jurisdiction of the officer who certifies it. *Thompson v. Burhams*, 61 N. Y. 52. And if the venue is laid in one county, and the jurat shows that the affidavit was sworn to before a justice of the peace of another county, the affidavit will be defective and void. *Davis v. Rich*, 2 How. 86; *Sandland v. Adams*, id. 127; *Snyder v. Olmstead*, id. 181.

Whenever an affidavit is necessary to enable a justice of the peace to decide upon the propriety of doing any act, he may receive an affidavit for that purpose; and whenever a justice of the peace is authorized by law to hear or receive an affidavit in relation to a matter concerning which he has a duty to perform, he may administer an oath for that purpose. Vol. 1, p. 130, § 843. It follows that a justice of the peace may take an affidavit in any case where the affidavit may properly be used before him. For taking the affidavit he is entitled to a fee of ten cents, and for drawing any affidavit required by statute, five cents for each folio, or one hundred words. Vol. 1, p. 98, § 3322. It is his duty also to carefully file and preserve each affidavit or other paper delivered to him to be filed in an action or special proceeding. Vol. 1, p. 85, § 3143. And for each affidavit so filed he is entitled to a fee of five cents. Vol. 1, p. 99.

When the statute does not require that the affidavit should be taken before the justice, or before a particular officer, it may be taken before any other person authorized by law to take an affidavit, and when certified by such officer to have been taken before him, the affidavit may be used before the justice with the same effect as if taken by the justice. The persons who are authorized to administer oaths and take affidavits within this State are clearly designated by statute. See vol. 1, p. 130, § 842. An affidavit taken without the State, if taken before the proper officer and properly certified, may also be used before the justice, unless there is a special provision of the statute to the contrary. Id., § 844. An affidavit taken without the State must be taken before an officer authorized by the laws of the State to take and certify the acknowledgment and proof of deeds, to be recorded in the State. The officer taking the affidavit must certify that it was taken before

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him, and the affidavit must be accompanied with the like certificates as to the official character of the officer and the genuineness of his signature as are required to entitle a deed acknowledged before him to be recorded within the State. Ib.

In speaking of affidavits no attempt has been made to point out what facts must be stated to authorize the court to grant a particular order or some special relief. These matters will be discussed as they arise. It will be noticed that in many cases a justice of the peace is authorized to do a specified act when certain facts are shown by affidavit "to the satisfaction of the justice." It has sometimes been supposed that where this phrase is used a justice has the right to dispense with some of the general rules of law prescribing the nature and character of the evidence to be produced before him as the basis of his judicial action, or to require the party to furnish proof of such a conclusive character as would practically amount to a denial of justice. But this is a misconstruction of the intent of the statute. The satisfaction spoken of is a legal satisfaction. The justice is to be convinced. His conviction is not to be arbitrary or capricious. It is to be brought about by means that are fit and enough to produce conviction in the mind acting judicially. He may no more be satisfied by that which the law will deem inadequate to produce conviction, than he may withhold his satisfaction when that proof is produced to him that the law will say he ought in reason to be satisfied with. *People v. Sutherland*, 81 N. Y. 1. It is not meant merely that the justice shall be personally satisfied, but he must be satisfied judicially; and he has no right to be satisfied unless upon legal proof. *Mott v. Lawrence*, 9 Abb. 196; S. C., 17 How. 559; *Smith v. Luce*, 14 Wend. 237; *Green v. Gonzales*, 2 Daly, 412. And see *Vredenburg v. Hendricks*, 17 Barb. 179. If a statute requires that certain facts shall be shown by affidavit to the satisfaction of the justice before he makes a specified order or issues a particular process, and the justice disregarding the statute makes the order or issues the process without requiring any affidavit of the facts specified by the statute, the order or process so made will be absolutely void, and will be so declared either in a direct proceeding to reverse his action, as by appeal, or whenever the question of the validity of the order or process arises collaterally, as in another action, or proceeding. See *Stone v. Miller*, 62 Barb. 430.

But if an affidavit is made and presented to the justice, and the facts and circumstances disclosed therein have a legal tendency to establish the facts specified in the statute, and fairly call upon the justice for the exercise of his judgment upon the weight of the evidence, an order

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made or process issued thereon will not be void, even if the justice erred in his action upon the facts presented; and this rule is the same whether the question arises in a direct or in a collateral proceeding. *Schoonmaker v. Spencer*, 54 N. Y. 366; *Allen v. Meyer*, 7 Daly, 229; *Easton v. Malavazi*, id. 147; *Niles v. Vanderzee*, 14 How. 547. But if the facts stated in the affidavit are so slight and inconclusive as to warrant the appellate court to hold that the action of the justice was erroneous, his error in judgment may be corrected by a reversal of his action upon appeal, provided the case is one in which an appeal is authorized. *Ib.*

§ 2. **Petitions.** A petition is included in the term "affidavit" as used in the Code of Civil Procedure, although in form it bears a more striking resemblance to a verified complaint than to an ordinary affidavit.

What has heretofore been said in regard to the title of affidavits applies with equal force to a petition. See *ante*, 111.

If the petition is not entitled its essential parts will consist of the address, the statement of facts, the prayer for relief, and the verification.

The address may be in the following form: "To Richard Murray, Esq., Justice of the Peace of the town of Johnstown, county of Fulton." The statement of facts is usually preceded by formal introductory matter, varying in form according to the taste of the person drawing the instrument. By some the following form is adopted: "The undersigned, your petitioner, respectfully states;" and by others the following form is used: "The petition of John Doe respectfully shows," etc. Any other equivalent matter would answer equally as well. Following this is the statement of facts, to which the rules before given as to the statement of facts in an affidavit are applicable. See *ante*, 114. In a petition, the words "your petitioner" should be used where the word "deponent" would be proper in an affidavit.

Following the statement of facts is the prayer for relief, which may be in the following form: "Wherefore your petitioner prays for a final order," etc., stating the relief to which the party deems himself entitled on the facts stated, or following the direction, if any, given in the statute by which the petition is authorized. The prayer for relief is followed by the signature of the petitioner and the verification.

The verification is a brief affidavit in the following form:

Verification.

COUNTY OF FULTON, ss.:

John Doe, being duly sworn, says that the foregoing petition is true to his own knowledge except as to the matters therein stated to be al-

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leged upon information and belief, and as to those matters he believes it to be true.

JOHN DOE.

Subscribed and sworn before me, {
this 15th day of April, 1882. }

RICHARD MURRAY, *Justice of the Peace.*

CHAPTER VII.

THE SUMMONS AND ITS SERVICE.

SECTION 1. Form and contents of the summons. Under the present practice, a person desiring to commence an action in justice's court must first obtain a summons and have it served upon the person or persons to be proceeded against, unless such person or persons voluntarily appear and join issue. No other process is now authorized for the commencement of an *action* as defined by the Code, though a different form of process is authorized for the commencement of certain statutory proceedings, called actions, which fall within the Code definition of special proceedings. See *ante*, 24, 99, 100.

Under the present statute, also, there is but one kind of summons authorized for the commencement of actions, whether the parties are residents or non-residents. The general Repealing Act of 1880 abolished the provisions of the Non-Imprisonment Act authorizing a short summons or a short attachment in case one of the parties was a non-resident.

As there is no special provision of law to the contrary, the summons must be in the name of the people of the State. Vol. 1, p. 105, § 22. It must be directed generally to any constable of the county where the justice resides, and it must command him to summon the defendant to appear before the justice at a place specified therein, to answer the complaint of the plaintiff in a civil action. If the summons is accompanied by an order to arrest the defendant, it must be made returnable immediately upon the arrest of the defendant, within twelve days after the day when it was issued. In every other case it must be made returnable not less than six nor more than twelve days after the day when it was issued, and the time when it is returnable must be specified in the summons. Vol. 1, p. 5, § 2877. It must be signed by the justice and entirely filled up so as to leave no blank either in the date or otherwise. *Ante*, 8.

When not accompanied by an order to arrest the defendant the summons may be in the following form, the blanks being properly filled:

Form and contents of the summons.

Form of summons.

COUNTY OF , } ss.:
 Town of , }

*The People of the State of New York, to any constable of the
 county of , greeting :*

You are hereby commanded to summon , to appear
 before the undersigned, a justice of the peace of said town and county,
 on the day of , 188 , at
 o'clock in the noon, at , in said town
 and county, to answer the complaint of , in a
 civil action.

Given under my hand, this day of ,
 1882.

A. B., Justice of the Peace.

Form when accompanied by order of arrest.

COUNTY OF , } ss.:
 Town of , }

*The People of the State of New York, to any constable of the
 county of , greeting :*

You are hereby commanded to summon , to
 appear before the undersigned, a justice of the peace of said town
 and county, immediately upon his arrest under the order hereto at-
 tached (*or* hereupon indorsed), and within twelve days after the day
 of the receipt hereof by you for service, at , in
 said town and county, to answer the complaint of , in
 a civil action.

Given under my hand, this day of ,
 1882.

A. B., Justice of the Peace.

These forms are given merely as illustrations of the matter imme-
 diately preceding them. Printed blanks are so commonly used in
 making out a summons, and possess so many advantages, that a form
 for a summons is of little practical value.

The statute does not require that the summons shall be in any par-
 ticular form, and it will be sufficient if the language used meets the
 general requirements of the Code.

The place where the defendant is to appear before the justice should

When to be made returnable.—Indorsement of summons in action for a penalty.

be stated as specifically as possible, especially where the justice has no fixed place of holding court. Too great particularity in this respect will not impair the validity of the summons, while a want of particularity may be a source of great inconvenience to the parties.

§ 2. **When to be made returnable.** When a summons is not accompanied by an order of arrest, it must be returnable not less than six nor more than twelve days after the day when it was issued. A summons is *issued* when it is made out and placed in the hands of a person authorized to serve it, with the intent to have it served. *Mills v. Corbett*, 8 How. 500. Under the old practice a long summons was made returnable "not less than six nor more than twelve days *from the date* of the same." See 3 R. S. (5th ed.) 428, § 14. The justice should take into consideration the possibilities of immediate service of the summons and so fix the date of its return that the constable may make personal service at least six days before the time of appearance specified in the summons. Fractions of a day are not regarded in the computation of time for the service of process. *Columbia Turnpike Road v. Haywood*, 10 Wend. 422; *Marvin v. Marvin*, 75 N. Y. 240; *Ball v. Mander*, 19 How. 468. Under the Revised Statutes it was well settled that where six days' service of a summons was required and it was returnable upon the eighth day of a given month, a service on the second day of that month was sufficient. *Columbia Turnpike Road v. Haywood*, 10 Wend. 422. See Code of Civil Pro., §§ 787, 788.

As has been stated, when an order of arrest accompanies the summons, the latter must be made returnable immediately upon the arrest of the defendant, and within twelve days after the day when it was issued. This would seem to permit service to be made at any time within twelve days after the summons was placed in the hands of the officer for service, without regard to the date of the process.

§ 3. **Indorsement of summons in action for a penalty.** "In an action to recover a penalty or forfeiture given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon a copy of the summons so delivered in the following form: "According to the provisions of," etc., adding such a description of the statute as will identify it with reasonable certainty, and also specifying the section if penalties or forfeitures are given in different sections thereof for different acts or omissions." Code of Civil Pro., § 1897. See *Cox v. N. Y. Central & H. R. R. Co.*, 61 Barb. 615.

The Revised Statutes contained a similar provision which was liberally

Designation of parties in the summons.

construed. The following indorsements have been held sufficient. In an action for a violation of the excise law, the process was indorsed thus: "Issued according to the *proceedings* of title 9, chapter 20, part 1 of the Revised Statutes." *Andrews v. Harrington*, 19 Barb. 343. In another action of a similar kind, the indorsement was: "According to the provisions of title 9, part 1, chapter 20 of the statute of excise and the regulations of taverns and groceries." *Perry v. Tynen*, 22 Barb. 137.

In an action for a penalty for receiving illegal toll at a plankroad gate: "Issued according to the provisions of the statute concerning the incorporation of turnpike and plankroad companies, and the collection of penalties for demanding and recovering more than lawful toll, in passing through toll-gates on such roads." *Marselis v. Seaman*, 21 Barb. 319. But the following was held defective in an action for a violation of the excise law: "According to the act 'Of the internal police of the State.'" "

The object of such an indorsement is to inform the defendant what particular statute it is claimed that he has violated. There ought, therefore, to be such a reference as will accomplish that purpose. If a reference is made to the Revised Statutes, it may be thus: "Issued according to the provisions of article of title of chapter of part of the Revised Statutes, entitled," etc.; or, the reference may be in the manner prescribed in the section of the statute which has been quoted. Or the reference may be to the laws of some particular year, as: "Issued according to the provisions of Laws of 1878, chapter 274, entitled," etc.

When the process is served by delivering a copy of the summons to the defendant, there ought also to be a copy of the indorsement served, and duly certified as a part of the process. A general appearance in the action without objection will waive the objection that the process ought to have been indorsed in the manner required by the statute. *Sprague v. Irwin*, 27 How. 51. And the effect of the appearance is the same, whether the defendant knew of the irregularity or not at the time of appearing. *Ib.*

In actions for a willful trespass on land, it is not necessary to indorse the process, because the statute does not give the action; it merely creates a forfeiture for treble damages, where the evidence warrants such damages. *Ib.*

§ 4. **Designation of parties in the summons.** In a preceding chapter the general rule was laid down that every action must be

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prosecuted in the name of the real party in interest, and the exceptions to that rule were there discussed. See *ante*, 60.

As a matter of convenience a few illustrations will here be given showing the manner in which the character of the parties should be stated in the summons.

A summons in behalf of an *infant* will conclude as follows: "To answer the complaint of *John Smith*, an infant, by *William Smith*, his guardian, in a civil action;" if in behalf of the *people*, "to answer the complaint of the people of the State of New York," etc. If in behalf of an *executor*, "to answer the complaint of *John Smith* as executor of the last will and testament of *William Smith*, deceased," etc.; if in behalf of a *surviving* executor, "to answer the complaint of *John Smith* as surviving executor of," etc.; if in behalf of an *administrator*, "to answer the complaint of *John Smith*, as administrator of the goods, chattels and credits of *William Smith*, deceased," etc.; if in behalf of a *surviving partner*, "to answer the complaint of *John Smith* as surviving partner of the late firm of," etc.; if in behalf of a *county*, "to answer the complaint of the board of supervisors of the county of *Fulton*," etc.; if in behalf of a joint-stock association, consisting of seven or more members, "to answer the complaint of *John Smith*, President of the *Hamilton County Silver Mining Company*," etc.; or "Treasurer of," etc.; or all the names of the associates may be inserted as plaintiffs; and if in behalf of a corporation, the corporate name of the plaintiff should be inserted in the summons, as, "to answer the complaint of the *Hamilton County Silver Mining Company*," etc. A full discussion of this subject will be found in a preceding chapter. See *ante*, 60, title "*Parties to Actions*."

The omission of the word "as" between the name of a plaintiff suing as executor, administrator, etc., and the words descriptive of his office, has not as much significance as formerly. It has been sometimes held that without that word in that position, the addition of the words, "*executor of*," etc., to the name of the plaintiff is but a *descriptio personæ*, and does not give to him other than a personal or individual character in the action. *Merritt v. Seaman*, 6 N. Y. 168, 172; *Sheldon v. Hoy*, 11 id. 11; *Worden v. Worthington*, 2 Barb. 368; *Root v. Price*, 22 How. 372. In other words, that the words "John Smith, executor of the last will and testament," etc., when inserted in a summons, have no more force and effect than the words, "John Smith, carpenter and joiner." But it has been held on the other hand, that although there is nothing in the *title* of the summons or complaint to give a representative character to the plaintiff, that the frame, and

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averments, and scope of the complaint may be such as to affix to him such character and standing in the litigation. *Stilwell v. Carpenter*, 62 N. Y. 639; S. C., 2 Abb. N. C. 238; *Beers v. Shannon*, 73 N. Y. 292. In such case the plaintiff may recover in his representative character. But whenever a person sues in such capacity the insertion of the word "as" between his name and the words descriptive of his office in the summons will remove all doubt as to the character in which he sues.

§ 5. **Personal service generally.** As we have seen, a summons may be served by a constable of the county in which it is issued, by the sheriff of the county in case resistance to the service is apprehended, and that fact is certified to by the constable, or by a person specially deputized by the justice to make such service. *Ante*, 105.

Personal service of a summons must be made by delivering a copy of the summons to the defendant, except where it is specially prescribed in chapter 19 of the Code of Civil Procedure, that personal service may be made by delivering a copy to another person. Where service of a summons is personal, it must be made at least six days before the time of appearance specified in it, unless it is accompanied by an order of arrest. Vol. 1, p. 5, § 2878.

The service must be made in the county in which the summons was issued and is returnable. If the jurisdiction of the justice is limited to the limits of the city or village in which he resides, service of the summons must be made in that city or village. The jurisdiction of a *local* court must be exercised within the locality, and its process cannot be executed outside of it. *Geraty v. Reid*, 78 N. Y. 64, 67. If served beyond the limits of his territorial jurisdiction, the justice will acquire no jurisdiction by such service. *Ib.* The rule is positive and inflexible that a service of the summons out of the county where it is returnable, will not confer any jurisdiction over the person of the defendant. If any judgment is rendered in pursuance of such service, the person named as defendant may reverse the judgment upon appeal or treat it as a nullity. But if the return does not show where the summons was served, the legal presumption will be that the service was made in the proper county. *Potter v. Whittaker*, 27 How. 10; *Gilbert v. Brown*, 9 Neb. 90.

A constable has no right to unlatch the outer door of the dwelling-house of the defendant for the purpose of serving a summons. If, however, on knocking at the outer door, or on ringing the door bells, any proper person appears and invites him into the house, he may lawfully enter and serve the summons. So if he finds the outer door of

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the defendant's house standing open, he may lawfully enter the house to serve the summons. If he is ordered to leave the house he may remain until he has made the service; and if an attempt is made to put him out of doors, for the purpose of preventing such service, he may resist the attempt, using no more force than is necessary in self-defense. See *Hager v. Danforth*, 20 Barb. 16.

It is sometimes said that a constable is not bound to look for the defendant at any place except his dwelling-house. But this statement is not founded upon authority. It is not easy to lay down any general rule measuring the degree of diligence required of a constable in making search for a defendant in an attempt to serve process upon him. In case the property of the defendant has been attached, the constable is required to serve the summons, warrant of attachment and inventory upon the defendant by delivering to him personally a copy of each, if he can *with reasonable diligence* be found within the county. Vol. 1, p. 15, § 2910. The summons, affidavit and requisition must in like manner be served in an action to recover a chattel. Vol. 1, p. 20, § 2922. There is no reason why this requirement of the statute that the constable should use reasonable diligence to find the defendant within the county should not be applied to the service of a summons, in every case where personal service is required. What is reasonable diligence in a given case is a question of fact to be determined by all the surrounding circumstances.

The Revised Statutes required that a summons should be served by reading it to the defendant and by delivering to him a copy if required. In common practice the reading of the summons was omitted and the officers merely stated its contents to the defendant. Under the present practice even this is dispensed with and a delivery of a copy of the summons to the defendant is all that is required.

§ 6. **Personal service upon a city.** When an action is brought against the mayor, aldermen and commonalty of the city of New York, personal service may be made upon the defendant by delivering a copy of the summons to the mayor, comptroller or counsel to the corporation. If the action is against any other city, personal service may be made by delivering a copy of the summons to the mayor, treasurer, counsel, attorney, or clerk, or, if the city lacks either of these officers, to the officer performing corresponding functions under another name. Vol. 1, p. 6, §§ 2879 and 431.

§ 7. **Service upon domestic corporations generally.** Personal service may be made upon any domestic corporation other than a city, by delivering a copy of the summons to the president or other head of

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the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, a director or managing agent, or to any director or trustee of the corporation by whatever official title he is called. Vol. 1, p. 6, §§ 2879 and 431.

A domestic corporation is one created by or under the laws of the State; or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York before the 19th day of April, 1775. Every other corporation is a foreign corporation. Vol. 1, p. 170, § 3343, subd. 18. Under this definition a National bank located in this State would be a domestic corporation, but if located in another State would be a foreign corporation. A corporation organized under the laws of this State by the consolidation of various foreign and domestic railroad companies is a domestic and not a foreign corporation. *Matter of Sage*, 70 N. Y. 220.

After a corporation is dissolved, it has no president or other officer on whom a summons can be served to bring the corporation into court for the purpose of enforcing judgment against it. *Hetzel v. Tannehall Silver Mining Co.*, 4 Abb. N. C. 40. And where an officer has resigned and his resignation has been duly accepted, the subsequent service of a summons upon him will be inoperative, even though the resignation was tendered for the purpose of avoiding service. *Ervin v. Oregon Steam Navigation Co.*, 22 Hun, 598.

The only difficulty in construing the statute prescribing the mode of personal service of a summons upon a corporation is in determining what persons are to be deemed *managing agents* within the meaning of the statute. It is clear that the legislature attached importance to the term "managing agent," and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of the work and the manner of its execution. *Reddington v. Mariposa Land and Mining Co.*, 19 Hun, 405. The managing agent must be one whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business. *Brewster v. Michigan Central R. R. Co.*, 5 How. 183. He must have the same general supervision and control of the interests of the corporation that are usually associated with the office of cashier or secretary. *Flynn v. Hudson River R. R. Co.*, 6 How. 308. The baggage master of a railroad company is not such an agent. *Ib.* Nor is a person who merely

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sells tickets for the company a managing agent. *Doty v. Michigan Cent. R. R. Co.*, 8 Abb. 427. An assistant secretary of a railroad corporation, whose duty it is to merely write and record as he is directed, is not its managing agent. *Sterrett v. Denver & Rio Grande R. R. Co.*, 17 Hun, 316. A person employed by a railroad company to superintend the running of horse cars on an unfinished portion of its road, but who has no authority to make contracts for the company except to purchase horses and feed, and who has no control over, or knowledge of the affairs of the company, or its books, is not its managing agent. *Emerson v. Auburn & Owasco Lake R. R.*, 13 Hun, 150. So one who is employed to take charge of a branch office of a land and mining corporation, and who transfers stocks and transmits assessments as directed by the officers of the corporation, but has nothing to do with the general business of the company or with its books and papers, is not a managing agent of the corporation within the meaning of the statute. *Reddington v. Mariposa Land and Mining Co.*, 19 How. 405. But on the other hand it has been held that the agent of an insurance company who has the entire management of the business of the company at a place other than that at which the principal office is located, and who has full power to procure business for the company, to receive premiums, issue policies, and subject the company to liabilities limited only to the extent of its capital, is a managing agent of the company. *Bain v. Globe Ins. Co.*, 9 How. 448.

Domestic railroad corporations. The provisions of the Code as to personal service of a summons on domestic corporations generally apply as well to railroad corporations as to any other. If the president, secretary, treasurer, managing agent, or cashier of the corporation, or a clerk to the corporation, or any director or trustee thereof, by whatever official title he is called, resides in the county in which the summons is returnable, personal service upon the corporation must be made by delivering a copy of the summons to some one of such resident officials or agents. But it often happens that no such official resides in the county in which the summons is to be served, and consequently no service can be made upon the company in the manner prescribed for the service of a summons upon domestic corporations generally. In that case the officer should ascertain whether, at least thirty days before the summons issued, the railroad company had filed in the office of the clerk of the county, a written instrument, designating a person, residing in the county, upon whom process against the company to be issued by a justice of the peace may be served; and whether, if such designation has been made, it has subsequently been revoked. The revocation of

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the designation would appear by a written instrument, executed by the company, and filed in the same clerk's office with the designation. See vol. 1, p. 7, § 2882. If he finds that such designation has been made and has not been revoked, he should serve the summons by delivering a copy of it to the person so designated, if he can find him within the county by exercising reasonable diligence. Service so made will be personal service upon the corporation. Vol. 1, p. 6, § 2880. If, however, no such designation has been made, or if it has been made and revoked, or if the person designated is dead, or has ceased to reside within the county, or cannot, after due diligence, be found within the county, then the officer may make valid personal service of the summons upon the corporation, by delivering a copy to the local superintendent of repairs, freight agent, agent to sell tickets, or station-keeper of the corporation, residing in the county. Vol. 1, pp. 6, 7, §§ 2880 and 2882. But a careful reading of the statute will show that service of a summons upon a railroad corporation by the delivery of a copy to either of the employees, last mentioned, is authorized, only in case, for some one of the reasons stated in the statute, no service could be made upon an officer of the company, or upon a person designated by it. The attempt to make the service should be in the order indicated.

§ 8. **Service upon a foreign corporation.** Any corporation which does not come within the definition of a domestic corporation, as given on a preceding page, is deemed a foreign corporation. *Ante*, 127.

A summons issued by a justice of the peace must be personally served upon a foreign corporation by delivering a copy of the summons, as follows:

1. To the president, treasurer or secretary, or if the corporation lacks either of these officers, to the officer performing corresponding functions under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president or other acting head, accompanied with the written consent of the person designated, and filed in the office of the Secretary of State.

3. If such designation is not in force, or if neither the person designated, nor the president, treasurer or secretary, or an officer performing corresponding functions, under another name, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein, to the cashier, a director, or a managing agent of the corporation within the State. Vol. 1, p. 6, § 432. The summons may also be personally served upon the corporation by de-

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livering a copy of it to any director or trustee of the corporation, by whatever official title he is called. *Id.*, § 2879.

It has been held that where a foreign corporation has a place of business within the State, and has not designated any person upon whom the service of papers might be made, service may be made upon the general counsel or solicitor of the company, if there is no officer of the corporation upon whom service could be made. *Clews v. Rockford, Rock Island & C. R. R.*, 49 How. 117. If the president of a foreign corporation is found within the jurisdiction of the justice, personal service of a summons may be made upon the corporation by delivering a copy of it to the president, although his presence in the State has no relation whatever to the corporation or to his official duties, and although the corporation has no property within the State and the cause of action did not arise therein. *Pope v. Terre Haute Car and Manf. Co.*, 24 Hun, 238. The question as to whether or not the corporation has property within the State, or whether the cause of action arose therein, is important only where the corporation have failed to designate a person upon whom service may be made, and service has been made upon the cashier, a director, or the managing agent of the corporation. *Ib.* But when the corporation has no property within the State, and the cause of action did not arise therein, service of the summons upon a director temporarily in the State in pursuit of his own business is unauthorized, and not a sufficient commencement of the action, unless the final clause of section 2879 of the Code of Civil Procedure has given greater effect to such service where the summons issues out of a justice's court than where it issues out of a court of record. See *Hiller v. Burlington and Missouri River R. R. Co.*, 70 N. Y. 223. For a history of the statutory provisions relating to service of a summons upon foreign corporations, see *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; S. C., 20 Am. Rep. 513.

§ 9. Service upon an express company. Where the defendant to be served is a corporation, association, partnership or person doing business in this State as an express company, the mode of effecting personal service is to be determined by the rules already given, if they provide a mode by which such service can be made. Thus, if the defendant is a corporation, foreign or domestic, service should be made in the manner prescribed for the service of a summons upon such corporations, if there is any person residing in the county to whom the copy summons can be delivered pursuant to the sections of the Code heretofore cited regulating such service. If the defendant is not a corporation then service should be made in the manner prescribed for the service of a

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summons upon a natural person. But if no person resides in the county to whom a copy of the summons can be delivered so as to effect personal service under these provisions of the Code, and the defendant, at least thirty days before the summons was issued, has filed in the office of the clerk of the county a written instrument designating a person residing in the county upon whom process to be issued by a justice of the peace against the defendant may be served, which designation is unrevoked, then the summons may be personally served upon the defendant by delivering a copy of it to the person so designated. But if no such designation has been made, or if it has been made and revoked by a writing executed by the defendant and filed in the office of the clerk of the county, or if the person designated is dead, or has ceased to reside within the county, or cannot, after due diligence, be found therein so as to deliver a copy of the summons to him, it may, in that case, be personally served upon the defendant by delivering a copy to any local or general agent, agent to receive freight or parcels, route agent or messenger of the defendant residing in the county. Vol. 1, p. 7, §§ 2881 and 2882. The provisions of the Code above cited are a substantial re-enactment of a prior statute which was repealed by the general Repealing Act of 1880. See Laws of 1864, chap. 411.

§ 10. **Service by copy.** Under the old practice a constable who was unable to find the defendant, and consequently was unable to make personal service of the summons upon him, could serve it by leaving a copy at the defendant's last place of abode in the presence of some one of the family of suitable age and discretion to whom he stated its contents. If the defendant did not appear on the return day, the action, which was commenced by the mere delivery of the summons to the officer, was deemed discontinued unless a new summons or a warrant was issued on the day of the return of the first summons, and if so issued, the action was thereby deemed to have been continued. See *Cornell v. Moulton*, 3 Denio, 12. By this mode of service the plaintiff was enabled in many instances to avoid the bar of the statute of limitations, and also to prevent the defendant from purchasing a demand to be used as a set-off after having been warned that an action was about to be commenced against him. This mode of service could be resorted to in any and all cases, if the constable was unable to find the defendant.

But since the adoption of the Code of Civil Procedure, "service by copy," as that term was understood by the profession, has been abandoned, except in connection with the service of a warrant of attachment or of a requisition to replevy, and even then such service has not the effect of service by copy under the former practice, as will be

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shown hereafter. It is true that every summons issued out of a justice's court must be served, if possible, by a *delivery of a copy* to the defendant personally, if the defendant is a natural person. In that sense every service of a summons is a service by copy. But under the former practice, service by copy meant the reverse of personal service, or delivery of a copy of a summons to the defendant personally.

Where a warrant of attachment accompanies the summons, the constable must immediately, after making an inventory of the property attached, and at least six days before the return day of the summons, serve the summons together with the warrant of attachment and inventory upon the defendant, by delivering to him personally a copy of each, if he can with reasonable diligence be found within the county, or, if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county, with a person of suitable age and discretion; or if such person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the property attached is found. Vol. 1, p. 15, § 2910. Service made by delivering a copy to a third person, as above provided, is not a preliminary to the actual service of other process as it was under the former practice, but is a completed service. It is essential to the commencement of any action under the Code that a summons shall be served in some of the modes prescribed, or that the defendant shall appear and join issue. If personal service of the summons, warrant and inventory cannot be made, the officer must seek the defendant's last place of residence in the county, and if he can find there a person of suitable age and discretion, leave with such person a certified copy of the papers mentioned. The statute does not require that this person shall be a member of the defendant's family, or in any way connected with the defendant, nor does it require that the officer should state the contents of the summons.

The certificate of the officer is merely to the effect that the papers left are correct copies of the originals. The certificate may be in the following form: "I hereby certify that the within is a correct copy of the summons in this action. Dated January 3, 1882, Jacob Plantz, constable."

If the officer cannot find a suitable person at the defendant's residence with whom to leave the papers for service he must proceed to post and mail certified copies, as required by the statute. If the defendant has

no residence in the county, the officer must serve the summons and accompanying papers, by delivering certified copies of them to the person found in possession of the property attached.

The summons, affidavit and requisition in an action to recover a chattel must be served within the time and in the manner above stated for the service of a summons, warrant of attachment and inventory. Vol. 1, p. 20, § 2922.

The proceedings in case a provisional remedy is issued in an action will be fully noticed hereafter. From what has been said it is clear that the former practice of serving a summons by copy has little that is in common with any form of service now recognized by the Code.

§ 11. Form and contents of the return. The constable who serves a summons must, at or before the time when it is returnable, make and deliver to the justice a written return under his hand; stating the time when, and the manner in which he served it. If he has failed to make reasonable service of the summons, he must still make his return, stating that it was not served, and the reason why he failed to serve it. Vol. 1, p. 8, § 2885.

The statute requires that the return should be in writing under the hand of the constable. But the statute will be satisfied by a return partly written and partly printed, signed with the name of the constable by the hand of a third person, if signed at the request of the officer. Code of Civil Pro., § 3343 ; *Reno v. Pinder*, 20 N. Y. 298.

The Revised Statutes required the return to be made *upon* the summons ; the present statute does not. In an action of replevin the return to the requisition contains also a return to the summons and no further or separate return is required. Such return must state the manner in which the summons, affidavit and requisition were served, and if they were served otherwise than by delivering the requisite copies to the defendant personally, must state the reason why they were so served, and also the name of the person to whom they were delivered, if his name is known to the constable, and if it is not, the return must describe the person so as to identify him as nearly as may be. Vol. 1, p. 20, § 2923. Substantially the same return is required to a warrant of attachment, except that it is not necessary that the return to the warrant should contain a return to the summons. But as the warrant, inventory and summons are all served at the same time and in precisely the same manner, there is no reason why the return to the warrant should not include a return to the summons. See vol. 1, p. 16, § 2915.

In certain actions a plaintiff is permitted to verify his complaint, at-

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tach it to his summons, and have both summons and complaint served upon the defendant by the constable. In case of default, judgment is taken against the defendant on proof of due service of the summons and complaint. The summons and complaint are served by delivering to and leaving with the defendant true copies not less than six nor more than twelve days before the return day. Proof of such service is made by the return of the constable making the service. Vol. 1, p. 178.

Where a person has been deputized by a justice to make service of a summons, he must make a return in writing in the same manner as a constable, in order to confer jurisdiction upon the justice. It is not sufficient that the person deputized to make the service appears before the justice on the return day, and testifies orally under oath to all the essentials of a valid service. Nothing will take the place of a return. *Jackson v. Sherwood*, 50 Barb. 356.

Where there are two or more defendants named in the summons the return should show the time and manner of service upon each, or if either of the defendants was not served, that fact should be stated with the reason for non-service. If the defendants are joint debtors a service upon one but not upon all of the defendants, and a return showing service upon the one, but silent as to the others, may be sufficient to authorize the justice to proceed in the action and render judgment against all. See Code of Civil Pro., §§ 1932, 3020 ; *Fogg v. Child*, 13 Barb. 246. But such a return, while possibly conforming to the letter of the statute, is contrary to its spirit and intent. The justice who gives a transcript of a judgment so taken is required to distinctly designate therein each defendant who was not summoned ; and the constable's return is the means designated by the statute to furnish to the justice *prima facie* evidence of the facts as to service stated in the transcript. All of the defendants named in the summons may in fact have been served, and yet the constable may have omitted to return that fact. The question of service should not in any case be determined by conjecture or inference, nor by the mere oral declarations of the officer.

The return to a summons which is issued against a corporation must state such facts as will show affirmatively that the person to whom the copy was delivered was a person to whom such delivery is valid as a personal service upon the corporation. It should state that the person to whom the copy was delivered was the president or secretary, etc., of the corporation. When the defendant is a railroad corporation, and there are no officers resident in the county, and no person has been legally designated by the company as a person upon whom

Form and contents of the return.

process may be served, the return should state these facts and then show a delivery of a copy of the summons to a freight agent or other person to whom such delivery is authorized by the statute as a means of perfecting personal service upon the company. The return of the constable that the person to whom the copy summons was delivered is an officer of the corporation is sufficient evidence of that fact. *New York and Erie R. R. Co. v. Purdy*, 18 Barb. 574; *Wheeler v. New York and Harlem R. R. Co.*, 24 id. 415. See *Sherwood v. Saratoga and Washington R. R. Co.*, 15 id. 650. So where the defendant is a railroad corporation, and there are no officers of the company residing in the county, and no person has been designated as a person upon whom process may be served, the constable's return of those facts is sufficient evidence thereof, and that the person to whom the copy was delivered was the freight agent or other employee of the corporation, as stated in the return. *New York and Erie R. R. Co. v. Purdy*, 18 Barb. 574.

Where a railroad corporation or express company have designated a person residing in the county upon whom process issued out of a justice's court against the corporation or company may be served, and such person has since died, or has ceased to reside within the county, or cannot after due diligence be found within the county, the return of the constable to a summons against the corporation or company should show this fact, either as a reason why the summons was served upon some person other than the one designated, if any service is made, or as a reason for omitting service, and as the ground for issuing a second or third summons after the return of the original not served. These facts may, however, be shown by affidavit. Vol. 1, p. 7, § 2882.

In all cases the return should be according to the fact, as the *officer* will be bound by his return, and liable for all damages a party may sustain by reason of a false return.

A few forms of return will be given as illustrations of the preceding matter, though of course no form can be given applicable to every case.

Return of personal service on individual.

The within (or annexed) summons was personally served on the defendant John Doe, on the 24th day of January, 1882, by delivering to him a copy thereof.

Dated *January 31*, 1882. CHARLES L. CLARK, *Constable*.

Fees, \$1.25.

 Defective return.

Service of summons and complaint.

The annexed summons and complaint were personally served upon the defendant Richard Roe, on the 24th day of January, 1882, by delivering to and leaving with him personally, true copies thereof.

Dated *January 31, 1882.* CHARLES L. CLARK, *Constable.*

Service upon a corporation.

The within summons was personally served upon the Eldorado Silver Mining Company, the defendant therein, on the day of _____, 1882, by delivering a copy thereof to Henry Livingston, the secretary of such corporation.

(*Date.*)

(*Signature of constable.*)

Service upon railroad corporation.

The within summons was personally served upon the defendant, the Fonda, Johnstown and Gloversville Railroad Company, on the day of _____, 1882, by delivering a copy thereof to John Cook, a freight agent of said defendant, residing in the county of Fulton, no person upon whom process may be served having been designated by the defendant, as prescribed in section 2880 of the Code of Civil Procedure, and there being no officer of said railroad company residing in said county of Fulton.

(*Date.*)

(*Signature of constable.*)

Service on one of two defendants.

The within summons was personally served on the defendant John Doe, on the _____ day of _____, 1882, by delivering to him a copy thereof, and was not served upon the defendant Richard Roe, for the reason that he could not, after due diligence, be found within the county in time to make seasonable service of said summons upon him.

(*Date.*)

(*Signature of officer.*)

§ 12. **Defective return.** In the absence of any return of the summons the justice has no authority to proceed in the action although he has other satisfactory evidence before him of the due service of the summons. *Jackson v. Sherwood*, 50 Barb. 356. But with a proper return of the personal service of summons before him, the justice has jurisdiction of the person of the defendant, and after waiting an

Impeaching return.

hour for the defendant to appear, may regularly proceed with the case in his absence. See *Douglass v. Reilly*, 8 Hun, 85; *Sagendorph v. Shult*, 41 Barb. 102. If the return is defective in any material point he will be without authority to proceed in the action unless the defect is amended or waived. The defendant has the right to demand that the constable shall specifically state the *time* when the summons was served. *Wheeler v. Lampman*, 14 Johns. 481; *Legg v. Stillman*, 2 Cow. 418. And it is equally important that the return should state the *manner* in which it was served so that the justice may judicially determine that he has jurisdiction of the person of the defendant. See *Sherwood v. Saratoga and Washington R. R. Co.*, 15 Barb. 650. If the return shows affirmatively that the service of the summons was not made in the manner required by the statute, the justice has no authority to proceed with the action. But if the return shows a service in compliance with the statute, and nothing is shown or offered to be shown to the contrary, the return will be presumptive evidence of the facts stated, and the justice is authorized to proceed with the action. *Wheeler v. New York and Harlem R. R. Co.*, 24 Barb. 414. The appearance of a defendant on the return of the summons in order to take an objection to the sufficiency of the return will not be a waiver of the irregularity. But the objection will come too late after answer. *Wheeler v. Lampman*, 14 Johns. 480. If a return is defective by reason of a failure to state either the time or the manner of the service, a judgment rendered against the defendant in the action will be reversed on appeal unless the defect in the return has in some way been cured or waived. *Ib.*; *Stewart v. Smith*, 17 Wend. 517; *Bromley v. Smith*, 2 Hill, 517. A justice of the peace has authority to allow the constable to amend his return, and the refusal of the defendant to appear will not deprive him of that right. The power of amendment in such a case does not depend upon the appearance of the defendant. *Perry v. Tynan*, 22 Barb. 137.

§ 13. **Impeaching return.** The presumption that a summons was served in the manner stated in the return is not conclusive and may at the proper time and in the proper manner be overcome. If the summons has in fact been defectively served or not served at all, the defendant may come in, and by affidavit show the error, and ask a dismissal of the proceedings. If the justice disregards his objections, he may, on appeal from the judgment, have a review of the question, and thus obtain the relief denied him in the court below. But he

Second and third summons.

cannot take the objection by answer. The issue to be joined and tried relates to the merits and not to the practice in the suit. *Waring v. McKinley*, 62 Barb. 612. If the defendant has no notice of the suit his only remedy is by appeal. *Ib.* Where the return of the constable is mistaken or false, the defendant may, by affidavit, allege the defect or want of service as an error of fact upon an appeal, and if he establishes the error alleged, obtain a reversal of the judgment. *Fitch v. Devlin*, 15 Barb. 47; *New York and Erie R. R. Co. v. Purdy*, 18 id. 574; *Waring v. McKinley*, 62 id. 612. If the return is not defective but false, the party injured may prosecute the constable for a false return. *New York and Erie R. R. Co. v. Purdy*, 18 Barb. 574; *Waring v. McKinley*, 62 id. 612. In either of the methods mentioned, the proceeding to attack the return is direct, and its falsity may be shown. But where an action has been prosecuted to judgment, the defendant cannot in another action contradict the return and show it to be false for the purpose of defeating the judgment. *New York and Erie R. R. Co. v. Purdy*, 18 Barb. 574; *Putman v. Man*, 3 Wend. 202; *Bromley v. Smith*, 2 Hill, 517. The return of the constable cannot be impeached collaterally. *Ib.*; *Waring v. McKinley*, 62 Barb. 612; *Allen v. Martin*, 10 Wend. 301. And see *Sparling v. Levy*, 1 Daly, 75. It has been held that "if the party injured lies by and permits judgment to be rendered against him, when no legal service has been made upon him, he is remediless and justly so. By lying by until judgment is recovered, the rights of third persons who had no knowledge of the defect, and who had been led to deal with the judgment as valid, are involved, and it would be alike unwise and unjust to subject them to injury by permitting the defendant to allege a defect in the jurisdiction of the court or the officer rendering it, when there was a *prima facie* valid return of service." *Waring v. McKinley*, 62 Barb. 612. But as against a party instituting proceedings, it is always competent to show that a certificate of a public officer designed to confer jurisdiction is false or fraudulent. In an action brought upon a judgment the defendant may show that there was no jurisdiction of his person in the action in which it was rendered, because no service of process was made upon him. *Shumway v. Stillman*, 6 Wend. 447; *Noyes v. Butler*, 6 Barb. 613; *Hard v. Shipman*, id. 621, 623; *Porter v. Bronson*, 29 How. 292; *Ferguson v. Crawford*, 70 N. Y. 253; S. C., 26 Am. Rep. 589.

§ 14. **Second and third summons.** "When it appears by the return of the constable to whom a summons has been duly delivered for

service, that it was not served for any cause, a second summons may be issued by the same justice, in the same action, within twenty days after the first summons was issued ; and upon a like return thereof a third summons may be issued within twenty days after the second was issued. The second or third summons, as the case may be, relates back to the time when the first summons was issued ; and with respect to all proceedings before actual service, the service thereof has the same effect as if the first summons had been seasonably served. For the purpose of issuing a new summons as prescribed in this section, a previous summons may be returned upon the sixth, or any subsequent day before the return day thereof." Code of Civil Pro., § 2883.

This section of the Code furnishes a substitute for the former practice under the provisions of the Revised Statutes authorizing service of a summons by copy, and the issuing of a second summons or warrant upon the return day of the summons so served if the defendant failed to appear ; but it dispenses with the useless formality of a service which of itself gave the court no jurisdiction of the person of the defendant, and merely warned him to prepare a defense to the action, or to evade the service of the process, which was to follow.

The second summons authorized by this section of the Code must be issued within twenty days after the first summons was issued. In computing this time the day upon which the first summons issued must be excluded, and the day upon which the second summons issues must be included unless the last day is Sunday, or a public holiday, in which case it must be excluded, and the summons may issue on the day following. See vol. 1, p. 124, § 788. If the second summons is not personally served upon the defendant, the constable should return that fact with his reasons why such service was not made. The third summons should then be served if possible, and returned in the same manner as the first summons in an action.

CHAPTER VIII.

ORDER OF ARREST.

SECTION 1. Nature of the remedy. The framers of the Code, deeming it advisable that there should be but one process for the commencement of a civil action, and that the summons abolished the process known under the Revised Statutes as a civil warrant, and provided in its place a summons accompanied by an order of arrest. The office of the summons is to commence the action; the office of the order of arrest is to compel the immediate attendance of the defendant before the justice; and both together perform the office of a civil warrant.

Under the old practice, there were cases in which either a summons or a warrant might issue for the purpose of commencing an action; and there were other cases in which the warrant was the only process which could lawfully issue. See *Waters v. Whittemore*, 22 Barb. 593. Under the present practice the summons issues in all actions, and it is a matter wholly within the discretion of the plaintiff whether he will compel the attendance of the defendant by procuring his arrest under an order accompanying the summons, provided of course the case is one in which the order may lawfully issue.

An order of arrest is not a remedy peculiar to justices' courts, but is one of the provisional remedies authorized by the Code in actions brought in courts of record as well as in courts not of record. But an order of arrest may properly issue in a court of record in many cases where the remedy would be unauthorized in an action pending before a justice. In a court of record, too, it is within the discretion of the court to grant or withhold the remedy, although the papers upon which the application for the order is made would clearly authorize the court to issue the order. See *Clark v. Lowrie*, 82 N. Y. 580. But where an application is made to a justice of the peace, in a proper case, and upon the proper papers, he has no discretion in the matter, and must grant the order. In such case the issuing of the order is a matter of statutory right. In courts of record an order of arrest *may* accompany the summons, or be granted at any time after the commencement of the action; while in a justice's court, the order, if issued at any time, *must* accompany the summons.

In what cases an order of arrest may be issued.

It is, therefore, evident that the old practice in justices' courts, and the decisions in respect to the issuing of a civil warrant, and the practice and decisions of courts of record in respect to the allowance of an order of arrest, are not in all respects applicable to this remedy in a justice court under the present Code, although in many cases the old practice, and the practice in courts of record, and the decisions of the courts in respect thereto, may be of great use in construing the present statute.

§ 2. **In what cases an order of arrest may be issued.** In order to entitle a plaintiff to an order for the arrest of the defendant, the action must be brought either :

1. To recover a fine or penalty ; or
2. To recover damages for a personal injury of which a justice of the peace has jurisdiction ; an injury to property, including the wrongful taking, detention or conversion of personal property ; misconduct or neglect in office ; or in a professional employment ; fraud ; or deceit ; or
3. To recover for money received, or to recover a chattel where it appears that the money was received, or that the chattel was embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association in the course of his employment ; or by a factor, agent or broker, or other person in a fiduciary capacity. Vol. 1, p. 10, § 2895. The second subdivision does not apply to a claim for damages in an action to recover a chattel. *Ib.* Unless the action is brought for one of the causes above specified no order of arrest can issue, nor can the order issue in any case where the person sought to be arrested is a female. *Id.*, § 2894.

Where the action is brought for one or more of the causes of action specified, this alone will not entitle the plaintiff to the order. In addition to this one of three things must exist, namely :

1. Either the defendant to be arrested must be a non-resident of the county ; or
2. All the parties plaintiff must be non-residents of the county ; or
3. It must appear, by affidavit, to the satisfaction of the justice that the defendant is about to depart from the country with intent not to return thereto. *Ib.*

When it appears by affidavit, upon an application made by the plaintiff at the time the summons is issued, that the plaintiff has a cause of action against the defendant, and that it belongs to one of the classes above specified, and also that the plaintiff is a non-resident of the

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county, or if there are two or more plaintiffs, that all of them are non-residents, or that the defendant is a non-resident, or is about to depart from the county with the intention of not returning, the justice, upon receiving the statutory undertaking, *must* issue an order for the arrest of the defendant. *Ib.* For the statute regulating the issuing of the order in District Courts of the city of New York, see Laws of 1882, vol. 2, chap. 410, § 1303-1308.

There can be but little difficulty in determining whether a cause of action falls within either of the classes for which the right to arrest the defendant is given by the Code. The most meagre statement of facts in the affidavit upon which the application for the order is based should be sufficient to disclose whether the action is brought to recover a fine or a penalty; or whether the action is brought to recover damages for a "personal injury" or an "injury to property" within the meaning of those terms as defined by the Code. See vol. 1, p. 169. The cases in which a justice has jurisdiction of an action to recover damages for a personal injury, or for an injury to property, have been pointed out in a preceding chapter. See *ante*, 32, 33. The term "property" includes both real and personal property, and the right to an order of arrest is the same whether the action is for damages to lands or to personal property. See vol. 1, p. 169, § 3342, subd. 8; *Welch v. Winterburn*, 14 Hun, 518. But see *Merritt v. Carpenter*, 3 Keyes, 142; *Griswold v. Sweet*, 49 How. 171.

The statute authorizes the justice to issue an order of arrest in an action to recover damages for fraud or deceit. But this does not give authority to issue the order merely because the plaintiff may claim that he has been defrauded by the defendant. The remedy is given only where the gist of the action is the fraud committed, and where without proof of the fraud alleged the plaintiff must fail in his action. For example, if by means of false and fraudulent representations, the defendant has induced the plaintiff to part with his property on credit, and has thereby sustained damage to the extent of the value of his goods, the plaintiff may rescind the contract, and without waiting for the term of credit to expire, bring an action, based solely upon the fraud, to recover the amount of damages sustained, and in such action obtain an order of arrest. The appropriate allegations in the complaint in such action would be the representations made by the defendant; the falsity of the representations; that the defendant knew them to be false at the time that they were made, and made them with intent to deceive and defraud the plaintiff; that the plaintiff believed the representations to be true, and relying upon them parted with his goods

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to the defendant ; and that by reason of these wrongful acts the plaintiff sustained damage in a sum specified.

If, however, the action is brought *upon the contract* which the plaintiff was induced to enter into by reason of the false and fraudulent representations of the defendant, as for example, upon a promissory note given for the purchase-price of goods, no order of arrest can issue, as such actions are not among those specified in the section giving the remedy. It is otherwise in courts of record. In those courts the plaintiff may have an order of arrest in an action upon contract, express or implied, where the defendant has been guilty of fraud in contracting the debt or incurring the liability. See Code of Civil Pro., §§ 549, 550.

The fraud for which a defendant is liable to arrest should be in some sense his individual or personal act. It has been held that a member of a firm is liable to arrest for the frauds committed by other members of the firm, although he may have been entirely innocent of such frauds. See *Matter of Benson*, 60 How. 314 ; *Bowman v. Gates*, 11 Reporter, 744 ; *Sherman v. Smith*, 42 How. 198. In such cases the act of one partner is the act of all so far as it is in pursuance of the business of the firm. But the courts do not favor a construction of the statute which holds one person liable to arrest for a fraud committed by another, where he in no way participated in the commission of the fraudulent act, and has not ratified or adopted it with knowledge of the fraud. See *Hathaway v. Johnson*, 55 N. Y. 93 ; S. C., 14 Am. Rep. 186 ; *Hanover Company v. Sheldon*, 9 Abb. 240.

It has been held that an infant who has made false statements as to his property when buying goods *other than necessaries* cannot be made liable to arrest by basing the action upon the fraud, for the reason that, on account of the defendant's infancy, he could not have been made liable upon his contract if all his statements had been true, and therefore the falsity of such statement could not cause that legal injury to the plaintiff which is necessary to make fraud actionable. *Taylor v. Van Keuren*, 54 How. 25. Falsehood, the intent to deceive, and damage must concur to entitle the plaintiff to a right to arrest the defendant in an action for damages for fraud and deceit. *Chester v. Comstock*, 40 N. Y. 575 ; *Marsh v. Falker*, id. 562.

Under the provision of the Code authorizing the arrest of a defendant in an action to recover damages for misconduct or neglect in office or in a professional employment, a defendant in an action against an officer to recover damages sustained by reason of his neglect to perform an official duty, or by reason of his misconduct in the attempted

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performance of such duty, may be arrested, in case the other facts, as to residence, etc., exist, and are made to appear by affidavit.

So in an action against a physician or surgeon for malpractice, or against an attorney for negligence or willful misconduct in the management of a suit an order of arrest may issue. So the order may be issued in an action to recover for money received, or to recover a chattel, where it appears that the money was received or the chattel was embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment. If money is paid into court for a party, and is received by an attorney for such party and not paid over to his client, an order of arrest may be issued in an action brought by the client to recover from the attorney the amount so received. *Gross v. Graves*, 19 Abb. 95; S. C., 2 Rob. 707. So where an attorney refuses to return to his client on demand a sum of money placed in his hands by the client for a purpose still unaccomplished, the attorney may be arrested in an action to recover the money; *Schadle v. Chase*, 16 How. 413; and generally an attorney, solicitor or counselor may be arrested in an action to recover for money received, or to recover a chattel where it appears that the money was received or that the chattel was embezzled or fraudulently misapplied by the attorney, solicitor or counselor in the course of his employment. Vol. 1, p. 10, § 2895, subd. 3.

An order of arrest may be issued in an action to recover for money received or to recover a chattel where it appears that the money was received or that the chattel was embezzled or fraudulently misapplied by a factor, agent, broker or other person in a fiduciary capacity. *Ib.* The term "fiduciary," as used in the statute, has a legal meaning. It involves the idea of trust and confidence in the integrity and fidelity of the agent or other person trusted, rather than in his credit and ability. It contemplates good faith rather than legal obligation as the basis of the transaction. *Stoll v. King*, 8 How. 298. See *Obregon v. DeMier*, 52 id. 356.

And in all cases upon the question of the right to arrest an agent or factor at the suit of the principal, the inquiry is whether the fiduciary relation, that is, that of personal trust, exists. *Merrill v. Thomas*, 7 Daly, 393, 396. If this is wanting there can be no abuse of confidence or breach of trust, and consequently no right to arrest. *Fuentes v. Mayorga*, 7 Daly, 103.

A conversion of money by an agent, and its receipt in a fiduciary capacity are necessarily entirely different and inconsistent. The latter

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renders the liability to pay such money a mere debt, while the former constitutes a tort. *McBurney v. Martin*, 6 Rob. 502. If moneys are deposited with the defendant, as the banker of the plaintiff from time to time during a period of several years, in the ordinary course of banking business, subject to checks at sight, and it is neither intended or supposed that the funds deposited were to be held in trust for the plaintiff, but were to be used by the defendant, as is the custom with bankers, in the ordinary course of his business, the money so deposited becomes the property of the defendant, and the relation of debtor and creditor, and not of trustee and *cestui que trust*, is created by the transaction. The credit is given to the pecuniary responsibility of the banker, and not to his personal integrity, and the money deposited is not received by the defendant in a fiduciary capacity. *Buchanan Farm Oil Co. v. Woodman*, 1 Hun, 639; S. C., 4 N. Y. Sup. Ct. (T. & C.) 193. Where the effect of the agreement between the principal and his agent is that the latter may use the money of the principal as his own, and pay the same amount to the principal on demand, and not that the agent shall return the identical money or its traceable proceeds to the principal, there is no fiduciary relation between the parties. *Robbins v. Falconer*, 11 Jones & Sp. 363. To render a person liable to arrest upon the ground that he has appropriated to his own use money received in a fiduciary capacity, the identical money received must be the property of the creditor. *Morange v. Waldron*, 6 Hun, 529; *Wallace v. Castle*, 14 id. 106; *Liddell v. Paton*, 7 id. 196. But where an agent is employed to collect money he acts under a special trust; the money he receives is not his own; and he receives and holds it in a fiduciary capacity. *Stoll v. King*, 8 How. 298. If the agent appropriates such moneys to his own use he is liable to arrest. *Ib.* So if a commission merchant sells the property of another in his own name, and receives the proceeds of the sale, he receives the money in a fiduciary capacity, and under an implied trust that he will hold for and pay over to his principal the excess of such proceeds beyond what may be required to discharge his lien as a factor; and if, in violation of his duty to his principal, he mingles the proceeds of the sale with his own funds, and fails to pay over such proceeds on demand, he is liable to arrest. *Duguid v. Edwards*, 50 Barb. 288. The fact that he was acting under a *del credere* commission does not necessarily destroy the fiduciary relation; and if he in fact receives the proceeds of the sale, the money so received belongs to the principal and not to the factor, and he will be liable to arrest for its conversion. *Wallace v. Castle*, 14 Hun, 106; *Ostell v. Brough*, 24

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How. 274. See *German Bank v. Edwards*, 53 N. Y. 541, 544. An agent must be deemed to have received the moneys of his principal in a fiduciary capacity, when it appears that he had no authority to disburse them on account of his principal, but was bound to pay them over on request. *Republic of Mexico v. DeArangoiz*, 5 Duer, 634; S. C., 11 How. 576. If a broker, by false representations, induces the owner of goods to ship them to the several purchasers to whom he had sold them, and to forward the invoices and bills of lading to him, at the same time undertaking to collect the proceeds of the sale from the purchasers, and pay them over to the owner of the goods, he will occupy the position of a factor and not that of a broker, and if he collects such proceeds and misapplies them he will be liable to arrest in an action for moneys received in a fiduciary capacity. *Standard Sugar Refinery v. Dayton*, 70 N. Y. 486.

If a person consigns goods to another for sale, and he turns them over to a firm of which he is a member, and the firm sells the goods with full knowledge of all the facts, the partners of the original consignee will not be liable to arrest as having received money in a fiduciary capacity, as there is no relation of personal trust or confidence between them and the consignor. *Fuentes v. Mayorga*, 7 Daly, 103.

If a person, having in his hands property consigned to him for sale, accepts a draft drawn on him by the consignor in favor of a third party on account of the property consigned, and afterward sells the property and neglects to pay the draft, he may be arrested in an action to recover the proceeds of the sale, as he does not cease to be a factor or agent of the plaintiff by the mere acceptance of the draft. *Kelly v. Scripture*, 9 Hun, 283. But if the consignor receives from his agent the notes of third persons as security for the payment of the proceeds of the sale of the goods consigned, and has collected some of them, and retained the others without any offer to return them, the right of arrest will be barred. *Trunninger v. Busch*, 7 Daly, 124. If, however, the creditor had accepted the promissory note of his debtor for moneys received in a fiduciary capacity, this would be no bar to the right to arrest the debtor in an action brought upon the original indebtedness after the dishonor of the note, where the plaintiff was ready and able to return it. *Shipman v. Shafer*, 14 Abb. 449. And see *Dubois v. Thompson*, 1 Daly, 309; S. C., 25 How. 417.

§ 3. **Joinder of several causes of action.** The Code authorizes an order of arrest where the action is brought by or against a party specified in section 2894, and prohibits the issuing of the order except where the action is brought for one or more of the causes specified in

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section 2895 of that act. Vol. 1, p. 10. The Code also specifies the causes of action which may be united in the same complaint,* and declares that where a cause of action for which a defendant might be arrested is united with a cause of action for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment. Vol. 1, § 2937. The effect, therefore, of an improper joinder of a cause of action for which the defendant may be arrested with a cause of action for which an arrest is not authorized is to deprive the plaintiff of all right to an execution against the person of the defendant in that action and place him in the same position in respect to the enforcement of the judgment as if he had waived the tort and sued upon an implied contract. The misjoinder of causes of action would also appear the moment the complaint was filed, and could then be made the subject of objection by the defendant, and prompt relief obtained. Where a plaintiff unites in his complaint two causes of action, one of which would authorize the arrest of the defendant while the other would not, he waives his right to an order of arrest as to both, and if the order has been granted, it must be vacated upon application to the justice. *Madge v. Ping*, 71 N. Y. 608; *Smith v. Knapp*, 30 id. 581; *McGovern v. Payne*, 32 Barb. 83; *Bowen v. True*, 53 N. Y. 640; *Ely v. Steigler*, 9 Abb. (N. S.) 35; *Lambert v. Snow*, 17 How. 517; S. C., 9 Abb. 91; 2 Hilt. 501; *Toffey v. Williams*, 5 N. Y. Sup. Ct. (T. & C.) 294; S. C., 3 Hun, 211. And see *Mining Co. v. Raht*, 9 id. 208; *Mason v. Lambert*, 3 Daly, 250; *Wilson v. Harvey*, 52 How. 126. If the misjoinder appeared upon the face of the affidavit upon which the application for the order is based, it would of course be the duty of the justice to refuse to issue the order.

§ 4. **Application for the order.** The application to the justice for an order of arrest must be made at the time the summons is issued, or at least before the summons is placed in the hands of the constable for service. The application must be based upon an affidavit, setting forth facts, by which it must be made to appear to the justice that a sufficient cause of action exists against the defendant; that the cause of action is one for which an order of arrest is authorized by section 2895 of the Code; and that either the defendant is a non-resident of the county or is about to depart from the county with intent not to return thereto; or that the plaintiff is a non-resident, or if there are two or more plaintiffs, that all of them are non-residents of the county. Vol. 1, p. 11, § 2896. This affidavit may be made by the plaintiff, or by any other person. *Ib.* The plaintiff must also be prepared to furnish an undertaking to the amount of at least \$100, to the effect that if

Form and contents of the affidavit.

the defendant recovers judgment, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking. *Ib.*

The application for the order is informal, and of course *ex parte*.

§ 5. **Form and contents of the affidavit.** The essential facts that must in some manner be set forth in every affidavit upon which an application for an order of arrest is based are: *First*, The non-residence of the plaintiff, or of the defendant, or the intent of the defendant to depart permanently from the county; and *secondly*, the existence of a cause of action against the defendant for one of the causes specified in section 2895 of the Code of Civil Procedure. Vol. 1, p. 11, § 2896. The next thing to consider is how shall these facts be stated.

In a preceding chapter the subject of affidavits has been discussed at considerable length, and what is there stated in respect to the title, venue, signature and jurat of an affidavit, and the general mode of stating facts therein, including the residence of the deponent, is applicable to an affidavit used on an application for an order of arrest. See *ante*, 111-118.

The affidavit may be made by the plaintiff, or by any other person possessing sufficient knowledge of the material facts. Vol. 1, p. 11, § 2896. As the statute does not specify the officer before whom the affidavit is to be taken, it may be sworn to before any officer authorized to take affidavits. See *ante*, 116.

The fact that the plaintiff is a non-resident of the county in which the action is to be brought should be directly and positively alleged in the body of the affidavit, if the non-residence of the plaintiff is one of the grounds of the application. The same rule applies to a statement of the non-residence of the defendant, when that is one of the grounds of application. The fact of residence must be within the personal knowledge of the plaintiff or of witnesses whose affidavit he could procure, and, therefore, should not be stated upon information and belief. But when the application for the order is based in part upon the fact that the defendant is about to depart from the county with intent not to return thereto, these facts must necessarily be stated upon information and belief, as they cannot, from the nature of things, be within the personal knowledge of the plaintiff or his witnesses. How that intent shall be stated in the affidavit has been sufficiently noticed. See *ante*, 115.

It may be laid down as a general rule that when any essential fact upon which the right to an order of arrest depends is not within the

Form and contents of the affidavit.

actual knowledge of the plaintiff or his witnesses, this fact may be stated upon information and belief, provided the plaintiff also sets forth that information, states the source from which it was obtained, and gives a satisfactory reason why a positive statement of facts could not be procured, but not otherwise. See *Whitlock v. Roth*, 5 How. 143; S. C., 10 Barb. 78; *City Bank v. Lumley*, 28 How. 397; *Crandall v. Bryan*, 15 id. 48; S. C., 5 Abb. 162; *De Weerth v. Feldner*, 16 Abb. 295; *Dreyfus v. Otis*, 54 How. 405; *ante*, 114.

If the plaintiff swears merely to his belief that the defendant is about to depart from the county with intent not to return thereto, without disclosing any grounds for that belief, the affidavit will be insufficient to authorize the justice to issue the order, although every other fact necessary to authorize the issuing of the order is fully and positively alleged. See *Dewey v. Greene*, 4 Denio, 93, 95; *Tallman v. Bigelow*, 10 Wend. 420. But on the other hand, if the plaintiff swears to his belief that the defendant is about to depart from the county with intent not to return, and also directly and positively alleges facts and circumstances tending to show such an intention on the part of the defendant, and these facts and circumstances are of such a nature that they satisfy the mind of the justice of the existence of such an intent, the order may properly issue. See *Johnson v. Moss*, 20 Wend. 145; *Fulton v. Heaton*, 1 Barb. 552. The order issues in such case not because the plaintiff believes that the defendant is about to depart from the county with intent not to return to it, but because the justice is led to believe that such is the defendant's purpose and intent by the facts and circumstances set forth in the affidavit. If the justice arrives at a different conclusion upon the facts stated, or if the facts and circumstances unexplained fail to satisfy his mind that such is the purpose and intent of the defendant, and the right to the order depends upon that intent, then no order should be issued.

Declarations of the defendant as to his intention to depart from the county may properly be stated in the affidavit of the person to whom the declarations were made as evidence of such intent upon the principle that the admissions of a party are evidence against him. And it seems that where the defendant has made declarations from which a particular intent may be inferred, and has also made explanatory statements tending to do away with the effect of the declarations from which the inference is drawn, the justice may reject the explanatory statements if he believes them to be untrue, and issue an order of arrest. See *Wheaton v. Fay*, 62 N. Y. 275.

The plaintiff in his affidavit must state the *facts* which will justify

Form and contents of the affidavit.

the issuing of the order, and not his mere *conclusions*. *Dreyfus v. Otis*, 54 How. 405; *Vanderpool v. Kissam*, 5 Sandf. 715. The statute requires that it shall appear to the justice by the affidavit of the plaintiff or another person that a sufficient cause of action exists against the defendant, and that the case is within the provisions of sections 2894 and 2895 of the Code. This can only appear by a statement of the plaintiff's cause of action in the affidavit. It will not be sufficient to state that the defendant is a non-resident of the county, and that the plaintiff has, as he verily believes, a good cause of action against him to recover for wrongful and fraudulent representations in the exchange of horses by which the plaintiff was damaged to a large amount, without stating facts and circumstances from which the justice can determine whether or not there is a sufficient cause of action for fraud or deceit. *Wells v. Sisson*, 14 Hun, 267. Nor will it be sufficient for the party making the affidavit to state that his case is one of those mentioned in section 2895 of the Code of Civil Procedure. It must appear from the facts stated that it is such a case. *Pindar v. Black*, 4 How. 95.

In alleging the existence of a cause of action against the defendant, the plaintiff should set forth the facts upon which he relies substantially in the same manner that he would allege his cause of action in a carefully framed complaint. It is the facts and not the evidence of these facts which should be stated in this portion of the affidavit; and as the Code does not contemplate that the merits of the action are to be determined upon an application for a provisional remedy, it will be sufficient if the facts stated show a *prima facie* case.

It is not necessary that all of the essential facts should be stated in one affidavit. It may be necessary to establish the existence of a sufficient cause of action by the affidavit of the plaintiff, and the fact that the defendant is about to depart from the county with intent not to return by the affidavit of a third party who has heard the defendant make declarations to that effect. But the justice has no right to dispense with an affidavit by some person, to establish the existence of any material fact, even though he is satisfied of the fact by other means of evidence, or has personal knowledge of it. See *Money v. Tobias*, 12 Johns. 422

Undertaking required on the application.

Affidavit for an order of arrest.

JUSTICE'S COURT.

John Dye <i>agst.</i> Daniel Shea.	}	Before JAMES M. KENNEDY, <i>Justice.</i>
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FULTON COUNTY, ss.:

John Dye, being duly sworn, says, that he resides in the town of Johnstown in said county, and that Daniel Shea, above named, does not reside in said county, but is a resident of the town of Mohawk in the county of Montgomery.

And deponent further says, that he has a good cause of action against the said Daniel Shea for the recovery of the damages he has sustained by reason of the wrongful taking and conversion by said Shea, as herein-after stated, of certain personal property of deponent, of the value of \$150; and that said cause of action is based upon the following facts; namely, that on and before the 15th day of February, 1882, deponent was the owner and in possession of fifteen dozen of gloves, which were worth \$10 per dozen; that on said 15th day of February, the said Daniel Shea, without deponent's knowledge or consent, wrongfully took said gloves from deponent's shop in the village of Johnstown in said county, and sold them to one Aaron Rosenbergh, falsely claiming to be the agent of deponent, and authorized to make such sale; and that by reason of said wrongful acts deponent has sustained damage to the amount of \$150.

Subscribed and sworn to before } me, this 16th day February, 1882. }	JOHN DYE. JAMES M. KENNEDY, <i>Justice of the Peace.</i>
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The affidavit should be filed by the justice and retained with the other papers in the case.

§ 6. **Undertaking required on the application.** If the justice is satisfied, from the affidavit or affidavits produced on the part of the plaintiff, that a proper case exists for the arrest of the defendant, he should require a written undertaking to the defendant on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the defendant recovers judgment, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum

Undertaking required on the application.

specified in the undertaking, which must be at least \$100. Vol. 1, p. 11, § 2896. This must be required before the order is granted. *Ib.*

The sum to be specified in the undertaking as the limit of the liability of the parties executing it is left to be fixed by the justice in each case, except that the amount specified cannot be less than \$100. *Ib.* But the discretion of the justice ought not to be arbitrarily exercised and an amount fixed so excessively large as to be in effect a denial of the order. The object of the undertaking is to discourage a malicious abuse of the process by an irresponsible plaintiff, and at the same time provide a means of compensating a defendant for the damages he may sustain by reason of an arrest in an unfounded action. It is only in case the defendant recovers judgment that any liability can be created under the undertaking; and in case the order of arrest was improperly granted and the defendant is discharged from arrest upon the ground that the case was not one justifying the issuing of the order, or for any other reason, the defendant cannot maintain an action *upon the undertaking* to recover any damages he may have sustained by reason of the arrest, unless he recovers a judgment in the action in which the order issued. This necessarily follows from the language of the undertaking, which will furnish the measure of liability of the parties under it.

As the statute requiring the undertaking does not in terms require that the plaintiff shall execute it, it will be valid without his joining with the sureties in its execution, if it is in other respects sufficient. Vol. 1, p. 124, § 811. So as the statute does not expressly require two or more sureties, an undertaking executed by a single surety only will be sufficient. *Ib.* These matters are left to the discretion of the justice to whom the application is made. In exercising this discretion he should look to the security of the defendant, rather than to the convenience of the plaintiff.

If the undertaking is executed by two or more persons, it must be joint and several in form; and it must be accompanied with the affidavit of each surety to the effect that he is a householder or freeholder within the State and is worth twice the sum specified in the undertaking over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. Vol. 1, p. 124, § 812. This affidavit must be "subjoined" to the undertaking, *Ib.*, and is technically called the "justification" of the undertaking, although the word more properly applies to the act of taking the oath, than to the affidavit itself. The plaintiff need not join in the justification, although he is a party to the undertaking.

Undertaking required on the application.

The undertaking must be acknowledged or proved, and certified in the same manner that would be necessary if the instrument was a deed which was to be recorded. *Id.*, § 810. It must be approved by the justice, and his approval must be indorsed upon the undertaking. *Id.*, § 812. The undertaking should then be filed with the justice. Vol. 1, p. 125, § 816; *id.*, p. 83, § 3134.

The following form of undertaking is in common use and may be varied as to the names of the parties, date, amount, etc., to conform to the necessities of the case.

Plaintiff's undertaking on arrest.

JUSTICE'S COURT.

John Dye <i>agst.</i> Daniel Shea.	}	Before JAMES M. KENNEDY, <i>Justice.</i>
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The above-named plaintiff having applied to said justice for a summons herein, and having also applied to said justice to grant, at the time when the summons is issued, an order for the arrest of the defendant, and it appearing to the said justice by the affidavit of John Dye, the above-named plaintiff, that a sufficient cause of action exists against the defendant, and that the case is within the provisions of sections 2894 and 2895 of the Code of Civil Procedure, and he being about to grant the order of arrest applied for :

Now, therefore, we, John Dye, plaintiff, and John Doe and Richard Roe, sureties, do hereby jointly and severally undertake to the defendant that if the defendant recovers judgment, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the arrest, not exceeding \$100.

Dated the 16th day of February, 1882.

JOHN DYE,
 JOHN DOE,
 RICHARD ROE.

STATE OF NEW YORK, }
 County of Fulton, } ss. :

On this 16th day of February, 1882, before me, the subscriber, personally appeared John Dye, John Doe and Richard Roe, to me known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

JAMES M. KENNEDY, *Justice of the Peace.*

The order of arrest.

STATE OF NEW YORK, }
 County of Fulton, } ss.:

John Doe and Richard Roe, being severally sworn, each for himself says, said John Doe that he is a freeholder of the county of Fulton in this State, and that he is worth the sum of \$200 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Richard Roe, for himself, says that he is a freeholder of the county of Fulton in this State, and that he is worth the sum of \$200 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

JOHN DOE.

RICHARD ROE.

Severally subscribed and sworn to, before me, }
 this 16th day of February, 1882. }

JAMES M. KENNEDY, *Justice of the Peace.*

I certify that I find the sureties in the foregoing undertaking sufficient, and do approve of the same.

JAMES M. KENNEDY, *Justice of the Peace*

Where the application is made to a District Court of the city of New York, and the undertaking given to procure the order is executed by the plaintiff without any surety, the plaintiff must state in his affidavit of justification, in addition to the other matters required by law, that he is a resident of, and a householder within, the city of New York, specifying the street and number, or other sufficient identification of the building where he resides. Vol. 1, p. 93, § 3219. See Laws of 1882, chap. 410 (Vol. 2, p. 340), § 1305.

§ 7. **The order of arrest.** The plaintiff having made application for the order upon an affidavit or affidavits showing a proper case for the arrest of the defendant, and having furnished a written undertaking complying with the requirements of the statute and the directions of the justice as to sureties and amount, the order issues as a matter of right.

The order must be subscribed by the justice, and be indorsed upon or attached to the summons. It must briefly recite the ground of arrest, and must direct the constable who serves the summons to arrest the defendant, to bring him forthwith before the justice, and to notify the plaintiff of the arrest if he can do so with reasonable diligence. Vol. 1, p. 11, § 2897.

The general provisions of the Code as to the form and contents of a

The order of arrest.

mandate issued by a justice of the peace apply to an order of arrest. See *ante*, 101-105.

An order of arrest in an action brought in the justice's court of Albany, or the justice's court of Troy, and the manner of applying for, granting and executing such order, are governed by statutes specially applicable to those courts. Vol. 1, p. 90, § 3211.

An order of arrest issued out of a District Court of the city of New York must direct that the summons accompanying it be made returnable immediately upon the arrest of the defendant, and must specify a sum in which the defendant may be let to bail. The mode of applying for an order of arrest in a District Court, the granting and execution of the order and the proceedings subsequent to the order, with the exception of letting the defendant to bail, are governed by the statutes applying to and regulating applications in that court for a warrant to arrest a defendant. See vol. 1, p. 93, § 3218. See Laws of 1882, chap. 410, §§ 1307, 1308.

The order of arrest issued by a justice of the peace may be in the following form :

Order of arrest.

JUSTICE'S COURT.

John Dye <i>agst.</i> Daniel Shea.	}	Before JAMES M. KENNEDY, <i>Justice</i> .
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TOWN OF JOHNSTOWN, } *ss.* :
Fulton County,

In the name of the People of the State of New York, to any constable of said county who serves the summons herein, greeting :

The plaintiff herein having applied to me as a justice of the peace of said county for a summons herein, and I issuing the same, and at the same time when the summons is issued the plaintiff having applied to me, as such justice of the peace, to grant an order for the arrest of the defendant, and it appearing to me, as such justice of the peace, by the affidavit of John Dye, the above-named plaintiff, that a sufficient cause of action exists against the defendant, and that the case is within the provisions of sections 2894 and 2895 of the Code of Civil Procedure, to-wit: That the defendant is not a resident of the county of Fulton; and that the action is brought to recover the sum of \$150 as damages sustained by the plaintiff by reason of the wrongful

Execution of the order and return thereto.

taking and conversion by the defendant of personal property of the plaintiff, to-wit, fifteen dozen gloves valued at \$10 per dozen; and I, before granting this order of arrest, having required a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties approved by me as such justice of the peace, to the effect required by law, and the same having been duly given, executed and delivered, and it appearing to me that there is ground as aforesaid for the arrest of the defendant: Now, therefore, you the said constable who serve the summons herein are hereby directed to arrest the defendant, to bring him forthwith, before me, the said justice of the peace, and to notify the plaintiff of the arrest if you can do so with reasonable diligence.

Dated at the town of Johnstown aforesaid this 16th day of February, 1882.

JAMES M. KENNEDY, *Justice of the Peace.*

§ 8. **Execution of the order and return thereto.** The constable to whom the summons and order of arrest is delivered must serve the summons as in other cases, and at the same time must arrest the defendant.

An arrest is the apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action. No manual touching of the body or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer and submits to the arrest. And, therefore, if a constable has an order of arrest, and he goes to the defendant and informs him of that fact, and the defendant voluntarily accompanies the officer, it will be an arrest. See *Gold v. Bissell*, 1 Wend. 210, 215.

As to the time of executing the order the statute is silent except so far as it provides that the order shall be executed at the time of serving the summons. A summons cannot be lawfully served after its return day, and a summons accompanying an order of arrest is made returnable immediately upon the arrest of the defendant within twelve days after the day when it was issued. Vol. 1, p. 5, § 2877. The only limitation, therefore, as to the time of executing the order is that it shall be executed within twelve days after the day when it was issued. The arrest should be made at the earliest day possible; and if the defendant is absent from the county or keeps concealed therein, so that no arrest can be made before the return day of the summons accompanying the order, the constable should return the summons with a statement

Execution of the order and return thereto.

of the reason why it was not served, and thereupon a new summons may issue as hereinbefore explained. See *ante*, 138, 139.

When the name of the defendant is not known, he may be arrested although a fictitious name is given to him in the order. But, in this case, the constable must exercise great care, for if he arrests any other person than the one intended, he will be liable to an action for a false imprisonment. If the defendant is not present, the constable should require the plaintiff to accompany him in making the arrest, or to send some other person to point out the individual whom he wishes to have arrested. If the plaintiff refuses or neglects to do either, the constable should refuse to execute the process.

The manner of making an arrest has been partially explained, and so far as relates to what may constitute an arrest. But a few more remarks are necessary, since there may be cases in which the defendant will not peaceably accompany the officer. The first duty of an officer is, to notify the defendant that he has an order for his arrest. The officer may at the same time lay his hand gently upon the shoulder or the person of the defendant, although this is not necessary if the defendant submits to the arrest and accompanies the officer. If the defendant should attempt to evade an arrest by running away, or by attempting to secrete himself, it is the duty of the constable to pursue him and take him into actual custody; and if it is necessary, the officer may use such force as may be necessary to accomplish the arrest. And in all cases of resistance to the officer in executing the order, it is his duty to meet and overcome such resistance. And if third persons aid the defendant, they should be arrested and carried before a justice or other proper magistrate to be held to bail for trial. For it is an indictable offense to resist an officer in the execution of the duties of his office, or to aid another person in doing so. The constable may, in case of apprehended resistance, by a proper certificate in writing, transfer his duties under the order to the sheriff of the county. See vol. 1, p. 88, § 3158.

It was held, under the old practice, that a regular officer having a civil warrant for the arrest of the defendant, and acting within his proper district, was not bound to show his warrant for the arrest, even upon demand. *Arnold v. Steeves*, 10 Wend. 514. But that either before or at the moment of the arrest the officer was bound to give the substance of the warrant, or to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice. This is, however, when the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. *Bellows v. Shan-*

Execution of the order and return thereto.

non, 2 Hill, 86. If, however, the justice deputed a private citizen for the purpose of executing the warrant, the person so deputed was bound to show his process if the defendant requested him to do so, as otherwise the defendant would be justified in resisting an arrest. *Arnold v. Steeves*, 10 Wend. 514; *Frost v. Thomas*, 24 id. 418. Under the present practice, a justice of the peace may empower a person of full age and not a party to the suit to execute an order of arrest, and, with the exception of a right to compensation for the service, the person so empowered has all the power and authority and is subject to all the obligations and liabilities of a constable. See vol. 1, p. 87, § 3156. It may be doubted if the person so deputized would be under greater obligation to show his process upon demand than a constable acting in a similar matter. Any officer serving a mandate must, upon the request of the person served, deliver a copy to him without compensation. Vol. 1, p. 109, § 101.

A constable cannot, in any case, break open the defendant's dwelling-house to arrest him in the first instance. And a breaking, in such a case, need not be a violent forcing of the locks or fastenings of the doors. If the outer door is merely latched, it will be a breaking to merely unlatch it and enter the house. If a constable does thus unlawfully enter the defendant's house, the defendant, and any other person therein, may lawfully resist the officer in making the arrest. *People v. Hubbard*, 24 Wend. 368; *Curtis v. Hubbard*, 4 Hill, 437; *Glover v. Whittenhall*, 6 id. 597.

If the outer doors of the house are any of them open, the officer may lawfully enter the house and arrest the defendant if he is found therein. If the front door of the defendant's house is usually kept fastened, the constable may enter by a back door if it is open, and he may then break any inner doors for the purpose of making an arrest. *Hubbard v. Mace*, 17 Johns. 127. He should make a demand to have the door opened, however, before breaking it open. The officer will not be justified in obtaining an entrance into the outer door by a fraud; nor, if the door is opened by any person in answer to a knocking at such door or the ringing of the door-bell, will he be justified in forcibly rushing in and thus gaining admission. Crocker on Sheriffs, § 312. A dwelling-house is a protection to all persons who are members of the family. And it is also a protection to all the persons who board there, and make it their home, including servants of the family, etc. But it is no protection to a stranger; and if a stranger is in the house, it is the duty of the owner, on the demand of the constable, to open the door. And if the owner refuses to do so, after a proper demand, the

Execution of the order and return thereto.

constable may lawfully break the door, though he should do no unnecessary damage to the house. But in such a case the constable should be certain that the person whom he wishes to arrest is in the house; for if it should turn out that no such person was in the house at the time of the breaking, the officer will be liable to an action for the trespass. Where the defendant owned a house, and he let all of the house but one room, which he reserved for himself, it was held that a constable might enter the outer door of the house, which was open, and that he might then break the inner door, and arrest the defendant. *Williams v. Spencer*, 5 Johns. 352.

This privilege from arrest in the defendant's dwelling-house extends to all buildings which constitute a part of the dwelling-house itself. But it does not extend to a barn, or shop, or store, or warehouse, and the like buildings, if they are disconnected from the dwelling-house, and they do not form a part of the curtilage. *Haggerty v. Wilber*, 16 Johns. 287. The curtilage is the open space situated within a common inclosure belonging to a dwelling-house. There are instances in which an officer may break open the defendant's dwelling-house, although it cannot be done in the first instance. If the defendant has been arrested outside of his dwelling-house, and he escapes from the officer without his consent, and against his will, and he then seeks to shelter himself from being rearrested by shutting himself into his dwelling-house, this will not be of any avail. If the officer immediately pursues the defendant, he may break open the door for the purpose of retaking the defendant, and he is not bound in such a case to demand admittance before breaking the outer door. *Allen v. Martin*, 10 Wend. 300. But it is the better practice in all cases to demand admission before breaking open the outer door.

The duty of the constable in relation to taking the defendant before the justice, after the arrest, is declared in language too explicit to be misunderstood. It must be done *forthwith*. This is the requirement of the statute in relation to the command which the order shall contain; and it is the requirement which is made upon the constable after the arrest.

The constable has no right to consult his own convenience, his interest, or his inclinations in the matter. If the defendant is arrested at any time in the day, so that he may reasonably be taken before the justice by eight or nine o'clock in the evening, it is the duty of the constable to do so. And, especially, is it the duty of the officer to do it if the defendant insists upon having it done.

Circumstances may make it more convenient for the officer in some

Execution of the order and return thereto.

cases than in others. The defendant and the plaintiff, the justice and the constable, may, in some cases, all reside in the same city, village or neighborhood. In that case there would not need to be much delay in attending before the justice. In other cases, all the parties may reside at considerable distance from the justice, or the defendant may be arrested at a distance from the justice's office. In such cases the officer should act diligently in relation to taking the defendant before the justice. He need not travel all night, nor later than the usual hours of the evening. There may be causes which will unavoidably delay an officer. His conveyance may become useless, and other similar things may hinder and embarrass him. His duty is to act as promptly as possible to remedy the difficulty, and to discharge his duty.

There is no rule of law which will now permit an officer to do any thing less than to act as promptly as he is able. Any unnecessary delay in taking the defendant before the justice will make the constable liable in an action. In one case, *Pratt v. Hill*, 16 Barb. 303, a justice had issued a criminal warrant, and the defendant had been arrested late on Saturday night. The defendant was not taken before the justice at his office; but the justice had indorsed upon the warrant, before it was issued, an indorsement as follows: "Commit the within-named Rufus Pratt till next Monday for examination," which was dated and signed by the justice. The defendant was accordingly committed, and both the justice and the constable were held liable for a false imprisonment. The court said: "The law watches personal liberty with vigilance and jealousy; and whoever imprisons another in this country must do it for lawful cause, *and in a legal manner*." 16 Barb. 308. The constable was held liable for obeying the indorsement, which was no part of his warrant, and was entirely illegal. His duty was to take the defendant before the justice forthwith. If the justice cannot authorize the constable to disregard the command which is contained *within the order*, it is quite clear that the constable will not be any better off if he neglects his duty of his own motion.

If the justice who issued the order of arrest is absent or unable to try the action, the constable must forthwith take the defendant before another justice of the same town or city who must take cognizance of the action, and proceed therein as if the summons had been issued and the order of arrest had been granted by him. Vol. 1, p. 11, § 2898.

There is another contingency upon which the constable must take the defendant before another justice. If the defendant before issue is joined presents to the justice who issued the summons and order of arrest satisfactory proof by affidavit that the justice is a material witness

Execution of the order and return thereto.

for the defendant without whose testimony he cannot safely proceed to trial, setting forth therein the particular facts and circumstances which he expects to prove by him, the justice must forthwith make a written order directing the action to be continued before another justice of the same town or city named in the order. The constable must forthwith take the order and all other papers in the action, with the body of the defendant, before the justice named in the order. The plaintiff must appear before that justice, who must take cognizance of the action and proceed therein as if it had been commenced before him. Vol. 1, pp. 86, 87, §§ 3151, 3152.

In the case of the absence of the justice at the time that the defendant is brought in under arrest, it is clear that no order could be made transferring the case to another justice, and when the justice is present but unable to try the action, the statute makes no provision for an order continuing the case before any other justice. The statute points out the duty of the constable in such case, and the duty of the justice before whom the defendant is taken. The evidence of the authority of the justice to take cognizance of the case will be furnished by the return of the constable of his proceedings under the summons and order of arrest.

The constable upon finding the justice who issued the summons and order present and able to try the action, or in case that justice is absent or unable to try the action, then upon finding another justice of the same town or city who is present and able to try the action, must forthwith deliver to the justice the order and a written return thereto, under his hand, stating the manner in which he executed it, and either that he has notified the plaintiff or that he could not do so with reasonable diligence. Vol. 1, p. 11, § 2899.

Giving notice to the plaintiff of the arrest of the defendant is made by the statute a part of the execution of the order of arrest, and is as clearly a part of the duty of the constable as the making of the arrest, if he can give the notice with reasonable diligence. See *id.*, § 2897. As the giving of this notice is a part of the execution of the mandate the notice must be given by the constable in person. He cannot act by deputy in any case. See vol. 1, p. 87, § 3157. He cannot lawfully return that he has notified the plaintiff when he has merely sent a notice by a third party. It is his personal acts in the execution of the order that he is to return and not the acts of third persons.

Proceedings upon the return of the order.

Forms of returns.

FULTON COUNTY, ss. :

I do hereby certify that I have executed the within order of arrest by arresting the defendant, and forthwith bringing him here before the court in custody ; and also that I have notified the plaintiff of the arrest.

Dated *February* 18, 1882.

JACOB PLANTZ, *Constable.*

FULTON COUNTY, ss. :

I do hereby certify that I have executed the within order of arrest, by arresting the defendant, and forthwith taking him before the justice issuing the same, and because the said justice was unable to try the action, by forthwith bringing the defendant here in custody before another justice of the same town ; and also, that I have not been able, with reasonable diligence, to notify the plaintiff of the arrest.

Dated *February* 18, 1882.

JACOB PLANTZ, *Constable.*

§ 9. **Proceedings upon the return of the order.** When the constable returns that he has notified the plaintiff of the arrest of the defendant, the plaintiff must appear within one hour after the defendant is brought before the justice, otherwise a judgment of nonsuit must be rendered against him. Vol. 1, p. 11, § 2899. If the plaintiff appears within the hour, and the defendant makes no immediate application for his discharge from arrest, the plaintiff should file his complaint with the justice, or state orally the facts constituting his cause of action. If the defendant desires to apply for his discharge from arrest he may make the application immediately upon the appearance of the plaintiff before the justice, or he may wait until the complaint has been filed or made. In the first case the application will be founded upon the insufficiency of the affidavit and undertaking upon which the order was issued, while in the second case it may also be based upon the complaint. Vol. 1, p. 12, § 2901. The proceedings upon an application of this nature will be explained in a subsequent section. If the justice is a material witness for the defendant, the latter before answering should make the proper affidavit and procure an order continuing the action before another justice. Vol. 1, pp. 86, 87. If he has no preliminary applications to make, the defendant should join issue. The parties may thereupon proceed to trial, or either party may have an adjournment upon the same grounds as in actions in which no order of arrest has issued. Vol. 1, p. 32. The justice can adjourn the trial upon his own motion. Vol. 1, p. 31. If the constable does not return that he has

Privilege from arrest.

notified the plaintiff of the arrest, the constable executing the order, or another constable by the direction of the justice, must keep the defendant in custody until he is discharged by the order of the justice, or judgment is rendered in his favor. But the detention cannot in any case exceed twelve hours from the time when the defendant is brought before the justice, unless within that time a *venire* is issued, or the trial of the action is commenced, or unless either is delayed with the express assent of the defendant. Vol. 1, p. 11, § 2900.

This limitation of the time during which the defendant may be detained in custody without a trial was designed to prevent the process of the court from being made an instrument of oppression and abuse, while the time allowed is ample to permit the constable to give notice to the plaintiff of the arrest, and to permit the plaintiff to prepare for trial.

§ 10. **Privilege from arrest.** A person duly and in good faith subpœnaed or ordered to attend for the purpose of being examined in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding while he is going to, remaining at, and returning from the place where he is required to attend. Vol. 1, p. 132, § 860. And see *Coles v. McCollum*, 4 Hill, 59; *Hardenbrook's Case*, 8 Abb. 416. An arrest of a witness under such circumstances is absolutely void, is a contempt of court, and lays the person making the arrest liable to a suit by the person arrested, and by the party at whose instance the witness was subpœnaed or ordered to attend. Vol. 1, p. 132, § 863. A person attending as a witness upon the trial of an action to which he is a party is privileged from arrest upon civil process. *Mackay v. Lewis*, 7 Hun, 83. But the privilege conferred by the statute does not extend to a witness voluntarily attending upon a trial under no compulsion of process. *Hardenbrook's Case*, 8 Abb. 416.

An officer of a court of record, appointed or elected pursuant to law, is privileged from arrest during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or counselor is not thus privileged unless he is employed in a cause to be heard at that term. Code of Civil Pro., § 565.

Parties to a suit, in any court, are exempt from arrest while going to the court and attending it, and while returning home. They are exempt, during the trial, until the verdict of the jury is rendered, or they are discharged by the court, and a reasonable time thereafter to return home. *Clark v. Grant*, 2 Wend. 257.

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It seems that a suitor is protected from arrest upon civil process while attending at any proceeding of a judicial character. *Moore v. Booth*, 3 Ves. 350; *Willingham v. Matthews*, 6 Taunt. 356; *Salhinger v. Adler*, 2 Rob. 704; *Clark v. Grant*, 2 Wend. 257.

A party attending a reference, is entitled to the same exemption as when attending a trial in court. It extends to the time in going, and during the time of the hearing, and until a reasonable time to return home. *Ib.* The general rule is, that the parties and all persons who have any relation to the suit are exempt from arrest while going to court, attending it, and returning home. This would include bail, guardians and the like. *Grah. Pract.* 129, 2d ed.

The privilege seems to be still broader in respect to residents of a foreign State; and it would seem that a non-resident party or witness cannot be served with a summons for the commencement of a civil action against him while he is going to, attending, or returning from the court. *Person v. Grier*, 66 N. Y. 124; S. C., 23 Am. Rep. 35; *Grafton v. Weeks*, 7 Daly, 523. But see *Jenkins v. Smith*, 57 How. 171.

Jurors are exempt from arrest while going to, attending and returning home from the court at which they are summoned.

"No acting commissioner, superintendent of repairs, collector or lock-keeper on any canal shall be held to bail, or taken by warrant in any civil suit for any act done or omitted to be done by him in the exercise of his official duties." 1 R. S. 224, § 43, 1st ed.; 1 R. S. 588, § 61, 5th ed.

"No person belonging to the military forces shall be arrested on any civil process, while going to, remaining at, or returning from any place at which he may be required to attend for election of officers or other military duty." Laws of 1858, chap. 129, § 17; 1 R. S. 771, § 22, 5th ed. "For the purpose of preserving order on the day of parade, the militia shall be considered as under arms from the rising of the sun to its setting on the same day, and shall be exempted from arrest on civil process during that time." 1 R. S. 303, § 27, 1st ed.; 1 R. S. 742, § 38, 5th ed. See Laws of 1870, chap. 80, § 257.

Members of the State legislature, which includes senators and members of assembly, are exempt from arrest for fourteen days preceding the session, during their attendance there and while returning home, if the time of returning does not exceed fourteen days; so each member is exempt during any adjournment if it does not exceed fourteen days, and in all cases during the time he may be absent by leave of the house. No officer of either house is liable to arrest while in actual

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attendance of the house. 1 R. S. 154, §§ 6-9, inclusive, 1st ed.; 1 R. S. 455, §§ 6-9, inclusive, 5th ed. This exemption is not allowed if the process is issued against the defendant for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him. *Ib.* So the exemption is at an end if the defendant has returned home, although the fourteen days have not expired. *Corey v. Russell*, 4 Wend. 204. Senators and representatives in Congress, foreign ministers, etc., are exempt. But there are so few cases in which a justice would be authorized to issue a warrant against a member of Congress, or a member of the State legislature, or a foreign minister, that no further notice will be given to the subject.

Voters at an election or a town meeting are exempt from arrest on that day, and in the town in which they are entitled to vote. See 1 R. S. 342, § 10; Laws of 1842, chap. 130, § 4; Laws of 1878, chap. 354, § 1.

A female is not, as has sometimes been stated, privileged from arrest upon an order of arrest issued by a justice of the peace, but the statute declares that an order of arrest cannot be granted when the defendant against whom it is applied for is a female. Vol. 1, p. 10, § 2894. In case such an order should be issued against a female and she should be arrested thereunder, her remedy would not be to apply for her discharge from arrest, as a privileged person, but to make the application to the justice who issued the order in the manner pointed out by section 2901 of the Code of Civil Procedure, upon the ground that the order was unauthorized by the statute.

The mode of obtaining the discharge of a person privileged from arrest will be pointed out in the next section.

§ 11. **Discharge from arrest.** A person arrested under an order of arrest issued by a justice of the peace is entitled to obtain his discharge from arrest in either of the following cases:

1. When at the time of arrest he was privileged from arrest under some statute or rule of the common law as stated in the preceding section.

2. When the order of arrest issued in a case not within the provisions of sections 2894 and 2895 of the Code of Civil Procedure. Vol. 1, p. 12, § 2901.

3. When the plaintiff has united in his complaint a cause of action not enumerated in section 2895 of the Code of Civil Procedure, with one or more causes of action specified in that section. See *Madge v. Ping*, 71 N. Y. 608; *Smith v. Knapp*, 30 id. 581; *McGovern v. Payne*, 32 Barb. 83.

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4. When the defendant was enticed within the county of a constable holding an order for his arrest by means of any false statement or fraudulent pretense made for the purpose of effecting such arrest. *Goupil v. Simonson*, 3 Abb. 474; *Benninghoff v. Oswell*, 37 How. 235; *Metcalf v. Clark*, 41 Barb. 45; *Carpenter v. Spooner*, 2 Sandf. 717.

5. Where the constable has returned that he has notified the plaintiff of the arrest and the plaintiff does not appear within an hour after the time the defendant is brought before the justice. Vol. 1, p. 11, § 2899.

6. In any case, when twelve hours have elapsed since the time the defendant was brought before the justice, and the trial of the action has neither been commenced, nor a venire issued, and neither the commencement of the trial nor the issuing of a venire has been delayed with the express consent of the defendant. Vol. 1, p. 11, § 2900.

7. When the trial of the action is adjourned by consent, or upon the application of the plaintiff. Vol. 1, p. 33, § 2964.

8. When the trial of the action has been adjourned upon the request of the defendant, and he has given the undertaking to the plaintiff required by the statute. Vol. 1, p. 32, § 2963.

9. When the judgment is in favor of the defendant.

10. When the judgment is in favor of the plaintiff and he fails to take out an execution in his favor before the expiration of one hour after he is entitled thereto. Vol. 1, p. 12, § 2901.

11. When the order issued out of a District Court of the city of New York, and the defendant has given bail, or made a deposit with the officer of the sum specified in the order of arrest. Code of Civil Pro., § 3180. See Vol. 1, p. 93, § 3218; Laws of 1882, chap. 410, § 1311.

The mode of obtaining a discharge from arrest in any of the cases specified will be considered in the order above indicated.

Where a witness has been arrested under an order of arrest issued by a justice at a time when he was privileged from arrest, as stated in the preceding section, he should prepare an affidavit setting forth the arrest and the facts entitling him to his discharge. The affidavit should state that without deponent's own procurement and without intent of avoiding arrest, he was duly subpœnaed or ordered to attend before some court or officer as a witness for the purpose of being examined. The affidavit should specify the court or officer, the place of attendance, and the cause in which he was so subpœnaed or ordered. It should also state that at the time of the arrest, the deponent was in attendance at the place specified as such witness or going to or returning from such place. The witness should present this

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affidavit to the constable making the arrest, and demand his discharge. The constable must discharge him or incur a liability to an action by the party arrested in which treble damages may be recovered, and also to an action by the party in whose behalf the witness was subpoenaed to recover the damages sustained by him in consequence of the arrest. The affidavit may be taken by the constable and it will exonerate him from liability for not making the arrest. Vol. 1, pp. 132, 133, §§ 863, 864.

Instead of making application for his discharge to the constable, as above stated, or in case that officer refuses to discharge him, the witness may obtain an order for his discharge upon the application to the justice before whom he is brought, based upon the same, or upon a similar affidavit. Vol. 1, p. 12, § 2904. So upon such an affidavit the witness may obtain an order for his discharge upon application to the court from which the subpoena issued, or to a judge of that court, or to a justice of the supreme court in any part of the State, or to a county judge, or judge of a superior city court in his district. Vol. 1, p. 132, §§ 861, 862.

Any other privileged person is entitled to be discharged from arrest by an order of the justice before whom he is brought upon proof by affidavit of the facts entitling him to a discharge. Vol. 1, p. 12, § 2904. So upon a similar affidavit he may apply to the court, or to judge thereof, or to the county judge of the county, or a judge of a superior court of the city where the arrest was made, and obtain an order for his discharge. This order may be made without notice or upon notice as the court or judge may direct. Vol. 1, p. 12, §§ 2904, 564.

Form of affidavit showing privilege from arrest.

JUSTICE'S COURT.

James Sykes <i>agst.</i> Harvey Van Horn.	}	Before WILLIAM HARDY, <i>Justice</i> .
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MONTGOMERY COUNTY, ss. :

Harvey Van Horn, being duly sworn, says that he is the defendant in the above-entitled action, and resides at Little Falls in the county of Herkimer; that about one hour since deponent was arrested near the railroad depot in the village of Fonda, by John Jones, a constable, by virtue of an order of arrest issued by William Hardy, a justice of the peace, to accompany the summons in this action; that at the time of said

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arrest deponent was on his way from his residence aforesaid to the court-house in the village of Fonda to attend as a witness a term of the Montgomery County Court in obedience to a subpoena issued out of said court and duly served upon deponent, commanding him to appear at a term of that court to be held at the court-house aforesaid on the 17th day of April, 1882, at ten o'clock in the forenoon of that day, to testify as a witness in an action pending in that court, and then and there to be tried, between Douw Van Schoick, plaintiff, and Christian Van Wert, defendant, on the part of the plaintiff.

And deponent further says, that the said subpoena was served upon him by exhibiting to him the original subpoena, by delivering to him a ticket containing its substance, and at the same time paying to him the fees allowed by law for traveling to and returning from said court-house; that deponent was so subpoenaed in good faith, without his procurement and without intent of avoiding arrest.

Subscribed and sworn to before me, { HARVEY VAN HORN.
 this 17th day of April, 1882. }

WILLIAM HARDY, *Justice of the Peace.*

Form of order discharging privileged person.

(*Title of the cause.*)

On reading and filing the affidavit of Harvey Van Horn, the defendant in this action, by which it appears that he was arrested herein while privileged from arrest by reason of being at the time upon his way to attend, as a witness, a term of the Montgomery County Court, in obedience to a subpoena duly and in good faith served upon him to obtain his testimony in a case now pending in that court, and on application of said defendant it is

Ordered, that said defendant be forthwith discharged from arrest.

Dated *April 17* 1882.

WILLIAM HARDY, *Justice.*

When the application for a discharge from arrest is made upon the ground that the order was granted in a case not authorized by sections 2894 and 2895 of the Code of Civil Procedure, the application may be founded upon the papers upon which the order of arrest was granted and upon the complaint if it has been made. The application may be made without notice upon the appearance of the plaintiff before the justice, or at any time afterward before judgment upon two days' notice given personally to the plaintiff, or to his agent or attorney who

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appeared for him before the justice. Vol. 1, p. 12, § 2901. The statute provides that the plaintiff *may* found his application for discharge upon the papers upon which the order of arrest was granted, and upon the complaint, if one has been made, but does not in terms prohibit the use of other affidavits upon the motion. A careful examination of the authorities bearing upon questions of practice of this nature would seem to indicate, however, that where a statute, by the use of permissive terms, gives a party a right to base an application for an order vacating a provisional remedy upon certain specified papers, the statute is to be construed as restricting the party to the remedy expressly given to the exclusion of all others; and that where a party has claimed the right to introduce affidavits in support of, or in opposition to, such an application, the courts have determined the existence of that right by the authority expressly conferred by the statute. The fact, too, that the statute expressly provides that a defendant, moving to vacate an order of arrest in a court of record, may base his motion either upon the papers upon which the order was granted, or upon new affidavits controverting the case made in the plaintiff's affidavits, but does not contain a similar provision in respect to the introduction of affidavits on the part of the defendant upon his application for his discharge from arrest in courts not of record, is at least presumptive evidence that in the latter case the legislature intended that the application should be based solely upon the original papers and the complaint, if made. See Code of Civil Pro., § 568. This construction of the statute will result in little prejudice to a defendant under arrest, as it is a general rule that when the facts constituting the cause of action and those authorizing the arrest are identical, the court will not try the merits of the action upon affidavits introduced as the foundation of an application for the discharge of the defendant from arrest; and that whenever, upon such application, the point is reached, requiring the examination of the merits of the action upon conflicting affidavits, they will deny the motion except in rare and exceptional cases. See *Griswold v. Sweet*, 49 How. 171; *People v. Clark*, 45 id. 12; *Stuyvesant v. Bowran*, 34 id. 51; S. C., 3 Abb. (N. S.) 270; *Welch v. Winterburn*, 14 Hun, 518; *Peck v. Lombard*, 22 id. 63; *Frost v. M' Carger*, 14 How. 131; *Nelson v. Blanchfield*, 54 Barb. 630; *Merrett v. Heckscher*, 50 id. 451; *Ely v. Mumford*, 47 id. 629; *Barret v. Gracie*, 34 id. 20; *Yates v. North*, 44 N. Y. 271, 276. But see *Liddell v. Paton*, 7 Hun, 195.

In case the defendant elects to defer the application to the justice, for his discharge from arrest to some time after the joinder of issue,

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he should give to the plaintiff, or to the person who appeared for the plaintiff on the return of the summons, two days' notice of the application. This notice should be in writing, entitled in the action, signed by the defendant and addressed to the person to be served. It may be in the following form :

(*Title of the cause.*)

Take notice, that upon the affidavit upon which the order of arrest was granted in the above-entitled action, and upon the complaint of the plaintiff, an application will be made to....., justice of the peace, at his office in the town of....., on the..... day of....., 1882, at ten o'clock in the forenoon of that day for an order discharging the defendant from arrest.

Dated....., 1882.

RICHARD ROE, *Defendant.*

To JOHN DOE, *Plaintiff* (or to....., *Attorney for JOHN DOE, Plaintiff*).

A copy of this notice should be made and retained to accompany the proof of service. An affidavit of service must be prepared, and presented to the justice, at the time fixed for the hearing of the motion, unless the plaintiff appears to oppose the motion.

If the application for the discharge of the defendant is based solely upon the affidavit upon which the order of arrest was granted, the statements of fact contained therein, being uncontradicted, are to be taken as true. But as the statements are made by the plaintiff in his own language and manner, and in his own behalf, they are to be taken as made in the manner most favorable to himself that the facts would permit, and, therefore, are to be construed strictly against him. *Hathorn v. Hall*, 4 Abb. 227. See *Wolfe v. Brower*, 5 Rob. 601; *Union Bank v. Mott*, 9 Abb. 106; S. C., 17 How. 353.

The Code provides that "the justice must grant the application when it appears that the case is not within the provisions of sections 1894 and 2895 of this act." Vol. 1, p. 12, § 2901. This language is not equivalent to a declaration that the justice must grant the application when it does *not* appear that the case is within the provisions of the sections mentioned, but makes it obligatory upon him to discharge the defendant only when it affirmatively appears from the plaintiff's affidavit, or complaint, that the case is not within the provisions of those sections. This distinction is clearly pointed out in the cases construing the latter clause of section 558 of the Code of Civil Procedure. See

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Bowery Nat. Bank v. Duryee, 74 N. Y. 491, 493; *Genesee River Nat. Bank v. Mead*, 18 Hun, 303; *Sloan v. Livermore*, 55 How. 85; *Williams v. Norton*, 54 id. 509; *Thompson v. Friedberg*, id. 519. If the complaint is used upon the application, and shows that the action is brought for a cause not specified in section 2895 of the Code of Civil Procedure, the defendant must be discharged. So, if a cause of action not specified in that section is joined in the complaint with a cause of action specified therein, it will appear that the case is not within the provisions of sections 2894 and 2895, and the defendant must be discharged. See *ante*, 146. If the order of arrest was granted upon the ground that the defendant was about to depart from the county with intent not to return thereto, and the affidavit upon which the order was granted states that intent upon information and belief, without stating the facts inducing such belief, or giving the sources of such information, or if the sources of information are given, without showing that the persons from whom the plaintiff professes to have obtained the information are absent, or that their depositions could not be procured, then the defendant should be discharged, as the case would not be within the provisions of section 2894 of the statute, which requires that the fact that defendant is about to depart from the county, with intent not to return, shall be made to appear, by affidavit, to the satisfaction of the justice. That satisfaction, as we have seen, is a *legal* satisfaction, founded upon legal proof, and the statute will not be satisfied by any thing short of this. See *People v. Sutherland*, 81 N. Y. 1; *ante*, 117. If, however, in granting the order of arrest, the justice acted upon any legal evidence tending to make a case within the provision of the section cited, no matter how light and inconclusive that evidence may appear to others, it will not be error for him to deny the application for the defendant's discharge.* See *Steuben County Bank v. Alberger*, 78 N. Y. 252, 258.

The order for the defendant's discharge may be in the following form :

Order for defendant's discharge.

(*Title of the cause.*)

The defendant having made application for his discharge from arrest under an order issued to accompany the summons in this action, and * after hearing (the counsel for) the several parties herein *, it appearing from the papers upon which said order was granted (and from the plaintiff's complaint herein) that the case is not within the provisions of sections 2894 and 2895 of the Code of Civil Procedure,

Discharge from arrest.

Ordered, That the said defendant be forthwith discharged.
Dated....., 1882.

Y. Z., *Justice of the Peace*.

If the application is made upon notice, omit the matter included in the foregoing form between the * * and insert in its place the following: "After reading and filing the notice of such application, and proof of due and personal service thereof upon the plaintiff, no one appearing in opposition, and," etc.

When the defendant seeks an order discharging him from arrest upon the ground that he has been induced by fraud and false pretense to come within the jurisdiction of the court for the purpose of accomplishing his arrest, he should prepare an affidavit setting up the facts and apply upon such affidavit for an order setting aside the service of the summons and order of arrest. This application should be made before the defendant has appeared generally in the action; and at the time of making it the defendant should give notice that he appears specially for the purpose of making such application, and for that purpose only. The justice has power to grant an application of this nature independently of any statute if the facts support the application.

A justice of the peace is bound to take judicial notice of proceedings had before him; and, therefore, when the defendant claims his discharge upon the ground that the plaintiff has failed to appear within the hour; or that the trial has not been commenced nor a venire issued within twelve hours after the defendant was brought before the justice; or that the trial has been adjourned by consent, or upon the request of the plaintiff; or that judgment has been rendered in favor of the defendant; or that the plaintiff has failed to take out an execution in his favor within an hour after he is entitled thereto,—no affidavit is necessary to sustain an order for the defendant's discharge. A brief order, entitled in the cause, dated, signed by the justice, and containing a recital of the application, the facts entitling the defendant to the relief demanded, and the usual direction for his discharge is all that should be required. The order will be entered in the docket, and will be the protection of the officer having the defendant in custody.

A defendant who has failed or neglected to obtain his discharge upon an application made in any of the modes before mentioned may join issue, and upon making the oath prescribed by section 2961 of the Code, if such oath is required by the plaintiff or the justice, and upon giving the undertaking specified in section 2963 of that act, obtain an adjournment of the trial and his discharge from custody. An

Proceedings after discharge.

undertaking executed by one surety will be sufficient and the defendant need not join with the surety or sureties in its execution. The undertaking must be acknowledged or proved, approved by the justice, and filed. See vol. 1, p. 32, § 2963; id., p. 124, §§ 810-812. It may be in the following form:

Defendant's undertaking on arrest.

JUSTICE'S COURT.

Henry Hudson
agst.
Thomas Selfridge.

} Before HARVEY BIRCH, *Justice*.

The plaintiff having obtained from the said justice an order of arrest herein, upon which the defendant has been arrested, and said defendant having applied for an adjournment of the trial, in order to enable said defendant to procure such an adjournment without continuing during the time of adjournment in the custody of the constable:

Now, therefore, we, Thomas Selfridge, defendant, and Thomas Hill and Michael Savage, his sureties, do hereby jointly and severally undertake to the said plaintiff that if the plaintiff recovers judgment in the action, and if an execution is issued thereupon against the person of the defendant within ten days after the plaintiff is entitled to the same, and if a return is made thereto, on or after the return day thereof, that the defendant cannot be found, the sureties will pay to the plaintiff the amount due upon the judgment.

Dated the 22d day of April, 1882.

(Signature of defendant and sureties.)

(Add acknowledgment, justification and approval as in form on pages 153, 154, ante.)

§ 12. **Proceedings after discharge.** The discharge of the defendant from arrest before judgment, as prescribed in section 2901 or section 2963 of the Code, does not affect the jurisdiction of the justice over the action, but the action must proceed as if it had been commenced in the ordinary manner. The discharge of the defendant from arrest after judgment, upon the ground that the plaintiff has failed to take out an execution within an hour after he was entitled thereto, does not affect the execution. Vol. 1, p. 12, § 2902.

If an order of arrest has been granted and executed in a case specified in subdivision third of section 2895 of the Code, vol. 1, p. 10, the plaintiff cannot recover upon a default, and the defendant is entitled

Proceedings after discharge.

to judgment upon a trial, unless the plaintiff establishes all the matters of fact which are required by that subdivision to entitle him to an order of arrest. Vol. 1, p. 12, § 2903.

CHAPTER IX.

ATTACHMENT OF PROPERTY.

SECTION 1. General nature of the remedy. A warrant of attachment is a mere provisional remedy, which may or may not issue in certain actions, and under certain circumstances, at the option of the plaintiff. When the warrant issues, it accompanies the summons, and is served with it. The object of the remedy is merely to retain the property of the defendant within the jurisdiction of the justice, and in the custody of the law, subject to the execution which may be issued upon the judgment in the action, in case the plaintiff shall ultimately succeed therein. It is the object of the law to give to every person a prompt and effective remedy, and as nearly as possible to provide for every particular case. For ordinary cases an ordinary remedy is sufficient. But when that fails, or when if resorted to it would be ineffectual, then other modes of proceeding are provided. A summons, followed by a judgment and execution thereon, is usually a sufficient remedy if the delinquent party has property sufficient to pay the demand, and if such property may be sold on an execution.

But this mode of proceeding may be entirely useless in some cases, for the defendant may leave the county, or he may keep concealed therein for the purpose of avoiding the service of civil process upon him, and thereby preventing the recovery of any judgment against him. Or if he does not do this, he may remove his property from the county, or dispose of, assign or secrete it for the purpose of defrauding his creditors, by rendering a judgment and execution fruitless when obtained. The law discountenances every act which is done with such an intention. And when legal proof is made that such facts exist a more prompt and certain remedy is given.

When a debtor is disposed to prevent, or to hinder and delay the ordinary course of the practice in obtaining legal remedies, or when he removes, secretes or disposes of his property for the purpose of defrauding his creditors, he is not entitled to any especial favor from the laws, nor from the courts whose process he would evade or set at open defiance.

General nature of the remedy.

The law has, therefore, provided that the property of such debtors may be immediately taken by a proper officer, and securely kept by him until a judgment and execution can be duly obtained, when such property may be sold and the avails applied to the payment of the judgment.

It must be remembered, however, that such a mode of proceeding is a statutory one; that it is in its nature summary; that the defendant has no opportunity to show cause why the process ought not to issue; that it assumes to dispose of a person's property before any judgment has authorized it to be done; that it is frequently a serious injury to the person whose property is seized, by affecting his credit, or subjecting him to unnecessary costs, and that the issuing of this process is always based upon a charge of *fraud* which has been made and *sworn* against him. It is for these, among other reasons, that the courts require a strict compliance with the law before an attachment can be legally issued. And the first steps to be taken require due and legal proof that there is a legal demand, and that the defendant has done, or is about to do, some of the fraudulent acts specified. And in addition to this the plaintiff must give ample security for the indemnification of the defendant if the claim made should prove groundless. Claims are sometimes made which are unjust; or, at all events, they are not such as the law will enforce; and, therefore, the law carefully requires security against the damages which may be sustained by the party against whom such claim may be made. The law thus regards and protects the rights of both parties. And neither unjust claimants nor fraudulent debtors are permitted to have any legal advantage over the other. The foregoing remarks are sufficient to show the general nature of this process. And it may seem to a casual reader that the entire matter is plain enough. But it must be remembered that there are frequent difficulties in the way of applying the plainest principles to actual practice.

§ 2. **In what actions the warrant may be issued.** When the other facts exist which entitle a plaintiff to a warrant of attachment against the property of the defendant, the right to the remedy will depend upon the nature of the plaintiff's cause of action. The Code of Civil Procedure provides that "in an action brought before a justice of the peace a warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as prescribed in this article, when the action is brought upon a judgment, or to recover for one or more of the following causes:

1. Breach of contract, express or implied.

When an attachment may be issued against a corporation.

2. Wrongful conversion of personal property.

3. Any other injury to personal property, in consequence of negligence, fraud or other misconduct." Vol. 1, p. 13, § 2905. If a person has been induced to make advances upon the faith of forged bills of exchange, notes and acceptances, he has a cause of action for an "injury to personal property" within the meaning of the third subdivision of the section cited. See *Bogart v. Dart*, 25 Hun, 395.

§ 3. When an attachment may be issued against a corporation.

When a plaintiff can show to the satisfaction of the justice that he has a good cause of action against a foreign corporation to recover damages for one or more of the causes specified in the last section, and can show, if the action is upon a judgment or to recover for a breach of contract, that he is entitled to recover a specified sum over and above all counter-claims known to him, he is entitled as a matter of right to a warrant of attachment against the property of such corporation, upon making the proper affidavit and giving the requisite security. Vol. 1, p. 13, § 2906. It is now held that an attachment may issue in an action brought upon contract by a citizen of this State against a National bank located in another State. *Robinson v. National Bank of Newberne*, 81 N. Y. 385. The decisions to the contrary must be considered overruled. See *Rhoner v. First National Bank*, 14 Hun, 126; *Central Nat. B'k v. Richland Nat. B'k of Mansfield*, 52 How. 136. Formerly a National bank located in this State was considered a foreign corporation, at least for the purpose of subjecting its property to the process of attachment. *Bowen v. Nat. B'k of Medina*, 34 How. 408. See *Chatham Nat. B'k of N. Y. v. Merchants' Nat. B'k of West Virginia*, 1 Hun, 702; S. C., 4 Sup. Ct. (T. & C.) 196. But under the definition given by the present Code, a National bank located in this State is a domestic corporation, and is a foreign corporation if located without the State. See vol. 1, p. 170.

It was held under the old Code that the property of corporations created by or under the laws of this State could not be attached. *Farrier v. American Glass Silvering Co.*, 3 Abb. (N. S.) 419; S. C., 34 How. 496; 7 Rob. 288. But the present statute expressly confers the right to attach the property of a domestic corporation in the class of actions specified in the preceding section, when such corporation has removed or is about to remove property from the county where it last kept its principal office, or from the county in which the action is brought, with intent to defraud its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete its property with the like intent. See vol. 1, pp. 13, 14, § 2906.

Attachment against the property of natural persons.

§ 4. Attachment against the property of natural persons.

Whenever a plaintiff can show, to the satisfaction of the justice, that he has a good cause of action against a non-resident of the State for one of the causes specified in section 2905 of the Code of Civil Procedure, and, if the action is upon a judgment, or to recover for a breach of contract, that he is entitled to recover in such action a specified sum over and above all counter-claims known to him, he has an absolute right to a warrant of attachment against the party of such non-resident upon making affidavit to the facts and giving the required security. Vol. 1, p. 13, § 2906. A person who has been convicted of a criminal offense, and has escaped from the officer having him in custody, and has ever since remained a fugitive from justice, successfully eluding the officer seeking to discover the place of his concealment, may be proceeded against by attachment as a non-resident although his family continues to reside within the State. *Mayor v. Genet*, 4 Hun, 487; S. C. affirmed, 63 N. Y. 646. It seems that the actual *residence* of the defendant, without regard to his *domicile*, is what determines the right to the remedy. *Haggart v. Morgan*, 5 N. Y. 422; *Frost v. Brisbin*, 19 Wend. 11, 14; *Matter of Thompson*, 1 id. 43. The fact that a defendant, who resides in another State, has a place of business in this State does not make him a resident here so as to prevent the issuing of an attachment against him as a non-resident. *Wallace v. Castle*, 68 N. Y. 370.

As against the property of a resident of the State an attachment may be granted in one of the actions specified in section 2905 of the Code of Civil Procedure, in either of the following cases:

1. When the defendant has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of a summons.

2. When the defendant keeps himself concealed with a like intent.

3. Where a defendant has removed or is about to remove property from the county where he last resided, or from the county in which the action is brought, with intent to defraud his creditors.

4. When the defendant has assigned, disposed of, or secreted property, or is about to assign, dispose of, or secrete property, with a like intent.

5. When the defendant, being of full age, has been continuously without the United States for six months or more, immediately before the application, and either has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of the Code of Civil Procedure, or service upon the person so designated cannot be made with due diligence in the county where the person

Requisites of the affidavit.

making the designation resides. Vol. 1, pp. 13, 14, § 2906. See *id.*, p. 14, § 430.

The provisions of the Code as they have been enacted give the remedy by attachment only because of some delinquency on the part of the person or persons whose property is to be seized. They do not allow the property of one person to be seized merely because he is connected in business with another person who has been guilty of acts of misconduct which would justify the issuing of an attachment against his property. They provide for the issuing of the attachment against the property of one or more of the defendants who are shown to have committed one of the acts subjecting him or them to this remedy. And it is only against the person or persons who have been shown to have done what the statute intended to prohibit that the attachment can properly be issued. Thus, the fact that one of two partners has been guilty of acts of fraud and has absconded from the State will not authorize an attachment against the firm property, when it appears that the other partner is still engaged in carrying on the business in this State, and has been guilty of no actual misconduct. In such case the attachment can issue only against the property of the absconding partner. *Bogart v. Dart*, 25 Hun, 395.

§ 5. **Requisites of the affidavit.** To entitle a plaintiff to a warrant of attachment against the property of a defendant he must show by affidavit, to the satisfaction of the justice, that a sufficient cause of action exists against the defendant to recover damages for one or more of the causes specified in section 2905 of the Code, and, if the action is upon a judgment, or to recover for a breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him. The plaintiff must also show by affidavit, to the satisfaction of the justice, that the defendant is either a foreign corporation, or not a resident of the State, or, if he is a natural person, or a domestic corporation, that some one or more of the facts exist which, as stated in the two preceding sections, are made by statute a ground for issuing a warrant of attachment against the property of a domestic corporation or resident of the State. See *ante*, 177, 178 ; vol. 1, pp. 13, 14, § 2906.

How these facts shall be stated will be now considered. If the ground upon which the application for a warrant is based is the fact that the defendant is not a resident of the State, it will be advisable to state in the affidavit, in plain and direct terms, the fact of the defendant's non-residence, although that is not indispensably requisite, if the circumstances disclosed in the affidavit point in an unmistakable man-

Requisites of the affidavit.

ner to that conclusion. *Mayor v. Genet*, 4 Hun, 487; S. C. affirmed, 63 N. Y. 646.

If the action in which the attachment is sought is founded upon a judgment or upon a breach of contract, the affidavit must show "that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him," or it will be fatally defective. *Lyon v. Blakesly*, 19 Hun, 299; *Donnell v. Williams*, 21 id. 216; *Trow's Printing and Bookbinding Co. v. Hart*, 60 How. 190; *Rupert v. Haug*, 87 N. Y. 141.

If the intent of the defendant to defraud his creditors is one of the essential grounds upon which the application for the warrant is based, that intent must appear as a fair and logical sequence from facts proved. It matters not what a person believes or disbelieves, the applicant for an attachment must show by proof of facts known to the witnesses who testify to them that the belief in the intent to defraud is well founded. *Ellison v. Bernstein*, 60 How. 145. If the ground upon which the application is based is that the debtor is about to assign, dispose of, or secrete his property with intent to defraud his creditors, and all the material facts are stated in the affidavit upon information and belief, and it is not shown that the persons from whom the deponent professes to have obtained his information are absent, or that their depositions cannot be procured, the affidavit will be insufficient to give the justice jurisdiction to issue the attachment. *Steuben County Bank v. Alberger*, 78 N. Y. 252. The general principles stated in a preceding chapter as to statements of intent in affidavits, and allegations upon information and belief, are applicable to affidavits used upon application for attachments. See *ante*, 115.

In some cases, persons applying for an attachment seek to avoid the difficulty and labor of setting forth the grounds of their belief in the intention of the defendant to defraud his creditors by swearing positively to that intent. But this will not relieve the plaintiff of the duty of presenting to the justice facts showing an intent upon the part of the defendant to defraud his creditors, verified by the affidavit of persons having personal knowledge of those facts, or showing that their testimony was not available. Where a party swears positively to facts which are not necessarily beyond his means of personal knowledge, and the adverse party has had an opportunity to controvert them, but has failed to do so, an appellate court may be justified in assuming the truth of the facts so stated. *Pierson v. Freeman*, 77 N. Y. 589. But when it is plain that a person making an affidavit can have no actual knowledge of the facts to which he testifies, it

Requisites of the affidavit.

will not be enough that the witness has sworn to those facts positively. He must still give the sources of his information so that the justice may see that the facts sought to be proved are established by legitimate testimony. *Ellison v. Bernstein*, 60 How. 145. See *Stewart v. Brown*, 16 Barb. 367. It is not enough that the affidavit discloses the fact that the defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, unless it is further shown that the act has been done, or is about to be done, with intent to defraud the defendant's creditors. It is true that the statute in terms gives a right to an attachment in certain actions where it appears by affidavit, to the satisfaction of the justice, that the defendant has removed, or is about to remove, "property" * * * with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of, or secrete "property" with a like intent. But the "property" referred to in the statute is the property of the defendant, and not the property of the plaintiff, or of a stranger. The conversion of the plaintiff's property is one ground of issuing an attachment; and when that constitutes the plaintiff's cause of action the Code requires that he shall show, to the satisfaction of the judge, the existence of a sufficient cause of action against the defendant to recover damages for such conversion. But it also requires that, in addition to the statement of such cause of action, the plaintiff shall show that the defendant is either not a resident of the State, or that he has removed, assigned, secreted or disposed of, or is about to remove, assign, secrete or dispose of his property with intent to defraud his creditors. *German Bank of London v. Dash*, 60 How. 124.

An affidavit may be sufficient to justify a justice in issuing an order for the arrest of the defendant, but not sufficient to authorize him to issue a warrant of attachment against the property of the defendant. *Achelis v. Kalman*, 60 How. 491. The mere making of an assignment, with preferences to actual creditors, is not sufficient to establish an intent to defraud creditors. *Ib.*

It has been held that it was no evidence of fraud for an insolvent debtor to threaten an assignment, for this would imply an equal distribution among his creditors. *Dickerson v. Benham*, 20 How. 343; S. C., 12 Abb. 158. So it has been held that a threat to give preference might not be evidence of a fraudulent intent because in some cases this would be just and equitable. But such a threat gives suspicion of fraudulent intent, and with slight circumstances tending in the same direction, will uphold a presumption of fraudulent intent. *Anthony v. Stype*, 19 Hun, 265. A debtor cannot use the power he has of assign-

Requisites of the affidavit.

ing his property with preferences to intimidate creditors from pressing the remedies allowed by law to collect debts, without being chargeable with intent to defraud them. *Gasherie v. Apple*, 14 Abb. 64; *Livermore v. Rhodes*, 27 How. 506; S. C., 3 Rob. 626; *Anthony v. Stype*, 19 Hun, 265. In the case last cited it was made to appear from the affidavits upon which a warrant of attachment was granted that the plaintiff was justly indebted to the plaintiffs, on contract, for goods, wares and merchandise sold and delivered in a specified sum; that the defendant was a merchant; that he was insolvent; that the plaintiffs called upon him for payment of their claim; that he admitted his inability to meet his engagements and to pay his debts in full; that he was willing to turn out his goods to his creditors if they would get together and agree to take them and apply them *pro rata* on their claims and discharge him from further liability; that he asserted that, if sued, he would make an assignment, with preferences, and would leave out those suing so that they would get nothing on their claims; that notwithstanding his admitted insolvency, he kept his store open, continued to dispose of his goods, and appropriated the avails of sales to purposes other than the payment of his debts, refusing to pay any thing to his creditors, either in goods or money, and declaring that he would not pay any thing unless his creditors all agreed to take his goods and apply them *pro rata*, and discharge him; that a large number of his creditors refused these terms, but, so far as was known, were willing to take the goods and apply them on his indebtedness; that the debtor refused to turn them over to his creditors upon these terms; and continued to dispose of them; and it was held, upon an application to set aside the attachment upon the papers upon which it was granted, that the facts stated furnished abundant proof of an attempt on the part of the debtor to make a fraudulent disposition of his property.

Proof, by affidavit, that a debtor is insolvent; that he has turned out to some of his creditors goods to the amount of less than one-half of their respective claims; that he refuses to turn over any goods to the plaintiff, or to pay the amount due to them; that he is selling his stock in trade and not likely to continue his business, is not sufficient to authorize a justice of the peace to issue a warrant of attachment against the property of the debtor, upon the ground that he has disposed or is about to dispose of his property with intent to defraud his creditors. *Horton v. Fancher*, 14 Hun, 172. And see *Miller v. Brinkerhoff*, 4 Denio, 118.

If a plaintiff states in his affidavit, upon information and belief, facts showing an intention upon the part of the defendant to dispose of

Requisites of the affidavit.

his property with intent to defraud his creditors, and also positively alleges that he has stated these facts to the defendant, and that the defendant did not deny the truth of the statements but promised to call immediately and settle or secure the plaintiff's claim, the affidavit will present sufficient evidence of the fraud to warrant the issuing of an attachment. *Blake v. Bernhardt*, 6 Sup. Ct. (T. & C.) 74; S. C., 3 Hun, 397.

In stating the cause of action in the affidavit it is not necessary to negative every possible defense which might be interposed thereto. It is sufficient that the affidavit discloses a *prima facie* right of action of the class specified in section 2305 of the Code. See *Kiefer v. Webster*, 6 Hun, 526. But the affidavit should show that a cause of action exists in favor of the plaintiff, and should state the facts out of which the cause of action arose directly and not by way of recital. *Manton v. Poole*, 4 Hun, 638. See, also, *St. Amant v. De Beuxcedon*, 3 Sandf. 703; *Hill v. Bond*, 22 How. 272.

The general rules as to the requisites of all affidavits, and as to the mode of stating facts therein, have been sufficiently discussed in a preceding chapter. See *ante*, 111, 114. The legal effect of the words "to the satisfaction of the justice" has been already explained. See *ante*, 117. The justice must be satisfied when legal proof is made by affidavit of the facts required by statute to authorize him to issue a warrant of attachment, and he has no right to be satisfied with any thing short of such proof. See *People v. Sutherland*, 81 N. Y. 1.

The affidavit may be drawn by the justice and may be sworn to before him or before any other officer authorized to administer an oath. It may be made by the plaintiff or by any other person having the requisite knowledge of the facts. It must be filed with the justice when the warrant is granted. Vol. 1, p. 14, § 2906.

The following form may be of some service as a suggestion of what is required in these papers, although the ever-changing facts of different cases render forms of little practical value.

 Requisites of the affidavit.

Affidavit for an attachment.

JUSTICE'S COURT.

Edward Kenyon

agst.

George M. Cole.

} Before HENRY HUDSON, *Justice*.

COUNTY OF

Town of

; } ss. :

Edward Kenyon, being duly sworn, says that he has a sufficient cause of action against George M. Cole, above named, to recover the damages sustained by deponent by reason of the breach by said Cole of the contract hereinafter mentioned, and is entitled to recover as such damages from said Cole the sum of \$120 over and above all counter-claims known to deponent.

That the facts constituting said cause of action are as follows: That on or about the day of , 1882, deponent sold and delivered to the said George M. Cole at his request ten thousand feet of timber, to be used in constructing a bridge for the Callistoga Plankroad Company across the West Meriden creek, for which timber the said Cole agreed to pay to deponent the sum of \$12 per thousand feet, upon receiving from said company the first payment under his contract for building said bridge. That the said Cole received from the company the first payment under said contract more than thirty days ago, and since receiving such payment has neglected and refused and still neglects and refuses to pay to deponent the purchase-price of said timber, or any part thereof.

And deponent further says, that the said Cole is not a resident of the State of New York, but is a resident of the State of New Jersey; that deponent has applied to Henry Hudson, a justice of the peace of the town of , county of , for a summons whereby to commence an action in deponent's name and behalf against the said George M. Cole to recover the damages he has sustained, as before stated, and hereby applies to said justice to grant, at the time such summons is issued, a warrant of attachment against the property of the said George M. Cole, to accompany the summons in said action.

EDWARD KENYON.

Subscribed and sworn to before me, }
 this 26th day of April, 1882. }

HENRY HUDSON, *Justice of the Peace*.

Security required before granting the warrant.

§ 6. **Security required before granting the warrant.** The statute provides that before granting the warrant the justice must require a written undertaking to the defendant on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that if the defendant recover judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least \$200, and that, if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment, and interest thereupon. Vol. 1, p. 15, § 2908.

The plaintiff need not join in the execution of this undertaking, and the execution of the instrument by one surety will answer the requirements of the statute. Vol. 1, p. 124, § 811. The undertaking must be properly acknowledged or proved, and certified by the officer before whom the acknowledgment or proof is taken. Id., § 810. If two or more persons execute it, it must be joint and several in form and accompanied by the affidavit of each surety, to the effect that he is a resident of, and a householder or a freeholder within the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes, or has incurred, and exclusive of property exempt by law from levy and sale under execution. Id., § 812.

Plaintiff's undertaking for attachment.

JUSTICES' COURT.

Edward Kenyon

agst.

George M. Cole.

} Before HENRY HUDSON, *Justice*.

The above-named plaintiff having applied to the said justice of the peace for a summons herein, and having also applied to him to grant, at the time the summons is issued, a warrant of attachment against the property of the defendant, and it appearing by affidavit duly made that the action is brought to recover for one of the causes specified in section 2905 of the Code of Civil Procedure, and that a sufficient cause of action exists in favor of the plaintiff against the defendant to recover damages for the cause of action above specified; that the plaintiff is entitled to recover herein, therefor and thereon the sum of \$120,

The warrant of attachment.

over and above all counter-claims known to him; that plaintiff under section 2906 of the Code of Civil Procedure is entitled to a warrant of attachment against the property of the defendant, and the said justice having required a written undertaking to the defendant on the part of the plaintiff as provided for by law :

Now, therefore, we, Edward Kenyon, plaintiff, and Harvey Birch and John Flandreau as his sureties do hereby jointly and severally undertake to the defendant that if the defendant recover judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum of \$200 ; and that if the plaintiff recovers judgment he will pay to the defendant all money received by him from the property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment and interest thereupon.

Dated the *26th day of April*, 1882.

EDWARD KENYON,
HARVEY BIRCH,
JOHN FLANDREAU.

(Add acknowledgment and justification of sureties.)

The form of an acknowledgment and affidavit of justification will be found on pages 153, 154 of this volume.

The justice should indorse upon the attachment his approval of the sureties in the undertaking.

The undertaking should be filed by the justice, and retained by him as a part of the papers and proceedings in the case.

§ 7. **The warrant of attachment.** Upon the presentation to the justice of the undertaking mentioned in the preceding section and an affidavit or affidavits, sufficient in point of form, containing a proper statement of the facts required by the statute to entitle the plaintiff to this remedy, he should issue a summons in the ordinary form in favor of the plaintiff, and either indorse upon the summons or annex to it a warrant of attachment against the property of one or more of the defendants, as the facts of the case may require. The warrant issues as a matter of strict legal right when the plaintiff has presented to the justice due proof of the facts entitling him to the remedy and given the requisite security ; and the justice has no discretion in the matter.

The warrant must be subscribed by the justice and must briefly recite the ground of the attachment. It must require the constable to whom the summons is delivered to attach on or before a day specified

The warrant of attachment.

therein, which must be at least six days before the return day of the summons, and safely to keep, as much of the defendant's goods and chattels, within the county, as will satisfy the plaintiff's demand, with the costs and expenses, and to make return of his proceedings thereon to the justice, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant as stated in the affidavit. Vol. 1, p. 14, § 2907. In all other particulars the warrant must conform to the general requirements of the statute as to mandates issued out of a justice's court. See *ante*, 101. If by inadvertence the justice omits to insert in the warrant the amount of the plaintiff's demand as sworn to by him in his affidavit, he may correct the mistake by inserting the amount after the return of the warrant. *Near v. Van Alstyne*, 14 Wend. 230.

Form of the warrant of attachment.

JUSTICE'S COURT.

Edward Kenyon agst. George M. Cole.

} Before HENRY HUDSON, *Justice*.

The People of the State of New York, to any constable of the county of _____, to whom the summons herein is delivered, greeting:

The plaintiff herein having applied to the said justice of the peace for a summons herein, and having also applied to him to grant, at the time the summons is issued, a warrant of attachment against the property of the defendant George M. Cole, and it appearing to the satisfaction of said justice by affidavit duly made that the defendant is not a resident of this State; that the plaintiff has a sufficient cause of action against the defendant to recover damages for the breach of a contract, namely, to recover the purchase-price of ten thousand feet of timber sold and delivered by the plaintiff to the defendant, at his request, for the sum of \$12 per thousand feet, which sum the defendant promised and agreed to pay therefor at the time specified, but has refused and neglected to pay at said time or at any time thereafter; that the plaintiff is entitled to recover of the defendant the sum of \$120 over and above all counter-claims known to him; and that the plaintiff is entitled by law to a warrant of attachment against the property of said defendant upon the grounds stated, and the said justice having required a written undertaking to the defendant on the part of the plaintiff with one or more sureties approved by the said justice, to

Execution of the warrant.

the effect provided for in section 5098 of the Code of Civil Procedure, which has been duly given and delivered:

Now, therefore, you the said constable, to whom the summons herein is delivered, are required to attach, on or before the 29th day of April, 1882, and safely to keep, as much of the defendant's goods and chattels, within your county, as will satisfy the plaintiff's demand, which amounts, as stated in the affidavit, to \$120 with the costs and expenses, and to make return of your proceeding hereon to the justice, at the time when the summons is returnable.

Dated at the town of _____, this *26th day of April*, 1882.

HENRY HUDSON, *Justice of the Peace.*

§ 8. **Execution of the warrant.** In almost every case in which a warrant of attachment issues, time is of the utmost importance to the plaintiff, and any delay in levying upon the goods of the defendant is generally to the prejudice of the plaintiff. The warrant fixes the day on or before which the levy must be made, but otherwise leaves the time of the execution of the warrant to the convenience and discretion of the constable. There are certain days upon which the service of any mandate is prohibited. See *ante*, 107. Of course no service should be made upon those days, whatever may be the effect of the delay. But the constable should execute the warrant at the earliest hour upon which legal service can be made. Before setting forth to serve the warrant and summons, the constable should provide himself with an exact copy of the summons and warrant; and should prepare in duplicate a blank inventory in which to insert a description of the property seized.

The constable should execute the warrant by levying upon and taking into his custody so much of the goods and chattels of the defendant, not exempt from levy and sale by virtue of an execution, including money and bank notes, which he finds within his county, as will satisfy the plaintiff's demand, with the costs and expenses. Vol. 1, p. 15, § 2909. The warrant will not protect the officer in levying upon the property of a stranger, nor in seizing the property of the defendant beyond the limits of the county in which the officer resides, nor in levying upon property exempt from levy and sale by virtue of an execution. The statute enumerates the articles of personal property exempt from levy and sale under execution. See vol. 1, pp. 49, 50. Whatever cannot be taken by the judgment cannot be taken by the attachment which precedes the judgment and holds the property

Execution of the warrant.

for it. *McCullough v. Carragan*, 24 Hun, 157. An attachment may be issued against a member of a copartnership, and the interest of that partner in the firm property may be levied upon and sold. *Staats v. Bristow*, 73 N. Y. 264; *Smith v. Orser*, 42 id. 132; *Atkins v. Saxton*, 77 id. 395. For the purpose of rendering such levy and sale effectual the officer may take into possession the partnership property, and upon the sale may deliver it to the purchaser. *Ib.*; *Goll v. Hinton*, 8 Abb. 120; *Phillips v. Cook*, 24 Wend. 389; *Waddell v. Cook*, 2 Hill, 47; *Marshall v. McGregor*, 59 Barb. 519. In this respect there is no distinction between an attachment and an execution. *Smith v. Orser*, 42 N. Y. 132. See *Ryder v. Gilbert*, 16 Hun, 163; *Eighth Nat. Bank v. Fitch*, 49 N. Y. 539; *Walsh v. Adams*, 3 Denio, 152. But the purchaser at such sale takes the property subject to the rights of the copartners of the debtor, and of the creditors of the firm, and subject to an accounting which may disclose that he derived no beneficial interest from his purchase. All that he can ultimately obtain is the debtor's share of such surplus as may remain after payment of the firm debts and the adjustment of the accounts of the partners as between themselves. *Staats v. Bristow*, 73 N. Y. 264; *Atkins v. Saxton*, 77 id. 195. But the proceedings of the officer to reach the interest of the individual partner should be conducted, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the partnership property is merely incidental to the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently if he exceeds that limit, and undertakes to interfere with the rights of other partners further than is necessary to reach the interest of the partner named in the warrant, and dispose of it, as, for example, if instead of selling the interest of such partner he undertakes to sell the entire property, his act, although nugatory, is such an interference as renders him liable as a trespasser from the beginning. *Ib.*; *Waddell v. Cook*, 2 Hill, 47. If, instead of levying on the debtor's interest, he levies upon and seizes the property of the firm as the sole property of the debtor, he is a trespasser.

In respect to the amount of property to be attached, the statute provides that the constable shall levy upon and take into his custody so much of the chattels of the defendant as will satisfy the plaintiff's demand with the costs and expenses. He has the right to a reasonable judgment as to the amount to be so held, he is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no authority to dictate as to the

Execution of the warrant.

extent of the levy, and the defendant has no authority to limit it. *Wehle v. Conner*, 83 N. Y. 231; *Fitzgerald v. Blake*, 42 Barb. 513; S. C., 28 How. 110. The constable must decide for himself, upon the responsibility which attaches to his office, as to the extent and sufficiency of the seizure.

Having taken the property into his possession, he must safely keep it, to be disposed of according to law. He must immediately make an inventory of the property seized, and must state therein the estimated value of each item or article. This inventory is in practice usually attached to the warrant and summons, but may with equal propriety be made a separate instrument. The following form is in common use.

Constable's Inventory.

An inventory of the goods and chattels of the defendant levied upon and taken into my custody upon and by virtue of the foregoing warrant of attachment, this 28th day of April, 1882, with the estimated value of each item or article, viz.:

Item or article.	Estimated value.
One red cow, about four years old.....	\$23 00
Five cords of hard maple wood.....	30 00
Twenty-five bushels of corn in the ear.....	7 00
Five tons of hay	75 00

RICHARD JOHNSON, *Constable*.

After the inventory is made the constable ought to make an exact copy of it, and also an exact copy of the summons and warrant of attachment if that has not been done. He should then immediately serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a copy of each, if he can with reasonable diligence be found within the county; or, if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county with a person of suitable age and discretion; or, if such a person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the attached property is found. Vol. 1, p. 15, § 2910. It will be noticed that when the constable makes personal service of the summons, attachment and inventory, it does not require that the copies delivered by him to the defendant shall be certified.

Proceedings by defendant to retain his goods.

But when the service is not made upon the defendant personally the copies must be certified. The certificate may be in the following form:

Certificate on summons, warrant or inventory.

I do hereby certify that the within is a correct copy of the summons (or warrant of attachment, or inventory) in this action.

Dated *April 28*, 1882.

RICHARD JOHNSON, *Constable.*

When the defendant is a non-resident of the county, and he is merely passing through it, the copies cannot be served by leaving them at the hotel at which he may take a meal or stay over night. Such a stopping would not make the hotel his last place of residence. *Dudley v. Staples*, 15 Johns. 196. And a voluntary appearance of the defendant on the return day will merely confer jurisdiction over the person of the defendant, but not of the property. This was so decided in a case in which the defendant could not be found, but he had a residence in the county, though no copies were left there. The attachment was held void as against the claims of other execution creditors. *Watts v. Willett*, 2 Hilt. 212.

When the constable has once taken the defendant's property, the law holds him accountable for its safe-keeping, and he will be liable for its loss, unless he uses due diligence in securing it. He may leave it in custody of a third person, and take his receipt for its re-delivery in the same manner as upon an execution. *Harvey v. Lane*, 12 Wend. 563. This receipt may be in the same form as that which is given when property is taken upon an execution, except that in this case the receipt should show that the property was taken upon an *attachment* instead of an execution.

§ 9. **Proceedings by defendant to retain his goods.** At any time before judgment is rendered in an action in which a warrant of attachment has been levied, the defendant, or his attorney or agent acting in his behalf, may obtain a re-delivery of the property seized, by executing and delivering to the constable an undertaking to the plaintiff, in a sum specified therein, at least twice the value of the property attached as stated in the inventory, with one or more sureties, approved by the constable or by the justice who issued the warrant, and to the effect if judgment is rendered against the defendant, and an execution is issued thereupon within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Vol. 1, p. 15, § 2911.

Under the old practice, which required a bond to the constable in-

 Proceedings upon claim of property by stranger.

stead of an undertaking to the plaintiff, it was held that when the bond was conditioned that the judgment should be paid, instead of the statutory requirement that the property should be produced to satisfy the execution, etc., it was void. *Morange v. Edwards*, 1 E. D. Smith, 414.

Defendant's undertaking for attachment.

JUSTICE'S COURT.

Edward Kenyon	}	Before HENRY HUDSON, <i>Justice</i> .
<i>agst.</i>		
George M. Cole.		

The plaintiff, having obtained herein a warrant of attachment, under and by virtue of which the constable to whom the summons herein and said warrant of attachment were delivered, has levied upon and taken into his custody certain goods and chattels of the defendant, and the defendant desiring that the said constable should re-deliver said property to him and to obtain such re delivery :

Now, therefore, we, George M. Cole, defendant, and Andrew Plank and Philip Nolan, sureties, do hereby jointly and severally undertake to the plaintiff in the sum of \$270 (that being at least twice the value of the property attached as stated in the inventory) that if judgment is rendered against the defendant and an execution is issued thereupon within six months after the giving of this undertaking, the property attached shall be produced to satisfy the execution.

Dated the 26th day of April, 1882.

(Signatures.)

(Add acknowledgment, justification, and approval.)

Upon the receipt of the proper undertaking the constable must re-deliver the property to the defendant. Vol. 1, p. 15, § 2911. He should retain the undertaking in his possession until the return day of the summons and then deliver it to the justice with his return. Vol. 1, p. 16, § 2915.

§ 10. **Proceedings upon claim of property by stranger.** When any person, not a party to the action, claims any property attached, which has not been reclaimed by the defendant as prescribed in the last section, he may, at any time after the seizure and before an execution is issued, obtain a delivery of the property to him by giving the security prescribed by the statute. This security must be in the form of a bond to the plaintiff, with one or more sureties, approved by the constable

 Proceedings upon claim of property by stranger.

or by the justice, in a penalty at least twice the value of the property claimed, and conditioned that in an action upon the bond, to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed, at the time of the seizure, or if he fails to establish such ownership, that he will pay to the plaintiff the value of the property claimed, with interest. See vol. 1, p. 16, § 2912.

Bond by claimant of property attached.

Know all men by these presents that we, Moses Spike, Daniel Stewart and James Dunn, of the town of _____, county of _____, and State of New York, are held unto Edward Kenyon in the sum of \$270, to be paid to the said Edward Kenyon or to his certain attorney, executors, administrators or assigns; for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 29th day of April, 1882.

Whereas, certain goods and chattels, to-wit (*state the several articles claimed*) were on the 28th day of April, 1882, seized by Richard Johnson, constable, by virtue of a warrant of attachment issued by Henry Hudson, a justice of the peace of the town of _____, in the county of _____, in favor of the above-named Edward Kenyon against George M. Cole; and whereas, the said Moses Spike claims the said goods and chattels as his property, and the defendant has not reclaimed the same:

Now, therefore, the condition of this obligation is such that if in an action upon this instrument, commenced within three months from the date thereof, the said Moses Spike shall establish that he was the general owner of said goods and chattels at the time of such seizure, or, in case of his failure to do so, if the said Moses Spike shall pay to the said Edward Kenyon the value thereof, with interest, then this obligation to be void, otherwise of full force and virtue.

MOSES SPIKE. [L. s.]

DANIEL STEWART. [L. s.]

JAMES DUNN. [L. s.]

(*Add acknowledgment, justification and approval.*)

This bond falls within the general statutory rules respecting bonds and undertakings given in an action, and must be acknowledged or proved, and certified, and be accompanied by an affidavit of justification as required by the statute. See vol. 1, p. 124. As the statute ex-

pressly requires the execution of the bond by the claimant, it must be executed by him; and when approved by the justice or constable, must be filed with the justice. The Code provides that the constable must thereupon deliver the property claimed to the claimant. Vol. 1, p. 16, § 2912. Precisely how a constable is to know that any claim has been made to the property attached, or that the claimant has executed and filed with the justice the requisite bond, approved by that officer, or upon what evidence of these facts he is to act in delivering up the property to the claimant, when these proceedings have been conducted, as they may be, entirely before the justice and in the absence of the constable, is not pointed out by the statute. Under the Revised Statutes the provision as to the filing of the bond with the justice was omitted, and the constable was required to deliver up the property to the claimant only upon the delivery of the bond to him. The Code is silent also as to the manner in which the justice is to ascertain the value of the property claimed in order to fix the penalty of the bond at at least twice that value. After the constable has made his return, and delivered to the justice a certified copy of the inventory, which should state the value of each article attached, there can be no difficulty in fixing the penalty of the bond; but when the claim is made before such return, the justice must use his discretion as to the amount, taking care only that the amount fixed is large enough to satisfy the requirements of the statute, unless by a liberal construction of section 843 of the Code, he may act upon an affidavit stating the value of the property claimed. See vol. 1, p. 130, § 843.

The delivery to the claimant of all the property attached does not affect the action in which the warrant of attachment issued. That action proceeds as if no claim had been made. If the plaintiff succeeds in that action and recovers any judgment, whatever, he may bring an action upon the bond given by the claimant and his sureties, and in that action recover the value of the attached property delivered to the claimant with interest thereupon from the time of the delivery, provided, of course, it appears upon the trial that the plaintiff is entitled to recover any thing. If the amount so recovered exceeds the amount which the plaintiff recovered in the action in which the warrant of attachment issued, he is liable to the defendant in that action for the excess. Vol. 1, p. 16, § 2913. It is not necessary that the plaintiff should show in the action upon the bond that the justice had jurisdiction to issue the attachment. *Wiley v. Sherman*, 3 Denio, 185. But the defendant in that action may show that the justice had no jurisdiction to issue the attachment; and when this is shown, the

Return of the warrant.

plaintiff, being a trespasser in taking the property, cannot maintain an action on the bond. *Homan v. Brinkerhoff*, 1 Denio, 184. And see *Vose v. Cockcroft*, 44 N. Y. 415. So the claimant may show that he was the general owner of the property at the time of the seizure, and when that is shown the plaintiff must of course be defeated.

When the warrant of attachment is vacated, or when the action in which the warrant was granted abates, or is discontinued, or when a final judgment therein has been rendered in favor of the plaintiff, and such judgment has been fully paid, or when a final judgment therein has been rendered in favor of the defendant, the latter may maintain an action in his own name upon the bond given by the claimant with the like effect as the plaintiff might have done if the warrant had remained in full force. Vol. 1, p. 16, § 2914.

§ 11. **Return of the warrant.** The proceedings on the part of the defendant to obtain a re-delivery of the attached property to him, and the proceedings by a third party, claiming all or a part of the property attached, to obtain the delivery to him of the property so claimed, may or may not be taken before the return day of the summons and warrant of attachment. If such proceedings are taken before the return day of the warrant, the part taken by the constable in those proceedings should be stated in his return. The return to the summons must be made as in ordinary cases, upon the day when it is returnable. At the time of making such return the constable must also make a return to the warrant of attachment stating all his proceedings thereupon. The return must state the manner in which the warrant and inventory were served; and, if they were served otherwise than by delivering a copy of the warrant and inventory to the defendant, personally, the reason for making such service should be stated; and the name of the person to whom the copy was delivered should be given, unless his name is unknown to the constable, in which case the return must describe him so as to identify him as nearly as may be. The constable must deliver to the justice, with the return, each bond or undertaking delivered to him pursuant to any of the provisions of article 4 of chapter 19 of the Code of Civil Procedure and also a certified copy of the inventory of the property attached. Vol. 1, p. 10, § 2915.

As we have seen, the Code provides for the delivery to the constable of an undertaking to the plaintiff when the defendant desires a re-delivery of the property attached. This is the only undertaking which can be delivered to the constable pursuant to the provisions of the article mentioned in section 2915, and consequently is the only undertaking to be delivered to the justice with the return. The

Return of the warrant.

only bond mentioned in that article is the bond to the plaintiff to be given by a third person making claim to the attached property ; and, as the bond is to be filed with the justice before the constable has any authority to act upon it, and as no provision is made for its delivery to the constable in any event, it would seem that there is no force to so much of section 2915 as requires the constable to deliver to the justice, with the return, each bond "delivered to him pursuant to any of the foregoing provisions of this article." The requirement is harmless, and probably is the result of a careless following of the language of a similar provision of the Revised Statutes referring to a bond delivered to the constable either by the defendant or by a claimant of the property attached, to obtain the delivery of such property to the obligor.

The return to a warrant of attachment ought to be drawn with great care, and should state with sufficient detail all of the proceedings of the constable thereunder. It should state whether or not the warrant and inventory were personally served, as before stated, though if that part can be spelled out from the return it may be sufficient. See *Rosenfield v. Howard*, 15 Barb. 456. In that case the return showed a taking of the defendant's property ; that the defendant could not be found in the county ; that he had no residence therein ; and that the copies of attachment and inventory were served upon the person in whose possession the property was found. The court held this sufficient, although the return did not state specifically whether there was a service on the defendant. It was said by the court that, from the facts returned, it was evident that the copies were not served on the defendant, and that such return was sufficient. But, notwithstanding this case, the return ought to state specifically, whether there was or was not a service upon the defendant. It is easily done, and it ought not, therefore, to be omitted. The case cited may be sufficient to sustain a similar return, but experiments of that kind are usually quite unprofitable to the parties to the action. It must be remembered too that the present statute is not in all respects similar to the statute under which that case was decided.

In another case the officer in his return to the attachment stated that "because the defendant could not be found in the city and county of New York, I left a copy of the written attachment and of said inventory, duly certified by me, at the last place of residence of the said defendant." The court held that the return was clearly defective for two reasons : First, that the officer did not state specifically in his return the defendant's place of residence, nor even that it was in the

Return of the warrant.

county of New York; and second, that he did not state specifically whether such copies were or were not personally served upon the defendant as required by statute. But the decision was based upon the first ground, the court holding that if the defendant's last place of residence was not in the county of New York, then the copies should have been left with the person in whose possession the goods were found. *Egbert v. Watson*, 21 How. 429. The case last cited was decided under a statute requiring the constable to serve a copy of the attachment and inventory upon the defendant personally if he can be found in the county, or if he cannot be found in the county, by leaving the copy at his last place of residence; or if he has no place of residence in the county, then with the person in whose possession the goods are found. The present statute is far more exacting in its requirements, and the return specified in that case would be clearly defective under the Code. See vol. 1, p. 15, § 2910; id., p. 16, § 2915. If there are two or more defendants the return should show what was done in relation to each of the defendants. See *McDoel v. Cook*, 2 N. Y. 110. The forms of several different returns will be found below:

Property attached, and personal service made.

COUNTY OF , } ss. :
 Town of , }

By virtue of the within warrant of attachment, I did on the 28th day of April, 1882, at , in said county, attach and take into my custody the goods and chattels of the defendant, George M. Cole, mentioned in the inventory of which the annexed is a copy; and immediately thereafter made an inventory of the property so attached, and immediately thereafter, at , in said county, I served the within summons, warrant of attachment, and said inventory on the said defendant * by delivering to him personally a true copy of said summons, warrant and inventory.

Dated *April 29*, 1882.

RICHARD JOHNSON, *Constable*.

Property attached and copies left at defendant's residence.

(*Proceed to the *, as in the above form, then add*) by leaving a copy of each, duly certified by me, with Sarah Cole, the wife of the defendant, a person of suitable age and discretion, at the last place of residence of the defendant in said county. And I further certify that said service was not made by delivering a copy of said summons, warrant and inventory to the defendant personally for the reason that said defend-

Application by defendant for an order vacating the warrant.

ant could not with reasonable diligence be found within said county.

Dated *April* 29, 1882.

RICHARD JOHNSON, *Constable*.

Property taken, and service by posting copies, etc.

(*Proceed to the * as in first form, then add*) by posting a copy of each, duly certified by me, on the outer door of the defendant's last place of residence in said county, and also by depositing another copy of each, duly certified by me, inclosed in a sealed post-paid wrapper, directed to said defendant at his residence at _____, in the post-office at _____, that being the nearest post office. And I further certify that said service was not made by delivering a copy of said summons, warrant and inventory to the defendant personally for the reason that said defendant could not with reasonable diligence be found within said county; and also that no person of suitable age and discretion with whom to leave said copies could be found at defendant's last place of residence in said county.

Dated *April* 29, 1882.

RICHARD JOHNSON, *Constable*.

Property attached, defendant not found, and no residence in county.

(*Proceed as in first form to the *, then add*) by delivering a copy of said summons, warrant and inventory, duly certified by me, to John Doe in whose possession the property so attached was found. And I further certify that the defendant, George M. Cole, has no place of residence in this county; and that the service of said summons, warrant and inventory was not made upon said defendant by delivering copies thereof to him personally for the reason that he could not with reasonable diligence be found within this county.

Dated *April* 29, 1882.

RICHARD JOHNSON, *Constable*.

§ 12. **Application by defendant for an order vacating the warrant.** Whenever the property of a defendant has been seized under an attachment, in a case not authorized by the statute, he may obtain from the justice who issued the warrant an order vacating it, and by this means regain possession of the attached property. The application to vacate a warrant of attachment should be made upon the return of the summons. It may be founded upon the papers upon which the warrant was granted, or upon affidavits introduced by the defendant to rebut the case made by the plaintiff's affidavits, or upon both. If the affidavits upon which the plaintiff obtained the warrant of attach-

Application by defendant for an order vacating the warrant.

ment were clearly insufficient to authorize the justice to issue the warrant by reason of an omission to state any fact required by the statute, or if the plaintiff's affidavit shows affirmatively that the case is not one in which an attachment can legally issue, the motion to vacate the warrant can properly be made upon the papers upon which the warrant was granted. The motion to vacate should be confined to the papers upon which the warrant was granted whenever it clearly appears from an inspection of such papers that they were insufficient to justify the justice in issuing the warrant. Upon such application the plaintiff will be confined to the papers upon which he applied for the attachment, and will not be allowed to introduce other affidavits to supply omissions or cure defects in the original papers. *Trow's Printing and Bookbinding Co. v. Hart*, 60 How. 190; S. C. affirmed, 85 N. Y. 500; *Steuben County Bank v. Alberger*, 56 How. 345; S. C., 75 N. Y. 179; *Gates v. North*, 44 id. 271. This restriction upon the introduction of additional proof on the part of the plaintiff may be of material advantage to the defendant, and should not be removed by the introduction of affidavits controverting the facts stated in the papers upon which the warrant was granted except in case of necessity. If, however, the papers upon which the warrant issued made a *prima facie* case for an attachment, and presented some legal and competent evidence, no matter how slight and inconclusive, of every fact essential to justify the issuing of the warrant, it may be necessary for the defendant to base his application for an order vacating the warrant upon affidavits either directly controverting the facts set forth in the original affidavit of the plaintiff or explaining away the inference of an unlawful intent arising from those facts. Upon such an application the defects in the original papers may be urged with the same force and effect as if the motion was based upon those papers only, but the plaintiff may introduce, in opposition to the motion, new affidavits tending to sustain any ground for the attachment recited in the warrant, but no other. Vol. 1, p. 17, § 2916. The right of the plaintiff to introduce new affidavits, as above stated, depends upon the fact that the defendant has based his motion to vacate the attachment, wholly or in part, upon proof by affidavit attacking the allegations in the original affidavit of the plaintiff, and not upon the form or directness of that proof. If the defendant bases his motion in part upon an affidavit attacking an allegation in the plaintiff's original affidavit, this will be sufficient to authorize the plaintiff to read new affidavits sustaining any ground of attachment recited in the warrant, although

Application by defendant for an order vacating the warrant.

the allegation attacked was not of material importance. *Godfrey v. Godfrey*, 75 N. Y. 434.

Upon a motion to vacate an attachment, the question is not one of jurisdiction, but whether upon the facts presented the attachment ought to issue; and this is so whether the motion is founded upon the alleged insufficiency of the affidavits upon which the warrant was granted, or upon affidavits upon the part of the defendant. *Allen v. Meyer*, 73 N. Y. 1. If the application is based upon the original papers, and the material averments therein are made upon information and belief, without stating the sources of the information or giving any reason why the testimony of the persons furnishing the information has not been obtained, the justice should vacate the attachment. *Steuben County Bank v. Alberger*, 78 N. Y. 252. The same course should be pursued when the original papers fail to disclose the existence of a fact essential to the right to the remedy.

When the application to vacate the attachment is founded upon affidavits introduced on the part of the defendant, or upon such affidavits and the papers upon which the warrant was issued, the justice should take into consideration all the facts before him, whether stated in the original papers or in the affidavits introduced by the defendant in support of the motion, or in the affidavits of the plaintiff introduced in support of any ground for the attachment recited in the warranty; and upon all these facts, so presented, should determine whether or not he would issue the attachment if that question was then before him for the first time upon an application for the warrant. If he would, then he should deny the motion. If he would not, he should vacate the attachment. If upon all the facts the justice is in doubt as to what disposition should be made of the motion, he should vacate the attachment. Such at least was the rule adopted by courts of record in respect to a motion to vacate an order of arrest, and it would seem to be equally applicable to a motion to vacate an attachment.

It is not necessary that the defendant should appear generally in the action for the purpose of moving to vacate the attachment. A limited appearance for the purpose of that motion will be sufficient. *Manice v. Gould*, 1 Abb. (N. S.) 255. In fact it may be important for the defendant to avoid a general appearance where the summons has not been personally served upon him, or upon a defendant jointly indebted with him. See vol. 1, p. 17, §§ 2917, 2918.

The justice may, upon the return of the summons, or at any other time to which the action is adjourned, vacate the warrant of attach-

Application by defendant for an order vacating the warrant.

ment upon his own motion, if he deems the papers upon which it was granted insufficient to authorize it. Id., § 2916.

Order vacating the warrant.

JUSTICE'S COURT.

Edward Kenyon agst. George M. Cole.

} Before HENRY HUDSON, *Justice*.

A warrant of attachment against the property of the above-named defendant having been issued by me to accompany the summons in this action, and the defendant herein having applied to me upon the return of said summons for an order vacating said warrant,* now on reading and filing the affidavit of the defendant and of John Doe in support of said application and the affidavits of the plaintiff and Richard Roe in opposition thereto.*

Ordered, That said warrant of attachment be and is hereby vacated and discharged.

Dated this *29th day of April*, 1882.

HENRY HUDSON, *Justice*.

Order vacating warrant on original papers.

(*Insert in place of matter included between the * * in the above form*) upon the ground that the papers upon which it was granted were insufficient to authorize it, and after hearing the respective parties it appearing that said papers were insufficient to authorize the issuing of the warrant (*continue as above*).

When the warrant is vacated upon the motion of the justice a slight variation of the above form will render them available as a guide in drawing the order.

If the motion is denied, that disposition of the matter may be shown by stating the fact after the word "ordered."

Vacating the warrant of attachment does not affect the jurisdiction of the justice to hear and determine the action where the defendant has appeared generally in the action, or where the summons was personally served upon him, or where judgment may be taken against him as being jointly indebted with another defendant who has been thus summoned, or has thus appeared. In any other case, the justice who vacates a warrant of attachment against the property of the defendant must dismiss the action as to him. Vol. 1, p. 17, § 2917.

Modification of the warrant or increase of security.—Effect of the attachment.

§ 13. **Modification of the warrant or increase of security.** On the return of the summons the defendant may apply to the justice who issued the warrant of attachment for an order modifying it, or directing the plaintiff to furnish additional security, or both. See vol. 1, p. 17, § 2916. The application may be founded upon the papers upon which the warrant was granted, or upon proof by affidavit on the part of the defendant, or upon both. *Ib.* The granting or denial of the notice will rest in the sound discretion of the justice. While the justice should fully protect the rights of the plaintiff by continuing the attachment unchanged when its validity is undoubted and the right to the remedy is clear, he should at the same time protect the rights of the defendant by requiring the plaintiff to furnish such security as will indemnify the defendant against loss by reason of the attachment. If the security furnished by the plaintiff is insufficient for this purpose the justice should make an order for its increase, and if the warrant of attachment operates with undue severity, and the rights of the plaintiff may be fully protected under a modified warrant, the warrant should be modified accordingly. In disposing of these motions it should be remembered that the object of the attachment is to hold the property subject to the final judgment which may be rendered in the action in which the warrant issues, and not to punish any supposed wrong-doing on the part of the defendant.

§ 14. **Effect of the attachment.** The execution of a warrant of attachment does not divest the title of the defendant to the property attached or prevent him from selling and disposing of it subject to the lien of the attachment. The attaching creditor acquires no absolute property in the thing attached, but only a specific lien thereon, subject to any other lien existing thereon at the time of the execution of the warrant. By the seizure of the goods of the defendant under the warrant the constable acquires such a special property in the goods as will enable him to maintain trover, trespass or replevin against any person depriving him of possession while he remains liable to the attaching creditor or to the owner of the goods. If without fault of the officer or of the attaching creditor the property attached is lost or destroyed, the loss will fall upon the defendant, who still remains liable to the plaintiff.

The effect of vacating an attachment upon the jurisdiction of the justice to hear and determine the action has been already noticed. *Ante*, 29, 201. When the defendant has not appeared, and the summons has not been personally served upon him, and the property of the defendant has been duly attached by virtue of a warrant which has not

Effect of the attachment.

been vacated, the justice must proceed to hear and determine the action. But the judgment rendered by the justice in such a case is only presumptive evidence of indebtedness in an action subsequently brought, and the defendant is not barred from any counter-claim against the plaintiff. The execution issued upon a judgment so rendered must require the constable to satisfy it out of the property attached, without containing a direction to satisfy it out of any other property. Vol. 1, p. 17, § 2918.

CHAPTER X.

REPLEVIN.

SECTION 1. When the action of replevin can be maintained. An action of replevin differs in many particulars from any other action which may be brought in a justice's court. The object of the action is to recover specific personal property which the plaintiff claims has been wrongfully taken, withheld or detained from him, with or without damages for such wrongful taking, withholding or detention. In many cases this form of action is the only one which will furnish adequate relief. A judgment for damages for the conversion of property may be of little value when the defendant is irresponsible; and in many cases, any sum of money which could be recovered in an action of trover even against a responsible defendant would be but a poor equivalent for a chattel having a peculiar value to the owner.

X The cases in which this action will lie, and the general rules of law relating to the action, have been elsewhere explained. Vol. 2, p. 630.
X There are certain cases in which the action will not lie. These have been
X enumerated and defined by the Code. Vol. 1, p. 18. The action is brought before a justice of the peace of the county in which the chattel
X is found. Id., § 2919. The extent of the justice's jurisdiction in such
X actions has been considered in a preceding chapter. *Ante*, 21, 35. No further discussion of these questions will be attempted in this place. The plaintiff may be satisfied with the remedy afforded by a judgment and execution in replevin, and may make no attempt to obtain possession of the chattel in controversy until his right to such possession has been determined by a judgment. The Code provides that if the summons in replevin has been personally served upon the defendant, or if he appears in the action, the justice must proceed to hear and determine the action although the plaintiff has not required the chattel to be replevied
X or the constable has not been able to replevy it. Vol. 1, p. 24, § 2933. In such case the judgment will determine the plaintiff's right to the chattel, and if the judgment is in the plaintiff's favor, the possession of the chattel may be obtained by an execution issued upon the judgment, provided, of course, that it is within reach of that mandate. But if the

Affidavit to obtain the requisition.

plaintiff is not satisfied with a mere judgment and execution in the action, the Code furnishes a provisional remedy by which the chattel may be taken from the possession of the defendant at the commencement of the action and delivered to the plaintiff, unless the defendant requires its return, and gives security, in an amount not less than twice the value of the chattel, for its delivery to the plaintiff, if a delivery to him is adjudged in the action, or if the action abates in consequence of the defendant's death. It is this provisional remedy in the action of replevin which will be considered in this chapter, and not the action itself, except so far as the resort to the remedy affects the process and procedure therein.

§ 2. **Affidavit to obtain the requisition.** At the time when the summons is issued in an action to recover a chattel, but not afterward, the plaintiff therein may require the chattel to be replevied by obtaining from the justice a mandate, called a requisition, requiring the constable to replevy the property in controversy on or before a day specified, which must be at least six days before the return of the summons. For that purpose, the plaintiff must deliver to the justice an affidavit particularly describing the chattel to be replevied, and containing the following allegations :

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof by virtue of a special property therein, the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State, or of the United States; or if it has been taken under color of such a warrant, either that the taking was unlawful by reason of defects in the process, or other causes specified, or that the detention is unlawful, by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

6. Its actual value. Vol. 1, p. 19, § 1695.

When the affidavit describes two or more chattels of the same kind,

Affidavit to obtain the requisition.

it must state the number thereof; and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all, or, separately, the value of any chattel, or of any class of chattels, and the aggregate value of the remainder, if any. *Id.*, § 1697.

This affidavit may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge, or if the plaintiff is not within the county where the attorney resides or has his office, or is not capable of making the affidavit. But where the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the plaintiff. *Id.*, § 1712.

The general rules as to the form and requisites of affidavits have been stated in a preceding chapter. See *ante*, 111. These rules apply to affidavits in replevin as well as in other cases.

The object of the statute in requiring that the plaintiff's affidavit shall contain a particular description of the property to be replevied is chiefly to so identify the property that the constable executing the requisition may have no difficulty in selecting and taking into his custody the identical chattel or chattels claimed, and to afford to the officer the means of justifying under his process the seizure of property so described, if sued for a trespass or conversion by some person claiming to be the owner thereof. The requisition commands the constable to replevy the property described in the affidavit, and the latter instrument furnishes the only means of identifying the property to be taken.

The object of requiring the affidavit to state the value of the property is obvious. The jurisdiction of the justice is made to depend upon the value of the property as stated in the affidavit; and the amount of security required on the part of the plaintiff at the time of applying for the requisition, or on the part of the defendant at the time of requiring the return of the property replevied, is made to depend upon this statement of value.

When the plaintiff claims to be the owner of the property to be replevied, the direct allegation of such ownership will be sufficient without a statement of facts tending to prove such ownership. A statement of the facts as to the plaintiff's right is required only when he claims a special property in the goods. *Burns v. Robbins*, 1 Code B. 62. And see *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217. If

Affidavit to obtain the requisition.

the plaintiff does not claim to be the owner of the property, but only to be entitled to its possession by virtue of a special property therein, the facts showing such property and right of possession should be so set forth that the justice can say from those facts that a special property and right of possession is made out. It is not enough that the plaintiff swears positively to his conclusion that he has such property and right of possession. His conclusion cannot be substituted for the judicial conclusion of the justice. And if the evidence of the facts showing a special property and right of possession rests in a writing, that must be set forth as the true basis of the conclusion. *Depew v. Leal*, 2 Abb. 131.

The law requires the plaintiff to state in his affidavit the cause which is assigned by the defendant for the withholding or detention of the property. The plaintiff may state this according to his best knowledge, information and belief. He may know what those grounds are, from the declarations of the defendant; he may know from the facts and circumstances of the transactions between himself and the defendant, or he may have heard, through some third person, what claim the defendant makes. In all cases it will be sufficient to allege what the supposed cause of withholding or detention is, according to the best knowledge, information and belief of the person making the affidavit. This rule is the same whether the plaintiff or some other person makes the affidavit.

After stating the cause of the detention of the property by the defendant, it would be proper to allege that the claim so made by the defendant is unfounded.

It is not strictly necessary, however, to do this. When the affidavit alleges once that the withholding or detention is wrongful, there is no need of repeating it, after stating the alleged cause of detention. There is no harm, however, in doing so. And there may be those who would prefer to state the alleged cause of detention, and then to state or show that the claim is not valid either in fact or in law. For instance, the defendant may claim to have some lien upon the property as the cause of detention. The plaintiff may show in the affidavit, either that the lien has been discharged, or that in law it never had any existence.

The statute requires that the affidavit shall contain an allegation that the chattel "has not been taken by virtue of a warrant against the plaintiff for the collection of a tax," etc. If a tax collector illegally seizes the property of A. to satisfy the tax of B., A. can maintain an action of replevin for its recovery. *Stockwell v. Veitch*, 15 Abb. 412;

Affidavit to obtain the requisition.

Thompson v. Button, 14 Johns. 84; *Judd v. Fox*, 9 Cow. 259; *Lake Shore, etc., R. R. Co. v. Roach*, 80 N.Y. 339. As the warrant in such case does not authorize or justify the seizure of the property it cannot properly be said to be taken "by virtue" thereof. *Ib.* But the property would nevertheless be taken "under color" of such a warrant, and the affidavit should, therefore, specify the reason why the taking was unlawful.

Plaintiff's affidavit.

JUSTICE'S COURT.

David Johnson

agst.

Robert Jones.

} Before RICHARD HEMPSTEAD, *Justice*.

COUNTY OF FULTON, ss.:

David Johnson, of said county, being sworn, says that he is the plaintiff above named and is the lawful owner and lawfully entitled to the possession of the following articles of personal property, namely: (*Insert a particular and careful description of the property*); that said property is wrongfully detained from the said plaintiff by the defendant; that the alleged cause of the detention thereof, according to the best knowledge, information and belief of deponent is (*here state the supposed cause of the detention of the property*); that the said property has not, nor has any part thereof, been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State or of the United States, nor has it been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any person from or through whom the plaintiff has derived a title to said property since the seizure thereof, and that the actual value of said property is \$150.

Subscribed and sworn to before me, } DAVID JOHNSON.
this 18th day of May, 1882. }

RICHARD HEMPSTEAD, *Justice of the Peace*.

If the affidavit is made by the attorney or agent of the plaintiff it must contain the additional matter required by the statute. See *ante*, 206. And if the property has been taken for the collection of a tax, or seized under an execution or warrant of attachment, the form given must be modified so as to conform to the requirements of the statute in such cases. See *ante*, 205.

Undertaking on the part of the plaintiff.

§ 3. **Undertaking on the part of the plaintiff.** The plaintiff, on making application for a requisition, must also deliver to the justice an undertaking, executed by at least two sureties, who must be approved by the justice, to the effect that the sureties are bound in a specified sum, not less than twice the value of the chattel as stated in the affidavit, for the prosecution of the action; for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates or is discontinued, before the chattel is returned to the defendant; and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff. Vol. 1, pp. 18, 19, §§ 2920 and 1699.

The plaintiff may or may not join with the sureties in the execution of the undertaking. But in every case the undertaking must be executed by at least two sureties, must be joint and several in form, must be acknowledged or proved, and certified in the same manner as a deed to be recorded, and must be accompanied with the affidavit of each surety as to his residence and pecuniary ability as required by the general provisions of the statute. See vol. 1, p. 124, §§ 810-812.

The statute does not require that the undertaking shall be drawn in any particular form of words, but the language used must be to the effect specified in the section above cited.

The following form is in common use:

Undertaking in replevin.

JUSTICE'S COURT.

David Johnson	}
agst.	
Robert Jones.	

Whereas, the above-named plaintiff alleges that the above-named defendant, Robert Jones, has in his possession, and wrongfully withholds or detains certain personal property belonging to the said plaintiff of the estimated value of \$150, and the said plaintiff is about to commence an action to recover the possession of said property; and whereas the said plaintiff claims immediate delivery of the said property, pursuant to statute:

Now, therefore, we, James Marshall, of Mayfield, N. Y., and John Harrison, of Northville, N. Y., do hereby jointly and severally undertake and bind ourselves in the sum of \$300 (double the value of the chattel) for the prosecution of the said action, and for a return to the said defendant of the said property, if a return thereof shall be ad-

Undertaking on the part of the plaintiff.

judged, and for the payment to the said defendant of any such sum as may, for any cause, be recovered in said action against said plaintiff.

Dated this 18th day of May, 1882.

JAMES MARSHALL,
JOHN HARRISON.

STATE OF NEW YORK, }
Fulton County, } ss. :

On this 18th day of May, 1882, before me, the subscriber, appeared James Marshall and John Harrison, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

RICHARD HEMPSTEAD, *Justice of the Peace.*

STATE OF NEW YORK, }
Fulton County, } ss. :

James Marshall and John Harrison, being duly sworn, say, and each for himself severally says, that he resides in the county of Fulton and State of New York, and is worth the sum of \$600, over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

Subscribed and sworn to, before me, } JAMES MARSHALL,
this 18th day of May, 1882. } JOHN HARRISON.

RICHARD HEMPSTEAD, *Justice of the Peace.*

I hereby approve the sureties to the above undertaking.

RICHARD HEMPSTEAD, *Justice of the Peace.*

The statute provides for the delivery of this undertaking to the justice upon the application for the requisition, and for the issuing of the requisition on the receipt by the justice of the affidavit and undertaking, but makes no special provision for the custody of the undertaking between the time of its receipt by the justice and the return day of the summons, and does not require that a copy shall be served upon the defendant. In the same proceeding in courts of record the undertaking is delivered to the sheriff; see vol. 1, p. 19, § 1699; and he is required to serve a copy of it upon the defendant as well as a copy of the affidavit and requisition. *Id.*, p. 20, § 1700. But there is no authority for this procedure in an action before a justice of the peace. The Code provides generally that a justice of the peace must carefully file and preserve each affidavit or other paper delivered to him to be filed in an action or special proceeding. Another section of the statute provides that any undertaking required to be given by the Code must be filed with the clerk of the court, "except where, in a special case,

The requisition.

a different disposition thereof is directed by the court, or drescribed in this act." This section is made applicable to proceedings in a justice's court, but is limited by another section declaring that when a provision of the Code, not contained in chapter 19 of that act, is made applicable to proceedings before a justice of the peace, and relates to the filing of a paper in a court, or with a clerk, the paper must, in an action or special proceeding before a justice of the peace, be filed with the justice, unless he has a clerk appointed pursuant to law. But it would seem that, in an action of replevin in justice's court, the plaintiff's undertaking is not to be filed by the justice until the defendant has had an opportunity to except to the sureties therein, and the sureties have justified, and the undertaking allowed. See vol. 1, p. 21, § 2926. This cannot be done before the return day of the summons. In the meanwhile the undertaking should remain in the custody of the justice.

Where an action of replevin has been discontinued by the delivery of an answer showing that the title of real property will come in question and the giving of the undertaking required to be delivered to the justice with such answer, each undertaking given in the replevin proceedings before the justice will continue to be valid in and applicable to the new action brought thereafter in the Supreme Court or County Court. Vol. 1, p. 31, § 2957. So the undertaking given by the plaintiff in an action of replevin brought before a justice of the peace extends to all proceedings and adjudications in the same action through every court to which it may be carried by appeal in case the plaintiff is finally defeated. *Letson v. Dodge*, 61 Barb. 125; *Tibbles v. O'Connor*, 28 id. 538. Such at least was the construction put upon the undertaking required by the old Code, which provided for the "payment to the defendant of such sum as may, for any cause, be recovered against said plaintiff." It is possible that the courts will place a different construction upon an undertaking "for the payment to the defendant of any sum which the judgment awards to him against the plaintiff."

§ 4. **The requisition.** Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition subscribed by him, requiring the constable to whom the summons is delivered to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days before the return day of the summons. The affidavit and requisition must be delivered to the constable with the summons. Vol. 1, p. 19, § 2921.

Execution of the requisition.

The requisition is a mandate and falls within the general provisions of the statute prescribing the requisites of mandates issued by a justice of the peace. See *ante*, 101.

It may be in the following form:

Requisition in replevin.

JUSTICE'S COURT.

David Johnson

agst.

Robert Jones.

} Before RICHARD HEMPSTEAD, *Justice*.

COUNTY OF FULTON, ss.:

In the name of the People of the State of New York,

To the constable of said county, to whom the summons herein is delivered:

You are hereby required to replevy the chattels described in the within affidavit from the said defendant, Robert Jones, on or before the 23d day of May, 1882.

Dated this 18th day of *May*, 1882.

RICHARD HEMPSTEAD, *Justice of the Peace*.

§ 5. **Execution of the requisition.** The requisition in an action of replevin should be executed within the county of the constable to whom it is delivered for service. If the constable is able to find any chattel described in the affidavit, either in the possession of the defendant or of his agent, it is his duty to forthwith replevy it by taking it into his possession. Vol. 1, p. 20, § 1700. If any chattel described in the affidavit is secured or concealed in a building or inclosure, the constable must publicly demand its delivery. If it is not delivered pursuant to the demand, he must cause the building or inclosure to be broken open and must take it into his possession. *Id.*, § 1701.

In executing this mandate the officer should be particular to comply strictly with requirement of the statute and the direction of the mandate. The requisition commands him to replevy the property described in the affidavit, and his process will not protect him in taking any property not so described. *Bullis v. Montgomery*, 50 N. Y. 352; *Otis v. Williams*, 70 *id.* 208. So the statute authorizes the officer to take the property specified from the defendant named in the action or his agent; and if the officer takes the property from another person he will be liable for trespass, and his process will be no protection. *Ib.*

Execution of the requisition.

In the exercise of the right to break open a building or inclosure to take possession of property concealed therein, the constable should do as little damage as possible to the building. After gaining admission into the building it is the right and duty of the constable to search thoroughly every part of it. If there are inner rooms which are locked or fastened, and the property cannot be found in the rooms which are open, then the other rooms should be broken open. If the property is such that it may be kept in chests, trunks, bureaux and the like, and it cannot be found elsewhere in the building, the constable should break these open for the purpose of finding the property. If, however, there are any persons of suitable age and discretion in the building, it would be proper to request them to open such inner doors as were locked, or to open such chests, trunks, etc., before breaking them open. It must be remembered, however, that this right to break open a dwelling-house is a departure from the ordinary rule in relation to the service of civil process, and that it is not given unless the property is concealed within the building. The same rule is applicable in this case which governs arrests upon civil process. A dwelling-house may be broken open, after a proper demand and refusal, if the officer wishes to arrest a stranger who is not a member of the family occupying the house. The officer acts at his peril in breaking a dwelling-house in that case. If he finds such stranger there he will be justified; if he does not, the breaking of the house will be a trespass.

The term "concealed" means that the property is kept close or secret, or that it has been hidden. The true construction of the statute is to be found in the intention and object which was in view in enacting it. Ordinarily an officer would not be justified in breaking into a house to take property upon civil process. And if the law permitted parties to put property within their dwellings for the purpose of placing it beyond the reach of civil process; and if officers could not lawfully take it from such dwellings, the result would be, that every person who wished to evade the law would put within his dwelling-house all property which he wished to place beyond the reach of the law or its officers. The reasonable construction of the statute is, that when the defendant has wrongfully and unlawfully put such property into his dwelling-house for the purpose of keeping it from being taken by the owner or by an officer, that is a concealment within the meaning of the statute. So, when the property is of that kind which is usually kept in a dwelling-house, if the defendant refuses to deliver it to the constable on a proper demand, that will be within the intent of the statute; and it is a concealment such as will justify the constable

Execution of the requisition.

in breaking open the building for the purpose of taking it. This construction carries into effect the intention of the law, which is, that no man shall use his dwelling as a castle to protect him in unlawfully keeping the property of another person. This rule is eminently proper and just. If the defendant has unlawfully taken, or he unlawfully detains the personal property of another; and he refuses, upon a proper demand, to surrender it, either to the owner or to an officer of the law who has legal process for its recovery; he who thus wantonly disregards the rights of property of other persons has little reason to complain if the law deals vigorously with one who acts in direct violation of its requirements, in contempt of its process, and in resistance to its officers. Thus much has been said in relation to dwellings for the reason that it is in relation to those buildings that most questions as to authority to enter would arise. All other buildings, such as stores, shops, offices, barns and the like, and all inclosures may also be broken open after a proper demand, publicly made, as has been already explained.

After replevying a chattel the constable must retain it in his possession, keeping it in a secure place, until the person who is entitled to its possession is ascertained in the manner prescribed by statute. Vol. 1, p. 20, § 1702.

Immediately after the seizure of the property described in the affidavit, and at least six days before the return day of the summons, the constable must serve the summons, affidavit and requisition upon the defendant, by delivering to him personally a copy of each, if he can with reasonable diligence be found within the county, or if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county, with a person of suitable age and discretion; or if such a person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, inclosed in a sealed, post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the property replevied is found. See vol. 1, p. 15, § 2910; *id.*, p. 20, § 2922. The service of the summons, affidavit and requisition must be made within the time and in the manner prescribed by section 2910 of the Code of Civil Procedure for the service of a summons, warrant of attachment and inventory. *Ib.* This mode of service has been already pointed out. See *ante*, 188.

Exception to and justification of the plaintiff's sureties.

§ 6. Exception to and justification of the plaintiff's sureties.

A defendant, whose property has been replevied, may elect between two forms of procedure with a view to his protection against loss or damage by reason of the resort to this provisional remedy. He may take direct proceedings to have the property replevied immediately returned to him, as will be noticed in the following section; or, if he deems the return of the property pending the decision of the action less important than his right of action on the undertaking given by the plaintiff, or if he is unable to give the security necessary to procure a return of the property, he may proceed to inquire into the sufficiency of the security furnished by the plaintiff's undertaking, and ascertain that the sureties therein are responsible persons, able to respond to him for the return of the property or for any judgment which he may recover against the plaintiff, or if they are not responsible persons, to compel the plaintiff to furnish a new undertaking, with sufficient sureties, under the penalty of having the property restored to the defendant.

If the defendant does not require the return of the property to him, he may, at any time after the property is replevied and at least two days before the return day of the summons, serve upon the plaintiff, or upon the constable, a written notice that he excepts to the plaintiff's sureties. The notice may be in the following form :

Notice of exception to plaintiff's sureties.

JUSTICES' COURT.

John Doe agst. Richard Roe.

Take notice that I except to the sureties in the undertaking given by the plaintiff in this action.

Dated this 20th day of May, 1882.

RICHARD ROE, *Defendant.*

To JOHN DOE, *Plaintiff*; or
To JOHN STILES, *Constable.*

If such a notice is served, the sureties must justify upon the return day of the summons, or the plaintiff must then give a new undertaking, with other sureties, who must then appear and justify before the justice. Vol. 1, p. 21, § 2924. If, after such notice has been given, the plaintiff fails to procure the allowance of his undertaking, the con-

Exception to and justification of the plaintiff's sureties.

stable must immediately deliver the chattel to the defendant. On the other hand, if the plaintiff duly procures the allowance of his undertaking, the constable must immediately deliver the chattel to him, unless a person, not a party to the action, has made claim to the chattel in the manner prescribed by the statute. *Id.*, p. 22, § 2927. The proceedings in that case will be noticed hereafter.

The Code does not require that a constable, upon whom the defendant has served a notice that he excepts to the plaintiff's sureties, shall give seasonable notice of that fact to the plaintiff or his sureties, nor does it allow any fee for giving such notice. The fact will appear on the return day of the summons from the return of the constable, but need not be disclosed to the plaintiff before that time. It is, therefore, important that the plaintiff should in every case be prepared to proceed with the justification of his sureties upon the return day of the summons unless he is certain that the defendant has waived all objection to the sureties by omitting to give written notice of exception within the time allowed for that purpose.

For the purpose of justification each of the sureties must attend before the justice upon the return day of the summons, and be examined on oath, on the part of the defendant, touching his sufficiency in such manner as the justice, in his discretion, thinks proper. If required by the defendant's attorney, the examination must be reduced to writing and subscribed by the surety. Vol. 1, p. 22, § 580. The sureties must each be a resident of the State and be a householder or freeholder therein. Each surety must be worth the sum specified in the undertaking, exclusive of property exempt from execution. If there are more than two sureties in the undertaking, the justice may allow them to justify severally in sums less than that specified in the undertaking, if the whole justification is equivalent to that of two sufficient sureties. *Id.*, pp. 21, 22, § 579. If the justice finds the sureties sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and file it. The constable is thereupon exonerated from liability, and the plaintiff is entitled to the immediate possession of the chattel replevied unless it has been claimed by a stranger as before stated. *Id.*, pp. 21, 22, §§ 2926, 2927, and 581. But if the plaintiff fails to procure the allowance of his undertaking, the constable must immediately deliver the chattel to the defendant. *Id.*, § 2927.

The examination may be in the following form :

Return of property to the defendant.

Examination of plaintiff's sureties.

JUSTICE'S COURT.

David Johnson	}
agst.	
Robert Jones.	

On this 24th day of May, 1882, personally appeared before Richard Hempstead, a justice of the peace in and for the town of Mayfield, in the county of Fulton, at his office in said town, James Marshall and John Harrison, sureties in the annexed undertaking, and were each severally and duly examined, upon oath, touching their qualifications as sureties, which said examination was reduced to writing by said justice, at the request of the defendant's attorney, and subscribed by said sureties as follows, viz.:

STATE OF NEW YORK, {
County of Fulton, } ss.:

James Marshall, being duly sworn, says that he is one of the sureties named in and who executed the annexed undertaking and resides in the town of Mayfield, in the said county and State; that he is a farmer, and is the owner in fee of one hundred acres of land, in said town, which is reasonably worth the sum of \$30 per acre; that said land is free from all liens and incumbrances; that he is the owner of stock, horses and farming implements worth at least \$500; that the debts which he owes and the liabilities which he has incurred do not exceed the sum of \$800; and that he is worth the sum of \$1,800 over and above all such debts and liabilities, exclusive of property exempt by law from levy and sale under execution.

And the said John Harrison, being duly sworn, says:

(Insert testimony of this surety.)

Taken and sworn before me, this {	JAMES MARSHALL,
24th day of May, 1882. }	JOHN HARRISON.

RICHARD HEMPSTEAD, *Justice of the Peace.*

The allowance of the undertaking may be expressed in the single word "allowed," with the date and signature of the justice added. This should be indorsed upon the undertaking.

§ 7. **Return of property to the defendant.** As has been stated, if the defendant excepts to the plaintiff's sureties and the plaintiff afterward fails to procure the allowance of his undertaking, the constable must immediately return the property to the defendant. So

 Return of property to the defendant.

where the defendant has not excepted to the plaintiff's sureties, he may require the return to him of the property replevied by serving upon the justice the statutory notice, affidavit and undertaking, and procuring the allowance of the latter in the mode prescribed by the statute. These papers may be served upon the justice at any time before the return day of the summons. The notice to be served is merely to the effect that the defendant requires the return of the chattel replevied, and may be in the following form :

Notice requiring return of property

JUSTICE'S COURT.

David Johnson <i>agst.</i> Robert Jones.
--

Please take notice that I require the return of the chattel replevied in the above entitled action.

Dated this *23d day of May*, 1882.

ROBERT JONES, *Defendant.*

To RICHARD HEMPSTEAD, Esq., *Justice of the Peace.*

If the plaintiff has stated separately in his affidavit the value of one or more chattels or classes of chattels, the defendant may require the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of such portion thereof as has been replevied. Vol. 1, p. 19, § 1697; *id.*, p. 21, § 2925. In such case, the notice served by the defendant should specify what chattel or chattels he requires returned. This may be done by adopting the description of the property contained in the plaintiff's affidavit.

The affidavit to be served upon the justice with the notice must contain an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof by virtue of a special property therein, and, in the latter case, must set forth the facts with respect to such special property. Vol. 1, p. 21, § 1704. And see *ante*, 206, 207.

This affidavit may be made by an agent or attorney if the material facts are within his personal knowledge, or if the defendant is not within the county where the property was replevied, or is not capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon

Return of property to the defendant.

his information and belief ; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the defendant. Vol. 1, p. 19, § 1712.

The undertaking to accompany the notice and affidavit must be executed by at least two sureties, and must be to the effect that they are bound in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for the delivery of the chattel to the plaintiff, if delivery thereof is adjudged, and for the payment to him of any sum which the judgment awards against the defendant. Vol. 1, p. 21, §§ 1704, 2925.

Defendant's undertaking in replevin.

JUSTICE'S COURT.

David Johnson
agst.
Robert Jones.

} Before RICHARD HEMPSTEAD, *Justice*.

Whereas, the plaintiff in this action claims the delivery to him of certain chattels specified in the affidavit made on behalf of the plaintiff for that purpose, of the alleged value of \$150, and has caused the same to be taken by a constable of the county of Fulton pursuant to the Code of Civil Procedure, but the same has not yet been delivered to the plaintiff ; and, whereas, the defendant requires a return of the chattels replevied :

Now, therefore, we, Harvey Lake, of the town of Perth, county of Fulton, by occupation a farmer, and Michael Hollenbeck, of the same place, by occupation a butcher, do hereby jointly and severally undertake and become bound to the plaintiff in the sum of \$300, for the delivery of the said chattels to the plaintiff, if delivery thereof is adjudged, and for the payment to him of any sum which the judgment awards against the defendant.

Dated the 23d day of May, 1882.

HARVEY LAKE,
MICHAEL HALLENBECK.

This undertaking should be acknowledged or proved as in other cases, but no affidavit of justification need be added at the time of service. The sureties must justify before the justice upon the return of the summons. Vol. 1, p. 21, § 2925.

 Return of property to the defendant.

It is customary to indorse upon the undertaking a notice in the following form :

To RICHARD HEMPSTEAD, Esq., *Justice of the Peace* :

Take notice, that the within is an undertaking given on behalf of the defendant herein, to require the return of the chattels taken herein, and that the sureties in said undertaking will justify by and before said justice upon the return of the summons.

Yours, etc.,

ROBERT JONES, *Defendant*.

Upon the return day of the summons the sureties may be examined upon oath as to their property and qualifications by the plaintiff or his attorney in such manner as the justice, in his discretion, thinks proper. If required by the plaintiff, or his attorney, the examination must be reduced to writing and subscribed by the sureties. If the justice finds the sureties sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and file it with the other papers in the case. The qualification of the sureties is the same as that of the sureties in the plaintiff's undertaking, and the proceedings upon the examination of the sureties, and the allowance of the undertaking are the same in both cases. See *ante*, 215.

Upon the allowance of the undertaking by the justice the constable must immediately deliver the chattel to the defendant. Vol. 1, p. 22, § 2927. The constable is exonerated from all liability upon the filing with the justice of the defendant's undertaking duly allowed. Vol. 1, p. 21, § 2926. But the statute contemplates that the property shall be immediately delivered to the defendant ; and if, instead of delivering the property to the defendant, the constable should deliver the property to the plaintiff, without the defendant's consent, before judgment and execution in the action, he would forfeit to the defendant the sum of \$100, and also be liable to him for all damages sustained by reason of the wrongful delivery. See vol. 1, p. 22, § 2928.

If the property replevied consisted of two or more chattels, separately valued in the affidavit of the plaintiff, and the defendant has required the return of a part only of the chattels replevied, the remainder must be delivered to the plaintiff, unless a third person interposes a claim thereto. Vol. 1, p. 19, § 1697.

If the defendant, after requiring the return of the property, fails to procure the allowance of his undertaking, the constable must immediately deliver the property to the plaintiff, unless a stranger has inter-

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posed a claim to the property, as will be hereafter noticed. Vol. 1, p. 22, § 2927.

If the defendant causes the discontinuance of the action by interposing a plea of title to lands and giving the undertaking required in such case, and the plaintiff thereupon brings a new action for the same cause, in the proper court, the undertaking given in the action, before the justice, to procure a return of the property replevied will continue to be valid in such new action, and will be applicable thereto. Vol. 1, p. 31, § 2957.

§ 8. **Claim to possession by a person not a party.** If a person, not a party to the action, claims, as against the defendant, a right to the possession of the property, existing at the time when it was replevied, he may, at any time before the property is actually delivered to either party, make and deliver to the constable an affidavit, stating that he makes such a claim ; specifying the chattel or chattels to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them ; and setting forth the facts upon which his right of possession depends. Vol. 1, p. 22, § 1709. This affidavit may be made by the claimant's agent or attorney if the material facts are within his personal knowledge, or if the claimant is not within the county where the property was replevied, and capable of making the affidavit. Where the affidavit is made by the attorney or agent, he must state therein what allegations, if any, are made upon information and belief, and must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the claimant. Id., p. 19, § 1712.

Upon the delivery of this affidavit to the constable, he may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff, personally, or upon the person who appears for him before the justice, a copy of the affidavit, with a notice that he requires indemnity against the claim.

The indemnity to be furnished to the constable by the plaintiff upon a claim made as above provided must consist of a written undertaking to the constable, executed by at least two sureties, to the effect they will indemnify him against any liability for damages, costs or expenses to be incurred in an action brought against him by the claimant, or a person deriving title from, or through the claimant, by reason of the taking or detention of the chattel, or its delivery to the plaintiff, not exceeding a sum, to be specified in the undertaking, not less than the actual value of the chattel claimed, and \$250 in addition thereto, if that does not amount to more than \$300. The sum specified in the undertaking need

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not, in any case, exceed \$300, whatever may be the actual value of the chattel. Each of the sureties besides possessing the other qualifications required by law, must be a freeholder or householder of the constable's county. Vol. 1, p. 22, § 2929; id., p. 23, § 1711.

The demand for indemnity being made upon the return day of the summons, the plaintiff may be wholly unprepared to furnish it at once. The constable should, therefore, allow the plaintiff a reasonable time in which to procure sureties, and prepare his undertaking, if he desires such time. If the plaintiff does not furnish the indemnity within a reasonable time after he becomes entitled to a delivery of the chattel, the constable may, in his discretion, deliver it to the claimant without incurring any liability to the plaintiff by reason of so doing. Vol. 1, p. 23, § 1709. If the plaintiff furnishes the undertaking, he is entitled to the delivery of the property to him, in case he would have been so entitled, if no claim had been made. See *Manning v. Keenan*, 73 N. Y. 45. But, before delivering the chattel to the plaintiff, the constable may require the persons offered as sureties to submit to an examination before the officer who takes the acknowledgment of the undertaking. See vol. 1, p. 23, § 1711. The proceedings will be the same as upon the examination of the sureties in the undertaking given by the plaintiff on applying for the requisition. See *ante*.

When the defendant, instead of the plaintiff, is entitled to the delivery of the property replevied, the claim of a third person, made in the mode prescribed by the statute, will not affect his rights. Under the old Code, when a claim by a third person had been made as required by that act, the constable was not bound to keep the property, nor deliver it to the plaintiff, unless the plaintiff, on demand, indemnified the officer against the claim. See Code of Procedure, § 216. It was held in one case that this section of the old Code was intended simply for the protection of the sheriff, in case he should deliver the property to the plaintiff, and not to sanction its delivery to the defendant; and that, upon a claim by a third party, a failure of the plaintiff to give a proper indemnity did not entitle the officer to *deliver* the property to such third party, but that he could merely *permit* the defendant, from whose possession the property was taken, to *resume it*, by relinquishing it himself. *Haskins v. Kelly*, 1 Rob. 160; S. C., 1 Abb. (N. S.) 63. In another case it was said that the officer having in his possession property which he has taken from another, in which he has himself no personal right, and as to which he is no longer bound to exercise an official power, must of necessity either retrace his steps and restore the property to the defendant, from whom he took it, or deliver

Claim to possession by a person not a party.

it to the claimant. *Manning v. Keenan*, 73 N. Y. 45, 54. But the provision of the old Code that the officer shall not be bound to keep the property after such claim has been made and indemnity refused is not retained in the present Code, and the right of the officer to cease to act in such case no longer exists. If the defendant is entitled to the return of the property but for the claim of a third person, delivery must still be made to him notwithstanding such claim.

The liability of the constable to a claimant of the property replevied will be noticed hereafter. See § 10, *post*, 226.

The following forms may be of use in proceedings of this nature :

Affidavit of claimant.

JUSTICE'S COURT.

David Johnson
agst.
Robert Jones.

} Before RICHARD HEMPSTEAD, *Justice*.

STATE OF NEW YORK, }
County of Fulton, } *ss.:*

Alexander McGregor, being duly sworn, says that an action is pending before Richard Hempstead, Esq., a justice of the peace of the town of Mayfield, in said county, between David Johnson, plaintiff, and Robert Jones, defendant, to recover the following property : (*describe it as in the plaintiff's affidavit*) that John Stiles, a constable of said town, has taken said property by virtue of a requisition issued by said justice in said action; that at the time said property was so taken under said requisition, deponent was entitled to the possession thereof as against the defendant; that deponent's right to the possession thereof at the time aforesaid depends upon the following facts: (*here state fully the facts upon which the right to possession depends*) and that deponent now claims as against the defendant the right to the possession of said property.

Subscribed and sworn to before }
me, this 23d day of May, 1882. } ALEXANDER MCGREGGOR.

RICHARD HEMPSTEAD, *Justice of the Peace*.

Notice to plaintiff of claim by third person.

(*Title of cause as in previous form.*)

Please take notice that Alexander McGregor claims the property replevied by me in this action; that he has served upon me an affidavit,

The return.

of which the annexed is a copy ; and that I require indemnity against said claim.

(*Date.*)

JOHN STILES, *Constable.*

To DAVID JOHNSON, *plaintiff.*

Plaintiff's undertaking to the constable.

(*Title of the cause.*)

Whereas, John Stiles, a constable of the town of Mayfield, in the county of Fulton, has taken into his possession and now holds, by virtue of a requisition issued in the above-entitled action by Richard Hempstead, a justice of the peace of said county, the following property : (*describe it*) and whereas, one Alexander McGregor claims the right to the possession thereof, and has delivered to said constable an affidavit as required by law, a copy of which has been served upon the plaintiff by said constable, with a notice that he requires indemnity against said claim. Now, therefore, we, James Jackson, of the town of Mayfield aforesaid, by occupation a manufacturer, and Patrick Flinn of the same town, by occupation a mason, do jointly and severally undertake and become bound to the said John Stiles in a sum not exceeding \$300, that we will indemnify him against any liability for damages, costs or expenses to be incurred in an action brought against him by said Alexander McGregor, or any person deriving title from, through or under the said Alexander McGregor, by reason of the taking or detention of said property or its delivery to the plaintiff.

(*Date.*)

(*Signatures.*)

(*Add acknowledgment, justification and approval.*)

§ 9. **The return.** The proceedings on the part of the defendant to obtain a return of the property replevied, or on the part of a claimant of such property, must be commenced before the return day of the summons, and may precede the return of the summons and requisition. The constable must, on or before the return day of the summons, make a return to the requisition, under his hand, and file it, with the affidavit and requisition, with the justice. The return must state all the proceedings of the constable under the requisition ; the manner in which the summons, affidavit, and requisition were served ; and if they were served otherwise than by delivering the requisite copies to the defendant, the reason therefor, and the name of the person to whom the copies were delivered, unless his name is unknown to the constable, in

Custody of the property and liability of constable.

which case the return must describe him so as to identify him as nearly as possible. Vol. 1, p. 20, § 2923.

The form of returns to a warrant of attachment given upon a preceding page may be readily varied so as to furnish a form for a return to a requisition.

The following form may be followed in ordinary cases :

Constable's return.

COUNTY OF FULTON, ss. :

I certify that on the 20th day of May, 1882, at the residence of the defendant, Robert Jones, in the town of Mayfield in said county, I served the foregoing summons, affidavit and requisition upon said defendant personally by delivering to and leaving with him a copy of said summons, affidavit and requisition ; that at the same time and place I found in the possession of said defendant and forthwith replevied by taking into my possession the following chattels described in the foregoing affidavit, namely: (*describe property replevied*) and that I now hold said chattels in my possession.

And I further certify that on the 22d day of May, 1882, the defendant served upon me the annexed notice that he excepts to the plaintiff's sureties.

(*Date.*)

JOHN STILES, *Constable.*

§ 10. **Custody of the property and liability of constable.** A constable, upon replevying a chattel, must retain it in his possession, keeping it in a secure place, until the person who is entitled to its possession is ascertained, and must then deliver it to that person upon request and payment of his lawful fees and necessary expenses for taking and keeping it. Vol. 1, p. 20, § 1702. The person entitled to the possession of the property pending the suit should be ascertained upon the return of the summons, as between the plaintiff and defendant. If the defendant has excepted to the plaintiff's sureties, and the plaintiff has procured the allowance of his undertaking, he is entitled to the immediate delivery of the property as against the defendant. But if he has failed to procure the allowance of his undertaking, then the defendant is entitled to the immediate possession of the property. If the defendant has required the return of the property replevied, and has procured the allowance of his undertaking, he is entitled to the immediate delivery of the property to him ; but if he has failed to procure the allowance of his undertaking, the plaintiff is entitled, as against the defendant, to the immediate delivery of the

Custody of the property and liability of constable.

property. If the defendant has neither excepted to the plaintiff's sureties nor required the return of the property replevied within the time prescribed for that purpose, then the plaintiff is entitled, as against the defendant, to the immediate delivery of the property to him. If the defendant has required a return of a part of the property replevied as hereinbefore stated, and has procured the allowance of his undertaking, he is entitled to the immediate delivery of that part of the property, and as against him, the plaintiff is entitled to the immediate possession of the remainder. Vol. 1, p. 19, § 1697; *id.*, p. 22, § 2927.

A constable who delivers to another party, without the consent of the other, a chattel replevied by him, except as above stated, or by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of \$100, and is also liable to him for all damages which he sustains thereby. Vol. 1, p. 22, § 2928.

When the defendant has excepted to the plaintiff's sureties, and the plaintiff has procured the allowance of his undertaking and filed it with the justice, the liability of the constable to the defendant is at an end. *Id.*, p. 21, § 2926. So when the defendant has required the return of the property, given the statutory undertaking, procured its allowance, and filed it with the justice, the liability of the constable to the plaintiff ceases. *Ib.* Henceforth, each party must seek his remedy for any wrong done him by the delivery of the property to the adverse party as required by statute, in the execution issued in the action, or in an action upon the undertaking given for his protection, and not by action against the officer.

If a third person has made claim to the property and served the statutory affidavit, and the constable has demanded indemnity against the claim, which the plaintiff has declined to furnish, the officer will incur no liability to the plaintiff if he delivers the property to the claimant. *Id.*, § 1709. Nor will the officer incur any liability to the defendant by making such delivery, if the plaintiff would have been entitled to the delivery of the property to him had such claim not been made. The defendant has his remedy upon the undertaking given by the plaintiff upon procuring the requisition, in case a delivery of the property to him shall ultimately be adjudged. So if a third person has made claim to the property replevied by serving the affidavit prescribed by the statute, and the plaintiff, on demand of the constable, has furnished indemnity, and obtained a delivery of the property to him, the constable will incur no liability to the defendant by making such delivery, if the plaintiff would have been entitled to the delivery had such

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claim not been made. In neither case has any right of the defendant been violated by such act of the constable. In taking the property from the defendant or his agent in the first instance, the constable but followed the requirements of his process, and for that taking the process is his justification. If the defendant has neglected to except to the plaintiff's sureties, or to require a return of the property to him within the time allowed for that purpose, or if, having required the return of the property, he has failed to have his undertaking allowed, his failure to obtain a re-delivery of the property is due to his own neglect. If he has excepted to the plaintiff's sureties, and the latter has procured the allowance of his undertaking, such allowance, as we have seen, entitled the plaintiff to a delivery of the property and exonerated the constable from liability. In either case, the defendant having neither the legal right to the custody of the property during the pendency of the action, nor the right to require the officer to retain it in his possession during such time, sustains no legal injury by the delivery of the property to the plaintiff or the claimant. He is fully protected by the undertaking given to him by the plaintiff. If, however, the defendant is entitled to the delivery of the property to him at the time a third person claimed the right to its possession in the manner prescribed by the statute, and the constable, in violation of that right, delivers the property to the claimant, he makes such delivery at his own risk.

How far the constable is liable to the actual owner of the property replevied, who was not a party to the replevin action, is not easily determined from the statute or the authorities. The Code provides that a person not a party to the action who has made claim to the chattel replevied by the service of the affidavit prescribed by section 1709 of that act may maintain an action against the constable who has delivered the chattel to the plaintiff to recover his damages, by reason of the taking, detention, or delivery of the chattel, but that the summons in such action must be issued within three months after the delivery of the chattel to the plaintiff, and must be served within three months after it is issued. Vol. 1, p. 23, § 1710. It also provides that an action cannot be maintained against the constable by a person entitled to make a claim except as prescribed in the section above cited. *Ib.* There is no hardship in this provision of the statute rendering the constable liable to the claimant for the delivery to the plaintiff of the property replevied in disregard of the claim made. The officer may demand indemnity against the claim, and relieve himself from liability by a delivery of the property to the claimant in case such indemnity is not furnished. If the indemnity is not furnished, he must deliver the

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property to the plaintiff, if otherwise entitled to the delivery ; but he has his remedy upon the undertaking given for his indemnity, not only for damages, costs and expenses incurred in the action brought against him by the claimant, but for any liability for such damages, costs and expenses. The officer is afforded an opportunity of protecting himself against insolvent sureties, and they may be substituted as defendants in the action against him. See vol. 1, p. 23, § 2911. If he does not demand and secure full indemnity from the plaintiff before delivering the property to him, he must answer for his folly.

Whatever liability a constable may afterward incur in the custody or disposition of a chattel replevied, he incurs no liability to the defendant or any other person in the mere primary execution of the requisition according to its commands. So far his process protects him from all liability. But after a third person has duly made a claim to the property replevied, a liability to an action in behalf of the claimant arises by virtue of such claim, and against this liability the officer is not protected by his process. *Manning v. Keenan*, 73 N. Y. 45. But the only way in which such third party can assert his claim is by an affidavit made and served upon the constable as prescribed in section 1709 of the Code of Civil Procedure. See *Edgerton v. Ross*, 6 Abb. 189. And the only action which will lie against the officer after such claim has been made is an action *to recover the damages* sustained by the claimant by reason of the taking and detention of the chattel or its delivery to the plaintiff. Vol. 1, p. 23, § 1710. If, however, the constable has disregarded the commands of his process, and has taken property not described in the affidavit, or has taken property described therein from the possession of a person other than the defendant or his agent, he is a trespasser, and he will not be protected by his process against any form of action the owner of the property taken may bring against him, nor by any or all of the provisions of the Code. The owner is not bound to make his claim by affidavit against a trespasser. *King v. Orser*, 4 Duer, 431 ; *Otis v. Williams*, 70 N. Y. 203.

§ 11. **Trial of the action and judgment therein.** The proceedings for the examination of the sureties in the undertaking given on the part of the plaintiff or defendant are to be had on the return of the summons. This preliminary matter being disposed of, the issue is joined and the trial proceeds as in other actions. If the defendant has not required the return of the chattel replevied, pending the action, he may still demand judgment for its return in his answer either with or without damages for the taking, withholding or detention. Vol. 1, p. 23, § 2930 ; *Dellin v. Stohl*, 2 Civ. Pro. 222. If the plaintiff

seeks to recover damages for injuries to the chattel, or for its depreciation in value while it was in the possession or under the control of the defendant, he must set forth the facts in his complaint and demand judgment for damages accordingly. Vol. 1, p. 24, § 1722.

Where the summons has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the constable has not been able to replevy it. *Id.*, § 2933. Where the defendant does not appear, and the summons has not been personally served upon him, and a chattel or part of a chattel, to recover which the action is brought, has been replevied, and the proceedings thereupon have been duly taken as prescribed in the statute, the justice must proceed to hear and determine the action with respect to that chattel or part of a chattel, or if the action is brought to recover two or more chattels, with respect to those which have been replevied, in like manner and with like effect as if the summons had been personally served. *Id.*, § 2932.

If the action is tried before a jury, the verdict must fix the damages, if any, of the prevailing party. If in favor of the plaintiff, and the chattel recovered was injured or otherwise depreciated in value while it was in the possession and under the control of the defendant under such circumstances that the plaintiff might recover damages for the injury or depreciation in an action brought against the defendant therefor, he may recover the same damages in this action, provided he has set forth the facts in his complaint and demanded judgment for such damages. *Id.*, §§ 1722, 1726. If the verdict awards to the plaintiff a chattel which has not been replevied, it must also fix the value of the chattel at the time of the trial. So if the verdict awards to the plaintiff a chattel which has been replevied, but has afterward been delivered by the constable to the defendant, or to a person not a party who has made claim to the same as provided by the statute, it must fix the value of the chattel at the time of the trial. *Ib.* When the verdict awards to the defendant a chattel which has been replevied and afterward delivered by the constable to the plaintiff, or to a third person making the statutory claim to the same, it must fix the value of the chattel at the time of the trial, unless in one of the following cases:

1. When the plaintiff is the general owner of the chattel but it was rightfully distrained doing damage, and its value is greater than the damages sustained by the defendant by the injury for which it was distrained, in which case those damages must be fixed instead of the value of the chattel; and

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2. When the plaintiff is the general owner of the chattel, but the defendant has a special property therein, and the value of the chattel is greater than the value of the special property, or the sum charged upon the chattel by reason thereof, in which case the value of the special property, or the sum so charged, must be fixed instead of the value of the chattel. *Ib.* And see Code of Civil Pro., § 1727.

The rules applicable to the verdict of the jury in replevin are of course equally applicable to the decision of the justice in case the action is tried before him without a jury, except that his decision need not be announced or appear otherwise than in the judgment.

The form of the judgment in replevin is peculiar, and depends to a considerable extent upon the prior proceedings in the action. In case of a jury trial the judgment will of course follow the verdict.

Judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any. If a chattel recovered was not replevied, the judgment must also award to him the sum fixed as its value, to be paid by the defendant, if possession of the chattel is not delivered to the plaintiff. Vol. 1, p. 24, § 1730. The value, as we have seen, will be fixed by the verdict of the jury or the decision of the justice. This judgment will be proper only when the justice has obtained jurisdiction of the person of the defendant either by an appearance in the action or by the personal service of the summons upon him (see vol. 1, p. 24, § 2933), as jurisdiction of the person or the specific property of the defendant is essential to the right to make any adjudication in respect to such property. See *id.*, § 2932. If the chattel recovered by the plaintiff was replevied, but was afterward delivered to the defendant, or to a third person, not a party to the action, who has made a proper claim to it, the judgment, besides awarding to the plaintiff the possession of the chattel, with his damages, if any, must also award to him the sum fixed by the verdict of the jury or by the justice as the value of the chattel, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. *Id.*, § 1730.

Judgment for the defendant, where he has demanded judgment for the return of a chattel which was replevied and afterward delivered to the plaintiff, or to a third person, not a party to the action, who has made the statutory form of claim to the same, must award to the defendant the possession of the chattel, with his damages, if any, and also the sum fixed as the value thereof, to be paid by the plaintiff, if possession is not delivered to the defendant. *Ib.* If, however, the plaintiff is the general owner of the chattel replevied, but it was rightfully distrained doing damage, and those damages have been fixed instead of

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the value of the chattel as provided in section 1727 of the Code; or, if the plaintiff is the general owner of the chattel replevied, and the defendant has a special property therein, and the value of such special property, or the sum charged upon the chattel by virtue thereof, has been fixed, instead of the value of the chattel, as provided in the same section, the judgment for the defendant must award to him the sum so fixed, and, if it is not collected, the delivery of the chattel, or, if the chattel has not been replevied, or has been returned to the defendant after replevin, judgment for the defendant must award that he is entitled to the possession of the chattel, until the sum so awarded is collected, or otherwise paid. *Ib.*

The Code makes no special provision for a judgment in favor of the defendant, in a case not included within section 1727, where the property has not been replevied, or where it has been replevied and afterward returned to the defendant. The judgment in such case would fall within the general provision of the Code "that where a verdict, or the decision of the justice upon a trial without a jury, is rendered in favor of either party, the justice must render judgment against the adverse party in conformity thereto, except as is otherwise specially prescribed by law." Vol. 1, p. 44, § 3014.

The mode of enforcing a judgment in replevin will be noticed hereafter.

CHAPTER XI.

APPEARANCE.

SECTION 1. What is meant by appearance. An appearance, in a legal sense, means something more than the mere personal presence of the parties before the justice.

To constitute an appearance, the party must do some act or take some step in the action. When the names of the parties are called by the justice, on the return day of process, at the proper time, if either party is present and refuses to answer to his name, or if he merely answers to it by saying "here," and then refuses to put in any pleading, or to take any other step in the action, there will not be any legal appearance by the party who thus neglects or refuses to act. *Fanning v. Trowbridge*, 5 Hill, 428, 430, *People v. Wilgus*, 5 Denio, 58, 62. The same rule applies to an appearance at any adjourned day. An appearance may be general or special. A general appearance is, when a party appears in the action for all the purposes of the action, and for the purpose of litigating the cause upon the merits, and upon any or all the questions which may arise in the cause. A special appearance is, when the party appears for the sole purpose of making some motion or objection, raising some question, or pleading some special matter which does not relate to the merits of the action, but to some irregularity in the pleadings, some personal privilege, or a want of jurisdiction of person or property, or to something of a similar character.

An appearance will be deemed to be a general one, unless the party states that it is a special appearance; and in that case, he ought to state distinctly the purpose for which he appears. The justice ought to make an entry in his minutes whether the appearance was a general or a special one; and if special, he should also state the particular grounds or purpose of such appearance. This entry ought also to be made in his docket in entering judgment in the action.

§ 2. When to appear. Except when an order of arrest has been issued in an action the summons will specify the day and hour fixed for the appearance of the parties before the justice, and the parties must appear within one hour thereafter. The statute requires the justice to wait one hour after the time specified in the summons for its re-

Non-appearance of the justice.

turn, unless the parties sooner appear. Vol. 1, p. 10, § 2893. An appearance within this time will be sufficient.

The parties may, if they please, disregard the time fixed for their appearance in the summons, and appear and join issue at an earlier day. This act of the parties will give the justice jurisdiction to proceed to hear and determine the action as fully as an appearance in obedience to the summons.

Where an order of arrest accompanies the summons, the latter is made returnable immediately upon the arrest of the defendant. If the constable returns that he has notified the plaintiff of the arrest, the plaintiff must appear within one hour after the defendant is brought before the justice. If the officer does not so return, the plaintiff must appear and join issue within twelve hours after the defendant is brought before the justice. Vol. 1, p. 11, § 2899 ; id., p. 26, § 2934.

§ 3. **Non-appearance of the justice.** It sometimes happens that the justice himself is absent at the time fixed for the appearance of the parties. The statute has not provided for such a case, but the decisions of the Supreme Court will furnish a guide to the practice upon that point.

It is a general rule that an action is discontinued if the justice does not appear at the place mentioned in the summons at the hour appointed, or within one hour after that time. *Stoddard v. Holmes*, 1 Cow. 245 ; *Wiest v. Critsinger*, 4 Johns. 117 ; *Flint v. Gault*, 15 Hun, 213.

Neither party is bound to wait a longer time than that for the appearance of the other, and there is no reason why the justice should be permitted to detain the parties any longer time than that.

When a defendant has appeared at the proper time and place mentioned in the process, and he has there waited one hour for the justice to appear, and he still continues absent, the defendant may then leave. It would be an intolerable injustice to a defendant if he were compelled to wait several hours, and perhaps a whole day, for the return of a justice to attend to his business, or in default of such waiting, to run the risk of such judgment as the justice might render in his absence.

It is sometimes said that a justice may thus remain absent for several hours, and then proceed and render a valid judgment in the absence of the defendant, if the justice was officially engaged.

The case of *Hunt v. Wickwire*, 10 Wend. 102, is generally cited for this proposition, but it does not *decide* any such thing. The facts in that case were briefly these : Foot was justice, Wickwire plaintiff, and Hunt defendant, in an action in a justice's court. The action was

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commenced by warrant; issue was joined, and the cause adjourned a few days for trial, at one o'clock in the afternoon. Hunt appeared on the day of trial with his witnesses, and waited for the justice's appearance until five o'clock, P. M., when he left, the justice not having appeared. After the defendant Hunt had left, the justice appeared, and in the absence of Hunt a judgment was rendered against him, and an execution issued, upon which he was arrested. Hunt then sued Foot, the justice, and Wickwire, the plaintiff, for a false imprisonment, and on the trial of that action, it appeared that the reason why the justice did not appear at the proper time was, that he was engaged as one of the officers of the board in holding a town meeting, and that he attended to the trial of the suit before him as soon as his official duties at the town meeting were discharged. It was also claimed that Hunt agreed with Wickwire that the cause need not be tried until after the town meeting closed. The jury found that there was such an agreement, and they, therefore, found a verdict for the defendant. Hunt then moved for a new trial, but that was denied, on the ground that the agreement was a conclusive defense to the action. And the court expressly declined to pass upon the question, whether the judgment would be void, or merely erroneous, in case an action was discontinued by such a delay.

It is, however, well settled, that the justice would be protected in such a case, however erroneous the judgment may be. It is not absolutely void. Whenever the justice fails to appear at the time and place mentioned for the return of process, or within one hour thereafter, and the defendant has been present and waited for that length of time and then left, the justice should refuse to proceed in the action. *McCarty v. McPherson*, 11 Johns. 407. But if the defendant is still present, although more than an hour has elapsed, the justice may then proceed to call the cause, and the parties will be bound to appear, even if it is an hour and a half after the proper hour. *Cornell v. Bennett*, 11 Barb. 657.

There is another class of cases in which the justice is not absent from the place mentioned for the return of the process, but he is officially engaged at the time. The proper course for the justice in that case will be, to call the cause at the proper time, and then postpone further proceedings in it until his previous engagements are disposed of. By pursuing such a course there will not be any room for misunderstanding, and neither party will have any advantage over the other. The justice must, however, proceed with the cause at the earliest possible moment, and if he does so, his proceedings will be entirely regular. *Myer v.*

Non-appearance of the plaintiff.

Fisher, 15 Johns. 504; *Wilcox v. Clement*, 4 Denio, 160; *Hunt v. Wickwire*, 10 Wend. 103, language of SAVAGE, Ch. J.

If the justice is absent on the return day of process, or upon the adjourned day, the parties may still try the cause if they choose, either by an express agreement, or by proceeding to trial without objection. *Weeks v. Lyon*, 18 Barb. 530; *Seymour v. Bradfield*, 35 id. 49; *Nellis v. McCarn*, id. 115. And such trial may be on any subsequent day. *Ib.*; *Stoddard v. Holmes*, 1 Cow. 245. But the agreement to try the cause in that manner will not bind any one but those who are parties to it. And if there are several defendants, and one of them proceeds to trial, the proceedings will be regular as to him, but not as to those defendants who did not agree to the arrangement, and who did not appear at the trial. *Stoddard v. Holmes*, 1 Cow. 245.

If the defendant insists upon specified conditions before he will consent to try the cause, the conditions must be complied with, or the defendant is not bound to try it; and if the plaintiff proceeds with the cause in the defendant's absence, and without performing such conditions, any judgment which he may recover will be reversed. *Weeks v. Lyon*, 18 Barb. 530.

§ 4. **Non-appearance of the plaintiff.** The Code provides that a judgment of nonsuit, with costs, must be rendered against a plaintiff prosecuting an action before a justice of the peace if he fails to appear within one hour after the summons is returnable, or within one hour after the time to which the trial has been adjourned. Vol. 1, p. 44, § 3013; *Morris v. Bleakley*, 1 Hilt. 90. So if the defendant has been arrested, the plaintiff notified, and a return to that effect made by the constable, a judgment of nonsuit must be rendered against the plaintiff unless he appears within an hour after the defendant is brought before the justice. Vol. 1, p. 11, § 2899.

In an old case, under the Revised Statutes, the plaintiff did not appear within the hour following the time fixed in the summons, but the defendant was present, and insisted that the justice should call the cause and nonsuit the plaintiff. The justice refused to do so, but informed the defendant that he would call the cause within five minutes of such time, the defendant objected to this and left the justice's office. After he left, and within five minutes of the proper time for calling the cause, the plaintiff appeared and proceeded with the cause in the absence of the defendant, and obtained a judgment against him. The Supreme Court reversed this judgment and held that a justice had no authority to compel the defendant to wait five minutes for the appearance of the plaintiff. *Wilcox v. Clement*, 4

Non-appearance of defendant.

Denio, 160. But, if the plaintiff is near the office, and is seen to be approaching it, for the purpose of appearing in the action, the justice may refuse to call the cause and nonsuit the plaintiff. The defendant will be bound, in such a case, to wait until the plaintiff arrives, if that is within a few minutes. And if the justice informs the defendant that he will call the cause as soon as the plaintiff can reach the office, the defendant will be bound to wait so long or lose his defense if he leaves the court. *Barber v. Parker*, 11 Wend. 51. In another case, *Cornell v. Bennett*, 11 Barb. 657, the summons was returnable at one o'clock in the afternoon, but the justice did not appear until half-past three. The defendant was still present in the justice's office, and the justice then called the cause, but the defendant refused to answer. The cause was then tried, and the plaintiff had a judgment. The defendant was called as a witness on the part of the plaintiff on this trial. This judgment was affirmed by the Supreme Court, on the ground that the defendant had willfully abandoned the suit.

The same rule would be applicable if the plaintiff failed to appear, and the defendant remained until he did appear, and then refused to make any defense.

§ 5. **Non-appearance of defendant.** The omission of an appearance by the justice, or by the plaintiff, will generally be a mere question of costs, and the plaintiff may commence another action. But if a defendant fails to appear in proper season, there may be a final judgment against him, which will be a bar to any further litigation of the same matter, and it may also deprive him of the advantage of a set-off. It is, therefore, of much importance to a defendant to know what his rights are, and what remedy he has in such cases.

There are some general rules which are now well established, and those rules will be stated without giving the cases at length, as is sometimes done.

1. If the defendant appears at the return day of the process at the time specified, or within one hour of that time, that is sufficient.

2. If the defendant appears on the return day of the process, and the justice and the plaintiff are still present in court, the defendant may interpose his answer or defense as a matter of right, even if the plaintiff had previously put in his complaint, and the cause had been adjourned to a subsequent day for trial, and for the purpose of allowing the plaintiff an opportunity of getting his witnesses. *Pickert v. Dexter*, 12 Wend. 150; *Lowther v. Crummie*, 8 Cow. 87.

3. If the defendant appears on the return day of the process, but not at the time mentioned, nor within an hour of it, he may still in-

Non-appearance of defendant.

terpose his defense, if the plaintiff is proceeding with the trial on that day, and such trial is then progressing. The plaintiff must be supposed to have been ready for trial, or he would not have proceeded with it, and he has no reason for depriving the defendant of a defense upon the return day. The justice may, however, receive the answer of the defendant, and then adjourn the cause on motion of either party, in the same manner as though the trial had not been commenced. A refusal to receive such defense, or to adjourn the cause in such a case, will be a ground for reversing the judgment. *Sweet v. Coon*, 15 Johns. 86; *Atwood v. Austin*, 16 id. 180; *Lowther v. Crummie*, 8 Cow. 87; *Pickert v. Dexter*, 12 Wend. 150.

Neither party is supposed to be prepared to try a litigated cause on the return day of the process. For, until the pleadings are put in and issue joined, neither party can know what the other will claim, and, therefore, neither can be ready with such evidence as he may need.

The plaintiff may, perhaps, be ready to try the cause on the return day if no defense is interposed. But he may be totally unprepared to meet the defense set up if one is interposed. The plaintiff is, therefore, entitled to an adjournment if that is necessary. On the other hand, if the defendant appears at any time on the return day before the cause is adjourned, and before the plaintiff has left the office of the justice, he ought to be allowed to defend. The plaintiff does not lose any rights in such a case, and to deprive a defendant of his defense in such a case would be gross injustice.

For that reason, the justice ought, in fairness to both parties, to permit an issue to be joined precisely as though both parties had been there in time. And the cause ought then to be adjourned on motion of either party, just as is done in ordinary cases.

4. If the defendant fails to appear at all on the return day of the process, but he does appear on the day to which the cause has been adjourned for the convenience of the plaintiff, to enable him to prove his case, the defendant cannot then claim to interpose a defense as a matter of right, and if the justice refuses to permit him to defend the action, such refusal will not be error. *Sammis v. Brice*, 4 Denio, 576; *Jenkins v. Brown*, 21 Wend. 454; *Snell v. Loucks*, 11 Johns. 69. But the defendant will not be remediless, even if the justice should refuse to permit such defense, provided the defendant is able to make a satisfactory excuse for his default, and to show that he has a defense to the action upon the merits; for, in such a case, the County Court is authorized to set aside the judgment of the justice and order a new trial.

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5. If the defendant fails to appear on the return day of the process, but he appears on the adjourned day, the justice may, in his discretion, permit a defendant to then interpose a defense. *Sammis v. Brice*, 4 Denio, 576; *Jenkins v. Brown*, 21 Wend. 454; *Mead v. Darragh*, 1 Hilt. 396. And if the defendant by affidavit, or upon being sworn by the justice, shows a satisfactory reason for not appearing on the return day, the justice ought to receive his defense. But the justice may and he ought, as a matter of justice to the plaintiff, to allow the defense upon such terms as will be just to both parties.

If an adjournment of the cause becomes necessary to the plaintiff in consequence of permitting such defense, the defendant ought to be required to consent to such adjournment, and to pay to the plaintiff such a sum as will pay his witnesses, and the other necessary costs, charges and expenses of the cause down to the time of putting in such defense. A justice should endeavor to so exercise his discretion as to advance the cause of justice, and to secure the full and just rights of both parties.

6. If the defendant did not appear on the return day of the process, nor on the adjourned day, until after a witness has been sworn and examined on the part of the plaintiff, it seems that he will be too late even if the justice is disposed to admit the defense. *Montfort v. Hughes*, 3 E. D. Smith, 591, 593; *Mead v. Darragh*, 1 Hilt. 396.

7. The defendant will clearly be too late if he does not appear until after judgment has been rendered, whether such appearance is on the return day or on the adjourned day. After judgment is rendered, the justice has no legal power to vacate it and permit a defense. That would be granting a new trial, a power which is not delegated to justices of the peace. *Alburtis v. McCready*, 2 E. D. Smith, 39; *Harden v. Woodside*, id. 37; *People v. Delaware, etc.*, 18 Wend. 558; *Dauchy v. Brown*, 41 Barb. 555. In the justice's court of the city of Albany the rule is otherwise, the legislature having conferred the power upon that court of opening defaults, setting aside judgments rendered therein, and executions issued thereon upon such terms as may be just, in case a defendant has failed to appear on the return day of the process, or on any adjourned day, and it is shown that manifest injustice has been done, and the defendant satisfactorily excuses his default. Vol. 1, p. 180, § 5. The proceedings upon the application for this relief are sufficiently stated in a preceding volume. *Ib.* A similar power is conferred upon justices of the peace of the city of Brooklyn. *Id.*, p. 80, § 3128. But the general rule is as stated above.

8. When a verified complaint has been served with the summons in

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the action, and the defendant fails to answer or demur to the complaint at the time of the return of the summons, he is deemed to have admitted all the allegations of the complaint as true, and upon filing the summons and complaint, with due proof of service, the justice must enter judgment for the plaintiff against the defendant for the amount demanded in the complaint, with costs, without further proof. *Id.*, p. 177, § 3. The defendant, in this case, has an hour after the time specified in the summons in which to appear and answer; but after the expiration of that hour, he stands in the same position, in respect to the right to defend, that he would if the plaintiff, after waiting the hour, had fully proved his case.

§ 6. **How the parties are to appear.** A party to an action before a justice of the peace, who is of full age, may appear and prosecute or defend the same, in person or by attorney, at his election, unless he has been judicially declared incompetent to manage his affairs. Vol. 1, p. 8, § 2886.

In discussing the subject of parties, it has been shown that an infant plaintiff must appear by a guardian appointed for that purpose before the summons is issued in the action. The proceedings to obtain such appointment, and the effect of an appearance by an infant without first securing the appointment, are there discussed. See *ante*, 71. In the same chapter it has also been shown that no proceedings can be taken against an infant defendant after the service and return of a summons against him, until a person has been appointed to appear as his guardian for the purpose of the action. The mode of securing such appointment, and the effect of an omission to secure the appointment before further proceedings in the action have been sufficiently considered in the same connection. See *ante*, 85.

A married woman appears, prosecutes or defends an action or special proceeding alone or joined with other parties, as if she was single. *Ante*, 73.

Idiots, lunatics, and all other persons who are *non compos mentis*, if they are of full age, must sue and be sued in their own names, and they must appear in person. *Lane v. Schermerhorn*, 1 Hill, 97; *McKillip v. McKillip*, 8 Barb. 552. But if the Supreme Court has appointed a receiver, or a committee to take charge of the *estate* of a lunatic, habitual drunkard, etc., then there are cases in which the action may be brought in their names instead of that of the lunatic, etc. 3 R. S., 135, § 11, 5th ed.; Laws of 1845, chap. 112, § 2. And see "*Parties to Action*," *ante*, 66, 71. The committee of a lunatic, or any competent person, may be appointed by the justice to attend to the proceedings in

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the action, or any proper person may assist such party, if no committee or receiver has been properly appointed. *Faulkner v. McClure*, 18 Johns. 134. Corporations cannot appear personally, and they must, therefore, appear by attorney. It is not necessary that an attorney who appears for a corporation in a justice's court should be appointed under the corporate seal. He may be appointed for that purpose as any other agent is appointed by a corporation. *Osborn v. Bank of U. S.*, 9 Wheat. 738; *American Ins. Co. v. Oakley*, 9 Paige, 497, 501; *Murray v. Vanderbilt*, 39 Barb. 141. Any officer of a corporation, such as president, secretary, treasurer or a director, may appear for it without any particular appointment for that purpose. *Ib.*; *Oakley v. Workingmen's, etc., Society*, 2 Hilt. 487; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Bank of Lyons v. Demmon*, Hill & Denio's Supp. 398. Such officer may appear in all cases whether the corporation is plaintiff or defendant. All the proof of authority that is necessary will be for the officer so appearing to swear that he is such officer of the corporation, and the law then declares that he is authorized to appear for such corporation. This is evident from the fact that a process for commencing an action against a corporation may be served upon any such officer. *Ante*, 126. And the rule may be extended so far as to allow any person to appear for such corporation, if he is the officer or agent upon whom the process was served for commencing the action. *Ante*, 126, 130.

If the plaintiff does not appear at the return day, or at an adjourned day, the justice must render a judgment of nonsuit, and if an issue has been joined in the action upon matters of account, and the defendant has interposed a set-off, and the trial has been commenced, and is then adjourned to a future day by consent of parties, if the plaintiff fails to appear on that day the judgment must be the same. The justice has no authority to take the defendant's evidence of a set-off in such a case, and render a judgment in favor of such defendant. If he does so the judgment will be reversed. *Norris v. Bleakley*, 1 Hilt. 90; S. C., 3 Abb. 107.

A warrant was issued by a justice of the peace, and a return was made by the constable, that he had arrested the defendants and had them in custody; the plaintiff did not appear before the justice, nor any one in his behalf. The defendants had given a written request to authorize the entry of a judgment against them, and they had sent this request to the justice. The justice entered a judgment against the defendants upon this request, but the judgment was reversed because

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the plaintiff was not present, and the action, therefore, discontinued. *Sprague v. Shed*, 9 Johns. 140.

Again, if the trial of an action has commenced, and it is adjourned for a short time for the purpose of permitting a defendant time to procure evidence of a set-off, if the plaintiff does not appear when the trial is resumed, the justice must render a judgment of discontinuance; and if he renders a judgment in favor of the defendant for such set-off, or for the balance between the parties, the judgment will be reversed. *Green v. Angel*, 13 Johns. 469.

§ 7. **Appearance by attorney.** It has been shown that any person of full age who has not been judicially declared to be incompetent to manage his affairs may appear and prosecute or defend an action in justice's court in person or by attorney. The distinction between attorneys at law in courts of record and attorneys in fact in courts not of record has been already noticed. See *ante*, 10. The office of *attorney*, in a professional sense of the term, is not known in justices' courts. *Sperry v. Reynolds*, 65 N. Y. 179; *Bailey v. Delaplaine*, 1 Sandf. 11, 13. But, although there are no attorneys at law in these courts in the sense that the term is used in reference to courts of record, there may be attorneys in fact, who are entirely competent, and who are authorized to represent the party who employs them as fully as though he were present in person. *Hughes v. Mulvey*, 1 Sandf. 95.

Except in the city and county of New York and in the county of Kings, a person having a cause pending before a justice's court may employ an attorney at law to attend to it for him, or a person who has never been admitted to the bar. In either case the person so employed will act as the mere agent or attorney in fact of the party. In the counties of New York and Kings, the person employed must be regularly admitted to practice as an attorney or counselor in the courts of record of the State. Vol. 1, p. 9, §§ 63, 64. Subject to this exception, any person other than the constable who served the summons or the venire, or the law partner or clerk of the justice may be the attorney for a party to an action before a justice of the peace. *Id.*, § 2889.

It has been held, *Knight v. Odell*, 18 How. 279, that, if an attorney of the Supreme Court or any other person is deputed by the justice to serve the process by which an action is commenced, the person so deputed will be prohibited from acting as advocate or counsel at the trial in the same manner that a constable is prohibited. To permit such a deputed person to appear and advocate the cause on the trial is an error for which the judgment will be reversed on an appeal.

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Wilkinson v. Vorce, 41 Barb. 370. But such appearance will not deprive the justice of jurisdiction in such a manner as to render his judgment void. *Ib.* By a legal commencement of the action, the justice acquired jurisdiction of the person of the defendant, and although his subsequent acts may render his judgment erroneous, and, therefore, reversible on an appeal, it will not be void, and will be sufficient to justify the issuing of an execution upon the judgment, and its collection by a sale of the defendant's property. *Ib.* The person so serving the process is not a constable, but he is subject to the same obligations. And the court held, in the case just cited, that it included the same disabilities.

Under the Revised Statutes, as amended, the constable who served either the original or jury process in the cause, and the law partner or clerk of the justice before whom the action was brought, were prohibited from *appearing and advocating* for either party at the trial, but were expressly authorized to act as attorneys in any other stage or proceeding in the cause. See 3 R. S. (5th ed.) 432, 44, as amended by Laws of 1864, chap. 421, § 1. See, also, *Ford v. Smith*, 11 Wend. 73; *Knight v. Odell*, 18 How. 279. But this provision of the Revised Statutes was repealed by the General Repealing Act of 1880, and the distinction above pointed out no longer exists. See vol. 1, p. 9, § 2889. A sheriff, under sheriff, deputy sheriff, sheriff's clerk, constable, coroner, crier or attendant of a court is prohibited, during his continuance in office, from practicing as an attorney or counselor in any court. Vol. 1, p. 108, § 62. Whether a person who acts as a mere attorney in fact can be said to practice as an attorney within the meaning of this section is extremely doubtful.

A party who employs a constable to act as counsel at the trial cannot assign such act as a ground of reversal of the judgment, because the law does not permit any person to take any advantage from his own wrong. *Smith v. Goodrich*, 5 Johns. 353.

It is irregular for one attorney to appear for both parties; and where the defendant did not appear, and the attorney for the plaintiff put in an answer for the defendant without making proof of his authority, a judgment against the defendant was reversed. *Sherwood v. Saratoga, etc., R. R. Co.*, 15 Barb. 650. A mere verbal request is a sufficient authority to appear and act as attorney for a party. *Murray v. House*, 11 Johns. 464; *Gaul v. Groat*, 1 Cow. 113; *Tullock v. Cunningham*, *id.* 256; *Pixley v. Butts*, 2 *id.* 421. The attorney is a competent witness to prove his authority. *Tullock v.*

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Cunningham, 1 Cow. 256; *Gaul v. Groat*, id. 113; *Caniff v. Myers*, 15 Johns. 246; vol. 1, p. 9, § 2890.

The authority to appear may be contained in a letter written to the attorney. In one case, *Bush v. Miller*, 13 Barb. 481, the authority of the attorney for the plaintiff to appear was denied. He was sworn and testified that some time previously he had received a letter through the mail, which was dated and post-marked, Fairfax, Vermont; that it purported to come from the plaintiff and to be signed by him, and to have reference to the subject-matter of this suit; that since that time he had sent two or three letters in regard to the same business, directed to the plaintiff at Fairfax, Vt., to each of which he had received answers by due course of mail, all from the same individual, dated at the same place, and all in the same handwriting, and that these letters from the plaintiff contained a general authority to take such steps, legal or otherwise, as in the opinion of the witness might be deemed advisable, for the purpose of recovering the carpet or the value of it, and that personally he had no acquaintance with the plaintiff or his handwriting, except as acquired by the correspondence of which he had spoken. It was held that the authority of the attorney was sufficiently proved. The letters were not called for, nor was any objection taken to proving their contents by parol. If the defendant had required the production of the letters, or if he had objected to parol proof of their contents, it would have been necessary for the plaintiff to have produced them, or to account for their non-production. Where the power of attorney is in writing and the attorney is the subscribing witness, he is competent to prove his authority. *Caniff v. Myers*, 15 Johns. 246.

The justice ought always to require proof of authority when the party himself does not appear, and any other person offers to appear as his attorney. The statute declares that "the justice shall not suffer a person to appear as an attorney, unless his authority is admitted by the adverse party, or proved by the affidavit or oral testimony of himself or another." Vol. 1, p. 9, § 2890.

If one party appears in person, and the other appears by attorney, the party who appears in person may admit the authority of the attorney on the opposite side of the case, and in that case it is not necessary to swear such attorney as to his authority. Vol. 1, p. 44, § 43. But, even in that case, it is proper to swear the person who offers to appear as attorney, since the absent party would not be bound by the action of one who assumed to act as his attorney, if he really had no authority for that purpose. *Sherwood v. Saratoga, etc., R. R. Co.*, 15

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Barb. 650, 652. And see *Armstrong v. Craig*, 18 id. 387; *Sperry v. Reynolds*, 65 N. Y. 179; *Andrews v. Long*, 19 Hun, 303.

In one case, *Ackerman v. Finch*, 15 Wend. 652, both parties appeared by attorney, and neither of the attorneys objected to the authority of the other, and this was held to be sufficient. But, in that case, the plaintiff's attorney had sworn out a short summons, and he also had the note upon which the action was brought. It may be said, therefore, that his authority to appear was proved, and if so, he might waive the swearing of the opposite attorney.

The justice has no right to permit a person to appear as attorney for another, on the ground that he knows that the attorney has been employed by such party to appear. In one case, *Beaver v. Van Every*, 2 Cow. 429, the plaintiff was sick, and had sent for the justice, the day before the suit, and requested him to permit one Heermance to appear as his attorney. The justice accordingly admitted him without proof, but the judgment in favor of the plaintiff was reversed, upon the ground that the justice had no right to decide that question upon his own knowledge. And see *Rosekrans v. Van Antwerp*, 4 Johns. 228.

A justice has no right to permit the appearance of an attorney for the plaintiff, on proof which is made in the absence of the defendant, and before the hour for calling the suit. *Fanning v. Trowbridge*, 5 Hill, 428. If an attorney swears to his authority to appear at the time of joining issue, he cannot be required to swear to his authority to appear in the subsequent proceedings in the action. And if either party wishes proof of the authority of an attorney to appear for the opposite side, such proof must be required at the time of appearance in the action. *Treadwell v. Bruder*, 3 E. D. Smith, 597.

Where, on the joining of the issue in an action before a justice of the peace, a person appeared in behalf of one of the parties without objection and without producing any authority, but on the trial of the cause, such party appeared in person; it was held that such appearance by the party was evidence of the authority of the person who joined issue to appear for him. *Underhill v. Taylor*, 2 Barb. 348; *Andrews v. Harrington*, 19 id. 343. But see *Fanning v. Trowbridge*, 5 Hill, 428.

In an action brought by two overseers of the poor against a defendant to recover a penalty, the attorney for the plaintiffs swore that he was authorized by one of the overseers to answer in the suit. It was proved on the trial that the plaintiffs were such overseers, and the court held

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that the authority was sufficiently proved. *Andrews v. Harrington*, 19 Barb. 343.

The law partner of one who is the official attorney of a municipal corporation is not entitled, upon proof of that fact, to appear as attorney for the corporation in justice's court. *Wilcox v. Clement*, 4 Denio, 160.

The defendant's wife is not as such authorized to appear for him in a suit before a justice, but where she appears and pleads, employs counsel, amends the pleadings and brings the defendant's children as witnesses at the trial, the justice is warranted in inferring authority. *Hughes v. Mulvey*, 1 Sandf. 92.

When a father appears as attorney for his son who is a defendant, slight proof of authority is sufficient. In such a case, where it was proved that the defendant said to his father the night before the trial that he must be there, when he was speaking of the suit; it was held to be enough, although nothing was said about the absence of the defendant at that time, nor that his father was to appear for him. *Gaul v. Groat*, 1 Cow. 113.

It is not generally the case that the attorney is appointed for any other purpose than that of attending to the joining of issue and the trial of action. But there is occasionally a case in which the attorney has full power to settle and compromise the matters and demands or claims in suit. In such cases it is better to furnish the person so acting with a power of attorney, for it will show a clear and specific authority to do the acts done, and the opposite party will have satisfactory evidence that the attorney has proper authority to act in relation to the demands. If, however, the adverse party does not, after inspection of the instrument, admit the authority of the attorney to appear, proof of such authority must still be made by affidavit, as that is the form of proof required by the statute when the authority is not admitted, and the justice has no right to substitute other proof in its place. The statute providing that "any written authority to appear by attorney in a justice's court may be acknowledged before any judge of the County Courts, or commissioner of deeds; and such authority purporting to have been so acknowledged shall be received as *prima facie* evidence of such authority in any justice's court in this State," (Laws of 1831, chap. 287, § 1), was repealed by the General Repealing Act of 1880.

A power of attorney may be limited to the prosecution or defense of a single action, or it may be general and authorize an appearance to

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prosecute or defend any or all actions. If it is desired to limit it to a single action, such action must be correctly and particularly described as to the name of the justice before whom it is brought, the names of the plaintiffs, the names of the defendants, and the like. There must be a correct description of the action, or the power of attorney will not be sufficient in those cases in which the particular action is described. But if the power of attorney is general, there cannot be any room for question as to its sufficiency, since it will relate to all actions in a justice's court, in which the person giving the power of attorney may happen to be a party.

General warrant to prosecute, etc.

Know all men by these presents, that I, Moses Spike, of the town of Broadalbin in the county of Fulton, N. Y., do hereby appoint John M. Carroll, Esq., my attorney, for me and in my name, to prosecute any action or actions to be commenced by him, or now depending before any justice of the peace in the State of New York, against any person or persons whomsoever, in my favor, either severally or jointly, with any other person or persons; and in his discretion, to do, execute, suffer and receive all acts, deeds and things which he shall deem necessary for the effectual prosecution thereof to judgment, execution and final collection or discharge, which I might or could do, execute, suffer or receive in my proper person, and also in his discretion, to settle or compound any such action or actions.

Witness my hand and seal, this 25th day of November, 1864.

Sealed and delivered }
in presence of }

MOSES SPIKE. [L. S.]

WILLIAM KENNEDY.

General warrant to defend, etc.

Know all men, that I, Moses Spike, of Broadalbin, Fulton county, N. Y., do hereby appoint John M. Carroll, Esq., my attorney, for me and in my name, to defend any action or actions to be commenced or now depending against me, either severally or jointly, with any other person or persons, by or in behalf of any person or persons whomsoever, before any justice of the peace in the State of New York; and in his discretion to do, execute, suffer and receive all acts, deeds and things which he shall deem necessary for the effectual defense thereof, and the collection or discharge of any judgment or judgments which may be therein rendered in my favor, which I might or could do, execute,

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suffer or receive in proper person, and also in his discretion to settle or compound any such action or actions.

Witness my hand and seal, this 25th day of November, 1864.

Sealed and delivered }
in presence of }

MOSES SPIKE. [L. S.]

WILLIAM KENNEDY.

Acknowledgment of power of attorney.

FULTON COUNTY, ss. :

On the 25th day of November, 1864, Moses Spike, to me known to be the individual who executed the within power of attorney, personally appeared before me, and acknowledged that he had made and executed the same.

WILLIAM KENNEDY,
Justice of the Peace.

CHAPTER XII.

PROCEEDINGS BEFORE PLEADING.

SECTION 1. Objections to irregularities, etc. After the summons has been served upon the defendant, he may either appear in the action or refuse to do so. What an appearance is has been already explained in the preceding chapter. When the summons has been accompanied by an order of arrest the defendant will have no choice whether to be present before the justice or not. But the mere presence of the party in such a case is not an appearance, and if the defendant does not regularly appear in the action, he will not waive any objection which he might have taken if he had not been personally present. It is a voluntary and regular appearance alone that can be construed into a waiver of legal rights, if such waiver is to result from the act of appearing in the action. When the plaintiff's proceedings are so defective, that the justice has no jurisdiction over the person of the defendant, no objection need be made for the purpose of securing the rights of the defendant. Because if he refuses to appear in the action, and does not in any manner waive such objections, he may at any time and in all places question the validity of the proceedings or of the judgment if one is rendered in the action.

In relation to the subject-matter of the action there can be no danger of waiving rights by an appearance, because it is well settled that even express consent will not confer jurisdiction in such a case; *ante*, 15; and, as a necessary consequence, there could not be a jurisdiction which is merely implied from a waiver by taking steps in the action when an express agreement could not confer it. But when the justice has jurisdiction of the subject-matter of the action, and the only defect in his jurisdiction relates exclusively to the process, it is a rule of very extensive influence that the defendant may waive such defects, and thus render the jurisdiction over his person complete. And, in such cases, it is not necessary that the defendant should expressly agree to waive the errors or defects; for, if he voluntarily appears in the action, without any objection on account of such defects or errors, he will be deemed to have voluntarily waived them, and to have consented to consider the proceedings regular.

Objections to irregularities, etc.

It is important, therefore, for a defendant before he appears in the action or takes any steps in it, to consider whether there are any irregularities on the part of the plaintiff, of which the defendant may avail himself. If there are such irregularities, it is the duty of the defendant to raise the objection at the earliest moment if he would avail himself of them upon an appeal from any judgment which may be rendered against him in such action. The proper time to raise and urge all such objections is on the first appearance of the parties before the justice on the return day of the process, and before any steps have been taken in the action. As soon as the cause is called by the justice, the defendant ought distinctly to state to the justice and to the opposite party the objections which are relied upon by such defendant. And if the defect is one which is not amendable, the defendant ought, after specifying the particular defects or irregularities, to ask the justice to dismiss the action. If the justice overrules the motion, the defendant may except to such decision, and the question will then be upon the record, so that the legality of the decision can be subsequently reviewed if that becomes proper or important. The nature of the objection which may be urged has been suggested already.

Under the old practice, an action might be commenced by the service of one of several kinds of process, according to the circumstances of the case; and when the action was not to be commenced by the service of a long summons, certain proof and security was required to be furnished by the plaintiff to give the justice jurisdiction to issue the other appropriate form of process. If such proof or security was not furnished, or if there were any irregularities in the proceedings of the plaintiff in procuring the process selected for the commencement of the action, the defendant was obliged to take his objection promptly before joining issue, or the objection was deemed waived. The reports are full of cases in which questions involving the regularity of the preliminary proceedings for the commencement of an action have been considered and determined. The change in the practice, by making the summons the only process for the commencement of an action, has swept away much of the doubt and uncertainty attending the acquirement of jurisdiction by a justice of the peace, and under the present practice a justice may obtain complete jurisdiction of the person of the defendant by the service of a summons upon him personally, and may hear and determine the action although a provisional remedy accompanying the summons, such as an order of arrest, warrant of attachment, or requisition to replevy, has been irregularly or improvidently issued.

Objections to irregularities, etc.

If the defendant has been arrested, he may, on the return day of the summons, apply for his discharge from arrest, either because the order of arrest was issued without proof, upon insufficient proof, or in a case not authorized by the statute. But the defendant is not obliged to raise the question at that time under the penalty of waiving his objection, as he would be if the service of the order was all that gave the justice jurisdiction of his person, like the service of the old civil warrant. He may take his objection to the proceeding by motion for his discharge at any time before judgment, and the justice must proceed with the case although the order of arrest is vacated. See vol. 1, p. 12.

So a defendant, whose property has been attached, may, upon the return day of the summons, move to vacate the attachment, either upon the ground of the insufficiency of the papers upon which the warrant is issued, or upon proof by affidavit of facts showing that the remedy has been allowed in an improper case. Unlike the application for a discharge from arrest, this motion must be made upon the return day of the summons. But if the summons which accompanied the warrant was personally served, or the defendant has appeared generally in the action, vacating the warrant will not affect the jurisdiction of the justice to hear and determine the action. It affects merely the custody and control of the property during the pendency of the suit; and if this is important to the defendant, he should make his application to vacate or modify the warrant on the return of the summons, not because he will waive any defect in the plaintiff's proceedings by not taking his objection at that time, but because the statute does not authorize the application at any other time. If the summons was not personally served upon the defendant, and his property has been attached, he should appear specially for the purpose of vacating the attachment and obtaining a dismissal of the action. This motion must be made at the return of the summons for the reason above stated. See vol. 1, p. 17; *ante*, p. 198.

The statute does not authorize an application to vacate or set aside proceedings by which a requisition has been obtained and the property of the defendant replevied in an action to recover a chattel in a justice's court. The defendant may except to the sureties in the plaintiff's undertaking provided he does so at least two days before the return day, unless he requires a return of the chattel. If he does not so except he is deemed to have waived all objection to them. So he may require a return of the chattel replevied, instead of excepting to the sureties in the plaintiff's undertaking, but this must be done before the return day of the summons. The proceedings to procure the allowance of the

undertaking given by the plaintiff or defendant are all the proceedings authorized to be taken between the return of the summons and the joinder of issue which are in any way peculiar to the action of replevin.

It is the duty of the justice to permit either party to examine all the process, affidavits, bonds, securities, pleadings or other proceedings in the action, which are filed with him, in due time to take a legal objection to them if they are defective. A defendant, therefore, has a full opportunity to know of any defects in the plaintiff's process, affidavits, etc., and if he neglects or refuses to examine them or to object to them, it is entirely proper to regard his conduct as an agreement to waive such defects. Again, if the process has been irregularly or illegally served, the defendant has a full opportunity to know it, and he can make a proper objection on that ground, on the return day of such process. If he fails or declines to do so, he will waive the irregularity. There are other objections which may be taken on an adjourned day, but those will be discussed in a subsequent place, since it is not intended to notice any matters here, except such as relate to the return day of the process for commencing the action.

But there are some other important considerations which ought not to be overlooked, although they do not relate to defects in the process. If the justice is a material witness for the defendant, he must raise that question at the return day and in due season. The manner of doing this will be explained in a subsequent chapter. So, again, if the defendant desires to raise a question as to the title to lands, or he intends to rely upon a title to land as his defense, he must take the proper steps to secure his rights, or he will waive them.

So, a defendant may have a partial defense, although he cannot entirely defeat the plaintiff's action. And, in such a case, it may be desirable to make an offer of judgment so as to save future costs. See "*Offer of Judgment.*"

These general suggestions are sufficient to show a defendant that vigilance is indispensable to a full protection of his rights, and that if he desires to avail himself of any objection to the acts or omissions of the opposite party, such objection must be promptly and distinctly taken at the first available opportunity. The legal maxim is *Vigilantibus, non dormientibus, jura subveniunt*; or in other words, the laws assist those who are vigilant, not those who sleep over their rights. Broom's Leg. Max. 692, original paging.

CHAPTER XIII.

JUSTICE A MATERIAL WITNESS.

SECTION 1. **General principles.** In the administration of the laws, it is important that there should be purity and impartiality as well as every reasonable facility for the investigation of the questions to be tried. One of the first principles, therefore, is that no person can act as a judge and a witness in the same action. If such acts were tolerated, it is evident that injustice must result, for it is not to be supposed that a person acting as judge would not attach quite as much importance to his own evidence as to that of any other witness. The statute requires the justice who tries the cause to administer the oaths to the witnesses who are sworn. Vol. 1, p. 53, § 94. No justice could administer an oath to himself, and thus act as court as well as witness. And it would not make any difference as to his right to be a witness, even if he were sworn by another justice. If he should be so sworn, and then give evidence, it would be error, and any judgment which he might render would be reversed on appeal. *Perry v. Weyman*, 1 Johns. 520. The parties, however, may waive the objection, and if the justice is sworn by another justice, and he then testifies as a witness without any objection, this will be deemed to be evidence given by consent, and no advantage can be taken of it on an appeal. *Cobb v. Curtiss*, 8 Johns. 470. But, where an objection is taken, it will be error for the justice to be thus sworn and give evidence. And, so far is this rule extended, that it will be illegal to swear one of three referees as a witness on a trial before them, if an objection is duly taken to that course. *Morss v. Morss*, 11 Barb. 510.

The law, however, has made ample provision for securing the evidence of a justice before whom a cause is pending. If a plaintiff sues before a justice who is a material and necessary witness for him, it is his own fault; and he will be compelled to lose the evidence of such justice if the cause is to be tried before him; although he may discontinue his action, and then commence it before some other justice, if he desires to do so, when he may have the advantage of such evidence.

This is, of course, optional with the plaintiff, and he will, therefore, be governed by his own feelings and judgment in the matter.

When to make the application.

But a defendant would not enjoy a similar advantage were it not for the provisions of a statute. To prevent injustice, and to give a defendant an opportunity of securing the evidence of a justice when material and necessary, the statute has provided a mode by which such a result may be attained. The statute will be found in full in vol. 1, pp. 86, 87, §§ 3151, 3152.

§ 2. **When to make the application.** Although the statute thus gives a defendant the privilege of procuring the justice as a witness, it does not leave it optional with him whether he will apply at an early day, or postpone it until the day of trial.

The statute is express and explicit that the application, if made at all, must be made *before an issue of fact is joined* in the action. This rule does not require a defendant to make his application before the plaintiff puts in or files his complaint. And, in ordinary cases, the application ought not to be made until the complaint is put in or filed, because the defendant cannot before that time be certain what cause of action will be alleged against him, and, therefore, he cannot know until then whether the justice will be a material and necessary witness for him on the trial of the cause. But the defendant must not put in an answer before making his application, because, under the present system of pleadings in justices' courts, the putting in of an answer is a *joining of issue*. And when that has been done, it will be too late to make the application. Upon a demurrer to the complaint there would be an issue of law, but no evidence is necessary for the determination of such an issue, because it is a mere question of law upon the record, and upon conceded facts. The application may be made after the determination of this issue.

The statute does not require a defendant to wait until the complaint is put in or filed before he can make his application.

The only object in waiting for that event is to be certain that the justice may or will be a material and necessary witness for the defendant, and, until the complaint is delivered, the defendant cannot be entirely certain what cause of action he will be required to defend himself against. But, as a general rule, the parties know the nature of each other's claims, and they know, too, whether the justice will be a material witness for them on the trial. For this reason a defendant may sometimes prepare his affidavits even before the return day of the process; and there is nothing improper or illegal in this course, if the defendant prefers to adopt it. And besides that, there may be instances when it would be inconvenient if not impossible for the party to attend and make the affidavits on the

Who to make the application.—How to apply.

return day, after the complaint has been put in or filed. A defendant might be sick, or he might be absent from the county, on the day of the process, and he is not, therefore, to lose the benefit of the statute. It would be proper, although it would not be necessary to set forth, in the affidavits, the reason why the usual practice was departed from. But the statute does not require this to be done, and, therefore, it may be done or omitted, at the pleasure of the defendant. There is, however, one thing which is indispensable in such a case, and that is that the affidavit shall state facts which relate to the actual cause of action set out in the complaint; or that the defense which can properly be interposed to it is such that the justice will be a material witness for the defendant in disproving the facts alleged in the complaint, or in substantiating the matters interposed by way of defense. There is, therefore, some risk attending an application which is founded upon affidavits which were made before knowing what the complaint would be. If the affidavits happen to meet the case it will be well; if they do not, the defendant will have to bear the consequences of the experiment.

§ 3. **Who to make the application.** Where there is but a single defendant there will, of course, be no question as to the person who must make the application. But where there are several defendants it may well happen that some of the defendants need the justice as a witness, while he may not be a material witness as to the others. And, whenever the judgment may be in favor of the plaintiffs against some of the defendants, while there may be, in the same action, a judgment in favor of the other defendants, there may then be a case in which the justice will be a material witness for a defendant, while he may not be either material or necessary for the other defendants. And since it is the policy of the law to secure the rights of every defendant, it would be sufficient to prove that the justice is a material and necessary witness for any of the defendants. And on such proof being duly made, the justice ought to make the same order that he would if the defendant applying were the only defendant in the action. Where the defendant has not been arrested, the application may be made by his attorney.

§ 4. **How to apply.** After the complaint has been put in, and the defendant ascertains that the justice is a material and necessary witness for him, he ought to state that fact to the justice before interposing any defense by answer or otherwise. But this mere statement is not alone sufficient. The statute requires that the proof furnished to the justice shall be *by affidavit*. And the essential part of every such affidavit is,

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that it shall contain a statement of such facts and circumstances as the law requires.

The statute requires that the affidavit shall show that the justice before whom the action is pending is a *material* witness for the defendant, and that the defendant *cannot safely proceed* to the trial *without* the *testimony* of such justice. And it will not be sufficient to allege these facts in the affidavit, and then stop at that; because the statute further requires that the affidavit shall *set forth* the *particular facts* and *circumstances* which it is expected can be proved by the justice.

A strict compliance with the requirements of the statute will be necessary, and if it is disregarded the justice may properly refuse the application.

The statute does not require that this affidavit shall be made by the defendant, nor that it shall be presented to the justice by the defendant in person. An agent or attorney of the defendant, or even any third person, in no way connected with the affairs of the defendant, may possess greater knowledge of the essential facts than the defendant himself, and in such case the person having the requisite knowledge should make the affidavit. The Revised Statutes required that the affidavit should be made by the defendant; but the Code merely requires that satisfactory proof of the essential facts shall be presented to the justice "by affidavit," and, where the defendant has not been arrested, permits this proof to be presented by the defendant's attorney. See vol. 1, p. 86, § 3151.

It will be noticed that the language of the present statute differs from that of the Revised Statutes in another particular. Under the Code the justice must make the order sought if "*satisfactory* proof, by affidavit," is presented to him as above stated; while under the Revised Statutes a judgment of discontinuance was required, "if the justice *shall be satisfied* that he is a material witness for the defendant, and that without his testimony the defendant cannot safely proceed to trial, and not otherwise." In effect, both statutes amount to the same thing; the language of the latter act having been changed to express more clearly the spirit of the former, as construed by the courts. The language of the statute is not to be construed as giving to the justice an arbitrary discretion whether he will proceed with the action or not. The statute does not mean that the defendant shall present an affidavit, sufficient to convince the justice that he is a material witness, notwithstanding his previous recollection or want of recollection of the facts stated. The justice has no right to use his belief or recollection as an answer to the application. All that the statute requires is that the facts

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presented by the affidavit shall be such that the justice, forgetting his individuality, can judicially determine that the person named in the affidavit is a material witness for the defendant, and that without his testimony the defendant cannot safely proceed to trial.

The decisions under the Revised Statutes clearly present this rule of construction. *Hopkins v. Cabrey*, 24 Wend. 264, is the leading case upon this subject. In that case, Hopkins sued Cabrey before a justice and claimed to recover money alleged to be in Cabrey's hands as a school district collector, which it was declared the defendant retained in his hands after retaining a sufficient sum to pay a school tax, for which the plaintiff's property had been sold by such defendant. After the complaint was put in, and before answer, the defendant moved for a discontinuance, which was denied on the ground that the affidavit was insufficient. The defendant then made a further affidavit, setting forth the facts which he expected to prove by the justice, which were: "That before the commencement of this suit, the plaintiff sued the defendant before the said justice for the same identical property for which he now claims the surplus money, and that judgment was passed on the same and entered in favor of the defendant against the plaintiff for costs; and also, that the plaintiff acknowledged, in the presence of the justice, that the defendant had tendered to him the overplus of the money before the commencement of the former suit, and that he had no claim for surplus moneys, and that the defendant did not know of any other person by whom he could prove those facts." The justice refused to dismiss the action, and ruled as follows: "I am not satisfied that I am or can be a material witness in behalf of the defendant in this cause, for I know nothing material between the said parties, except what is contained in the record of the former trial between these parties before me, which this defendant can at all times avail himself of upon the trial of this cause; and further, I have no recollection of ever having heard the plaintiff admit that the defendant had tendered him the overplus mentioned in the affidavit."

After this decision, the defendant joined issue, and judgment was rendered against him in favor of the plaintiff. This judgment was reversed by the County Court, and the latter judgment affirmed by the Supreme Court. Among other things, the court said by COWEN, J.: "The justice had no right to interpose his private knowledge or recollection as an answer to the affidavit. Doing so would enable a justice to defeat the application, and at the same time put the point beyond the reach of review, even on the facts which he may assume to know or to have forgotten. Here, it is true, he states them, but not under

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his oath as a witness. That the defendant had a right to require. Again, his specification was not satisfactory. He had no right to assume that the docket and other written proceedings would have been proof as full to the purpose as if accompanied with his oath. Oral proof is often necessary to show what was in fact heard and submitted under an issue which has been tried, in order to give it the desired effect upon a subsequent trial of the same matter. His want of recollection might also have been remedied by a recurrence to circumstance, in the course of his examination as a witness."

There have been several other cases decided upon the question since the decision last referred to; and the settled practice is to require a full statement of material facts or circumstances, or to hold the affidavits insufficient.

In *Young v. Scott*, 3 Hill, 32, the defendant's affidavit was as follows: "Andrew Scott, being sworn, says that the above-named justice is a material witness for this deponent on the trial of this cause, and without whose testimony he cannot safely proceed to the trial of said cause; that he expects to prove by said justice on the trial of the matters in difference between said parties, whenever the same shall be tried, that the matters in difference between said parties were submitted to said justice, Walter S. Dailey and Jeremiah Hackney, as arbitrators, selected by the said defendant, and Abram Cutler, who claimed the same demand for which this suit was brought, and submitted to them; and before the award was given in the matter, said Cutler revoked the agreement to submit to such arbitration; and defendant says that all the matters then submitted were afterward settled with said Cutler by defendant, as defendant supposed at the time, and understood, and expects to prove, and that said Cutler was the owner of all said matters, or the agent of the above plaintiff."

The plaintiff requested the defendant to say in the affidavit that he expected to prove the matters stated in the last clause of the affidavit by the justice, but the defendant refused to do so, saying he would add nothing more. The justice denied the motion to dismiss the case. The plaintiff then declared. The defendant refused to plead, and left the court. The plaintiff had judgment, which the County Court reversed; but the latter judgment was reversed in the Supreme Court, and the judgment of the justice affirmed. The court said, among other things, by BRONSON, J.: "When the affidavit is sufficient, the justice cannot refuse the discontinuance on the ground that he does not recollect the facts which the defendant expects to prove by him," citing *Hopkins v. Cabrey* (*ante*, 256); "but he clearly has a right to judge of

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the sufficiency of the affidavit. He must be 'satisfied,' acting judicially, that the ends of justice require a discontinuance of the action. From the 'facts and circumstances' set forth in this affidavit, I am unable to see that the justice was a material and necessary witness for the defendant. He expected to prove by the justice that there was a submission and arbitration between himself and one Cutler, in relation to the matter in controversy in the suit, and that Cutler revoked the submission before an award was made. I do not perceive that these facts, if proved, could have any legal influence on the action. And, although it seems that Cutler, as well as the plaintiff, claimed the demand, that would not make his acts evidence against the plaintiff. Indeed, if the plaintiff himself had made, and then revoked the submission, and there had been no award, it would not have affected his right to sue. The only thing of any importance is contained in the last clause of the affidavit, and that, at the most, only amounts to an allegation that the defendant had settled the matter with Cutler, who was either the owner of the demand or the agent of the plaintiff. But the defendant does not state that he expected to prove these facts by the justice; and when his attention was called to this defect, and he was requested to amend the affidavit, he refused to do so. This goes to show that the omission was not a mere clerical error, and I think the justice was right in refusing the discontinuance."

There are other difficulties in the case. So far as it relates to the arbitration, it appears, upon the face of the affidavit, that there are two other witnesses, Dailey and Hackney, who probably knew as much about the matter as the justice, and it is nowhere stated in the affidavit that the defendant was not able to prove his case by other witnesses as fully as by the justice. In *Hopkins v. Cabrey*, the defendant stated in his affidavit that he did not know of any other person by whom he could prove the facts on which he relied: I think the defendant must state enough to show that the justice is a *necessary* as well as a *material* witness. The justice is to be "satisfied that he is a material witness for the defendant, and that, without his testimony, the defendant cannot safely proceed to trial." To the same effect, see, also, *Murtha v. Walters*, 2 Sandf. 517; *Com. of Excise, etc., v. Doherty*, 16 How. 46, in Saratoga County Court.

In the cases cited it will be noticed that a discontinuance of the action is spoken of as the proper disposition of the application. This was the proper procedure under the Revised Statutes, except where the defendant had been arrested under a civil warrant. This has been changed by the Code as will be seen hereafter; but the cases are of

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value for the purpose of showing the meaning and intent of the statute in respect to the sufficiency of the affidavit, and the duty of the court to act upon the facts presented thereby instead of upon his own convictions, based upon his individual knowledge and belief.

In discussing the subject of affidavits in a previous chapter, cases have been cited showing the construction placed by the courts upon statutes requiring proof of certain facts "to the satisfaction" of the justice, etc. See *ante*, p. 117. What is there said as to the conclusiveness of the proof required, and also as to the requisites of affidavits generally, applies with equal force to affidavits used upon an application of this character.

Form of affidavit.

JUSTICE'S COURT.

Daniel Stewart <i>agst.</i> Henry Smith.
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FULTON COUNTY, ss. :

Henry Smith, being duly sworn, says that he is the defendant named in the above-entitled action; that Eugene Horton, Esq., the justice before whom the said action is pending, is a material witness for this deponent in the said action, and that he cannot safely proceed to the trial thereof without the testimony of the said justice. And this deponent further says, that he expects to prove by the said justice, the following facts and circumstances, to-wit: That before the commencement of this action the said plaintiff sued this defendant before the said justice for the same identical property for which he now claims to recover the surplus money, and that judgment was passed in the same, and entered in favor of the defendant against the plaintiff for costs; and also, that the plaintiff acknowledged, in the presence of the said justice, that the defendant had tendered to him the overplus money before the commencement of the former action, and that he had no claim against the defendant for any surplus moneys. And deponent further says that he is unable to prove these said facts by any other person than the said justice.

Subscribed and sworn before me, {
this 30th day of May, 1882. }

HENRY SMITH.

EUGENE HORTON, *Justice of the Peace.*

The defendant need not swear positively that he cannot prove the

Order continuing the action before another justice.

same facts by any other person than the justice. It will be sufficient to state that the defendant cannot prove such facts by any other person, "according to the defendant's best knowledge, information and belief."

If any other person knows the same facts but he cannot be procured as a witness, then state such facts as will show that.

If the affidavit is made before the return day of the process, it will be proper, and perhaps most prudent, to state the reasons therefor in the affidavit. In doing this, draw the affidavit in full as in the precedent already given, and then add the matter of excuse or explanation, according to the facts of the case as in the following form :

"And this defendant further says that he is now sick, and confined to his room, and that he is, therefore, unable to appear in person before the said justice; *or*, that one of his children is dangerously ill, and that defendant cannot reasonably or safely leave said child for the purpose of appearing before the said justice, at the hour mentioned in the process issued in this action as the time of appearance; *or*, that the defendant has very urgent business which requires his personal attendance at New York on the day appointed for the return of the process in this action."

Whenever any such excuse is made, it will form a part of the affidavit, and be signed and sworn to in the usual manner as in the form already given.

When such an affidavit is drawn and presented to the justice, he is bound to swear the defendant to its truth, if he requires the justice to do so. A refusal would be a misdemeanor, for which such justice would be indictable. *People v. Brooks*, 1 Denio, 457.

In such a case it is not material whether the affidavit is sufficient for the purpose intended or not; nor is it of any consequence that the justice acted in good faith, and in the belief that he was not bound to administer the oath. *Ib.* The law imposed that duty upon him, and it will not be any legal excuse that he was ignorant of his duty. *Ib.*

§ 5. **Order continuing the action before another justice.** When satisfactory proof is presented to the justice, in the manner before stated, that the justice is a material witness without whose testimony the defendant cannot safely proceed to trial, the justice must forthwith make a written order directing the action or special proceeding to be continued before another justice of the same town or city, named in the order. Vol. 1, p. 86, § 3151. For drawing this order the justice is entitled to a fee of twenty-five cents, and may refuse to sign the order until his fee is paid.

Proceedings under the order.—Errors of the justice, how corrected.

Form of the order.

JUSTICE'S COURT.

Daniel Stewart
agst.
Henry Smith.

} Before EUGENE HORTON, *Justice*.

This action having been duly commenced before the undersigned, a justice of the peace of the town of Johnstown, in the county of Fulton, and the parties therein having appeared before said justice upon the return of the summons, and the defendant upon so appearing, and before the joinder of an issue of fact therein, having presented to said justice satisfactory proof, by affidavit, that said justice is a material witness for the defendant, without whose testimony he cannot safely proceed to trial:

Ordered, That said action be continued before Richard Murray, a justice of the peace of the town of Johnstown aforesaid.

Dated this 30th day of May, 1882.

EUGENE HORTON,
Justice of the Peace.

§ 6. **Proceedings under the order.** Where an order has been made as prescribed in the last section, the constable must forthwith take it, and all the other papers in the action, with the body of the defendant, if he is under arrest, before the justice named in the order. The plaintiff must forthwith appear before that justice, who must take cognizance of the action, and must proceed therein as if it had been commenced before him. Vol. 1, p. 86, § 3152. For serving this order, and for attending before the justice named therein, the constable is entitled to a fee of fifty cents, and fifty cents in addition if he attends with the defendant in his custody. He is also entitled to his mileage as upon the service of any other mandate. He may refuse to act until his fees are paid.

The successful party in an action transferred before another justice is entitled to, in his costs, the fees allowed by law for services performed by the constable and the justice before the transfer, together with the fees allowed by law for the proceedings before the justice to whom the cause is transferred. Vol. 1, p. 87.

§ 7. **Errors of the justice, how corrected.** If the justice erroneously denies the defendant's motion for the continuance of the action before another justice, the error may be corrected by an appeal from any judgment which he may render in favor of the plaintiff. See *Hopkins v. Cabrey*, 24 Wend. 264. But it would seem that the de-

Errors of the justice, how corrected.

fendant may, by acquiescence in the erroneous decision of the justice, waive the error.

In one case the defendant presented an affidavit of the materiality of the justice as a witness, but the justice stated that "he could give no evidence of any thing except what appeared on his minutes," and he denied the motion to dismiss the action. On the trial of the action the defendant participated, and he accepted the plaintiff's offer to allow the minutes of the justice on a former trial, to be read in evidence from the justice's memorandum thereof. He entered no exception to the denial of the motion, but rather appeared to acquiesce in the decision, and he himself also gave in evidence the minutes of the former trial. *Brown v. Brown*, 2 E. D. Smith, 154. The court did not decide this case upon this point, although they evidently considered the conduct nearly equivalent to a waiver of the error. There ought, however, to be very clear evidence of a waiver of such an objection. And where an *express* exception has been taken to such an erroneous ruling of the justice, nothing less than an *express* waiver ought to deprive the defendant of his remedy on an appeal. *Walrod v. Bennett*, 6 Barb. 145; *Penfield v. Jacobs*, 21 id. 335; *Avery v. Slack*, 17 Wend. 85, 87.

CHAPTER XIV.

OFFER OF JUDGMENT.

SECTION 1. **When and in what cases the offer is proper.** It frequently happens that a defendant in an action brought in justice's court does not deny the plaintiff's right to recover judgment for some amount, but does dispute the amount of the plaintiff's demand. Before any suit is brought, a person against whom a claim is made for too large a sum, may generally make a tender of the sum actually due, and by afterward keeping the tender good, bringing into court the sum tendered, and pleading the tender, may avoid the payment of costs. If an action is commenced before the tender is made, the defendant still has his remedy. Except in an action to recover a chattel, the defendant may, upon the return of the summons, and before answering, file with the justice a written offer to allow judgment to be taken against him for a specified sum, with costs. If there are two or more defendants and the action can be severed, a like offer may be made by one or more of the defendants against whom a separate judgment may be taken. If the plaintiff files a written acceptance of the offer before taking any other proceeding in the action, the justice must render judgment accordingly. If the plaintiff does not so accept the offer, and fails to obtain a more favorable judgment upon the trial, he cannot recover costs from the time of the offer, but must pay the defendant's costs from that time. Vol. 1, p. 9, § 2892.

The defendant is thus allowed an opportunity of preventing a protracted or an expensive litigation. And, when a defendant is satisfied that there is a particular sum due to the plaintiff on demand arising upon contract, or that such plaintiff is entitled to recover some amount of damages in an action for a tort, it will always be prudent to offer judgment for such sum as the plaintiff will probably recover. If such an offer is properly made the plaintiff will be compelled to accept it, or take the risk of paying all subsequent costs of the action, in case he does not recover a more favorable judgment.

The costs in actions in justices' courts are not large when compared with those in actions in the Supreme Court, and yet the amount is sometimes such that it is an object to avoid their payment, especially when the action itself is a mere vexatious proceeding on the part of

When and in what cases the offer is proper.

the plaintiff. In actions for a tort, where it is certain that the plaintiff is entitled to recover at least nominal damages, it will always be advisable to make an offer of judgment. And the offer made ought to be such as is quite certain to be equal to any amount that a fair jury or an intelligent and candid justice would be likely to give from the evidence in the particular case. By pursuing this course, a jury or the justice cannot fail to see that the continuance of the litigation is not the fault or the wish of the defendant, and if the offer has been a reasonable and just one, there is little difficulty in the way of a just verdict. In making such an offer, it will always be advisable to make some little sacrifice, by way of offering rather more instead of a little less than could be fairly claimed by the plaintiff, and this is especially the case when it is certain or when it is quite probable that the offer will not be accepted by the plaintiff. In such a case, the offer will be fair toward the plaintiff, and if he rejects it, that will be his own fault or his own folly. While it will be an act of prudence on the part of the defendant, in any event, and especially so, if the justice or the jury should find a verdict for less than the amount offered, since in that case it would not only deprive the plaintiff of costs from the time of the offer, but would also subject him to all the costs of the action from that time. The offer will be proper in any action which can be tried in a justice's court, except the action of replevin.

The right of one of two or more defendants to make an offer of judgment depends upon the question whether the action can be severed and a separate judgment taken against such defendant. An action can be severed whenever a separate judgment is proper. See Code of Civil Pro., § 1205. A separate judgment can be taken in an action of tort against two or more defendants whenever the plaintiff establishes a cause of action against one defendant, but not against all. It can be taken in an action on contract against two or more defendants, and where a plaintiff establishes a cause of action against one defendant but not against all, and the other defendants are not *joint* contractors or jointly liable with the one against whom the cause of action is established. *People v. Crain*, 8 How. 151. It cannot be taken where the action is brought upon a *joint*, and not upon a joint and several liability. *Perry v. Chester*, 53 N. Y. 240. Therefore one of several defendants may make an offer of judgment in all actions of tort, except replevin, and in all actions upon contract where the defendants are charged upon a joint and several liability.

The offer must be in writing ; must be made upon the return of the summons and before answering ; must be for a specified amount, with

Acceptance or rejection of the offer.

costs; and must be filed with the justice. An offer of judgment not so made is a nullity. The offer cannot properly be made until the complaint is put in or filed; for until that is done the defendant cannot be certain what cause of action will be alleged against him, and, therefore, he cannot intelligently make an offer of judgment. But as soon as the complaint is made, either orally or in writing, the defendant will be in a condition to determine whether to offer judgment.

Form of offer of judgment.

JUSTICE'S COURT.

John Doe
agst.
Richard Roe.

} Before PETER W. PLANTZ, *Justice*.

SIR — Take notice that the defendant, Richard Roe, hereby offers to allow judgment to be taken against him by the plaintiff, for the sum of \$25, with costs, pursuant to section 2892 of the Code of Civil Procedure.

Dated *May 31, 1882.*

RICHARD ROE, *Defendant*.

To JOHN DOE, *Plaintiff*.

§ 2. **Acceptance or rejection of the offer.** If the plaintiff elects to accept the offer he must signify his acceptance by filing a written acceptance of the offer with the justice before taking any other proceeding in the action. If the offer is rejected, the plaintiff need do nothing more than to declare that he will not accept it, or that he rejects it. And if the plaintiff does not make any declaration whatever, but merely remains silent, this will be deemed a rejection of the offer. If the acceptance is not filed, the offer cannot be given in evidence upon the trial; but if the plaintiff fails to obtain a more favorable judgment he cannot recover costs from the time of the offer and must pay the defendant's costs from that time. Vol. 1, p. 9, § 2892.

Form of acceptance.

JUSTICE'S COURT.

John Doe
agst.
Richard Roe.

} Before PETER W. PLANTZ, *Justice*.

I hereby accept the offer of the defendant to allow judgment to be taken against him in this action for the sum of \$25, with costs.

Dated *May 31, 1882.*

JOHN DOE, *Plaintiff*.

Form of judgment on acceptance.

§ 3. **Form of judgment on acceptance.** There is nothing peculiar in the form of a judgment rendered by a justice upon the acceptance of the offer. The docket of the justice will show the title of the action as in ordinary cases; the issuing of the summons; the return of service; the appearance of the parties upon the return day; the nature of the cause of action set forth in the plaintiff's complaint; the filing of the offer of judgment by the defendant before answering, stating the substance of the offer; the filing of an acceptance of the offer by the plaintiff; and an ordinary judgment in favor of the plaintiff for the sum specified in the offer, with costs.

CHAPTER XV.

JOINDER OF CAUSES OF ACTION.

SECTION 1. General statutory provisions. The question who are proper parties to an action has been discussed. But there is also another question which immediately arises; because one person may have a right of action against another for several different causes. The defendant may owe the plaintiff on contract, and he may also be liable for some wrongful act to personal or real property. In such cases it becomes important to determine what causes of action *may* be joined; and also what causes of action *must* be joined in the same action.

The Code has abolished all forms of action; and, as the law now stands, the mere form of the action will afford no test for the determination of the question whether there is a misjoinder or not. The uncertainty which attended the determination of this question has been greatly lessened by a provision of the present Code specifying what causes of action may be united in the same complaint, and by implication at least prohibiting the joinder of causes not thus specified. The plaintiff may unite in the same complaint two or more causes of action, where they all arise out of

1. The same transaction, or transactions connected with the same subject of action; or
2. Contract, express or implied; or
3. Personal injuries, and injuries to property, or either.

But it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions; that they are consistent with each other; that they require the same judgment, and, except as otherwise prescribed by law, that they affect all the parties. Vol. 1, p. 26, § 2936.

§ 2. Joinder of causes of action on contract and in tort. It is a general rule that a cause of action on contract cannot be joined in the same complaint with a cause of action in tort. *Hall v. Fisher*, 20 Barb. 441; *Butt v. Cameron*, 53 id. 342; *Booth v. Farmers and Mechanics' Nat. Bank*, 65 id. 457; *Ehle v. Haller*, 6 Bosw. 661; S. C., 10 Abb. 287; *Tompkins v. White*, 8 How. 520. Thus it has been held that an action for wrongfully killing cattle could not be joined

Joinder of causes of action on contract and in tort.

with a cause of action arising upon a contract to carry the same cattle to a distant place, and an omission to do so because they were killed by the way; *Colwell v. New York & Erie R. R. Co.*, 9 How. 311; that a claim for the unlawful conversion of goods could not be joined in the same action for money had and received; *Cobb v. Dows*, 9 Barb. 230; that a cause of action in tort could not be united with one on implied contract; *Hunter v. Powell*, 15 How. 221; *Hall v. Fisher*, 20 Barb. 442; *Martin v. Mayor of Brooklyn*, 1 Hill, 545; that a count in a complaint for a breach of warranty in the sale of a horse could not be joined with a count for fraud and deceit in wrongfully concealing the defects of the same horse. *Sweet v. Ingerson*, 12 How. 331. And that a complaint against a bailee of a horse could not contain a count upon an implied contract to return him to the bailor, and also a count for the wrongful conversion of him by driving him to death. *Howe v. Cook*, 21 Wend. 29.

A cause of action arising out of a breach of contract on the sale of real estate cannot be united in the same complaint with a cause of action arising from the wrongful conversion of personal property; nor can a cause of action for such conversion be united with a claim for an accounting between principal and agent, or banker and his customer, with regard to dealings in money. *McDonald v. Kountze*, 58 How. 152.

The only exception to the general rule that a cause of action on contract cannot be joined in the same complaint with a cause of action in tort is to be found in the first subdivision of section 2937 of the Code. Vol. 1, p. 26. Under that subdivision it is clearly proper to unite in the same complaint a cause of action upon contract and a cause of action in tort, if both causes of action arose out of the same transaction, or transactions connected with the same subject of action, are consistent with each other, require the same judgment, and, except as otherwise provided by law, affect all the parties. See *Adams v. Bissell*, 28 Barb. 382; *Robinson v. Flint*, 16 How. 240. But to authorize such joinder even in that case, it must appear from the face of the complaint by a proper statement of facts that the several causes of action arose out of the same transaction, or transactions connected with the same subject of action. A general allegation that the several causes of action so arose, without facts showing in what way or manner the several causes of action arose out of the same transaction, is insufficient. *Flynn v. Bailey*, 50 Barb. 73. See *Brown v. Buckingham*, 21 How. 190; S. C., 11 Abb. 387.

In practice it is not always easy to determine whether two causes of

action arose out of "the same transaction, or transactions connected with the same subject of action."

This language is very general and very indefinite, and, as was said by Judge COMSTOCK, is "well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be most convenient and best calculated to promote the ends of justice." See *New York and New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592, 604. In speaking of a similar provision of the old Code, in which the same language is used, Chief Justice CHURCH says: "I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for the courts to pass upon the question as each case is presented. To invent a rule for determining what the "same transaction" means, and when a cause of action shall be deemed to "arise out" of it, and what the "same subject of action" means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution of these questions." See *Wiles v. Suydam*, 64 N. Y. 173, 178. What the chief justice of the Court of Appeals has found impracticable to do will not be attempted here. In several cases the words "subject of the action" are said to mean the subject-matter in dispute, or the facts constituting the cause of action. *Chamboret v. Cagney*, 41 How. 125; S. C., 2 Sweeny, 384; 10 Abb. (N. S.) 31; *Coddington v. Dunham*, 45 How. 40; S. C., 3 Jones & Sp. 412; *Lehmair v. Griswold*, 8 id. 100. This definition seems to have been invented to distinguish the *object* from the *subject* of the action. Thus it was said in the case first cited that the *object* of an action for a trespass upon the property of the plaintiff is to recover damages, but the subject of the action is the trespass.

An action of trespass in breaking into a house and opening a trunk cannot be joined with an action on a covenant in a lease for quiet enjoyment, although the act which renders the defendant liable in both cases is the same. *Keep v. Kaufman*, 56 N. Y. 332.

A cause of action against a stockholder of a manufacturing corporation, organized under the act of 1848, sufficient to charge the defendant with a debt of the corporation because of a failure to make and record the certificate required by section 10 of that act, cannot be joined with a cause of action seeking to charge him, as trustee, with the debt, because of failure to file an annual report as required by section 12 of that act, as the first cause of action is upon contract, while the second

Joinder of causes of action on contract and in tort.

is an action upon a statute for a penalty or forfeiture, and the two causes of action do not arise out of the same transaction, or transactions connected with the same subject of action. *Wiles v. Suydam*, 64 N. Y. 173. So a cause of action against the trustee of an insolvent savings bank, to recover damages occasioned by unauthorized and illegal investments made by him, cannot be joined with a cause of action upon a bond given by him to make up a deficiency in the assets of the bank. *French v. Salter*, 17 Hun, 546.

The language of the section of the Code in respect to the character of the cause of action which may be interposed as a counter-claim to the cause of action set forth in the plaintiff's complaint is so nearly identical with that of the section under consideration, that the decisions under either section will be found of value in construing the language of the other. See vol. 2, p. 175.

It does not follow that because two causes of action originated or happened at the same time, each cause of action arose out of the same transaction. The question is not whether both causes of action sprung into existence at the same moment of time, but whether each cause of action arose out of the same transaction, the same thing done. Time has very little to do in solving the real question. For example, the maker of a promissory note might, at the instant of its delivery and inception, falsely call the payee a thief, and yet the payee could not join a cause of action for the slander with the cause of action on the note upon the theory that both causes of action arose out of the same transaction. So, a defendant, at the time of committing an assault and battery upon the plaintiff, may use false and slanderous words, and thus furnish the defendant with two independent causes of action, but they will not arise out of the same transaction. *Anderson v. Hill*, 53 Barb. 238. And it has been held that a complaint charging certain of the defendants with fraud in acquiring a claim held by the plaintiffs against the estate of an insolvent, and demanding a rescission of the contract, and also asking for an accounting by certain of the defendants as assignees of the estate of the insolvent, contained two causes of action which could not properly be joined, for the reason that the causes of action did not arise out of the same transaction, nor could they in any proper sense be said to arise out of transactions connected with the same subject of action, nor did they belong to any one class of actions which could be united in the same complaint. *VanLiew v. Johnson*, 6 N. Y. Sup. Ct. (T. & C.) 648; S. C., 4 Hun, 415.

If a person enters into a contract to print a book from stereotype plates furnished by the other contracting party, he assumes a double

obligation, the one founded upon the express contract to print the book, the other upon the implied contract to take proper care of the plates and return them to the owner. If the printer is guilty of a breach of both contracts, and not only fails to print the book, but also negligently suffers the plates to be destroyed, these separate causes of action against him may be properly joined as arising out of one transaction. *Badger v. Benedict*, 1 Hilt. 414.

A cause of action for deceit may be joined with one for money had and received when both causes of action arise out of the same transaction. *Woodbury v. Deloss*, 65 Barb. 501.

Where a cause of action arising upon contract is joined in the same complaint with a cause of action for a tort, for which the defendant might otherwise be arrested, the plaintiff, by such joinder, waives his right to arrest, see *ante*, 146; and also his right to an execution against the person of the defendant. Vol. 1, p. 26, § 2937. This is the only effect of the joinder, where such joinder is authorized by the Code.

§ 3. **Joinder of causes of action upon contract.** A plaintiff may unite in the same complaint two or more causes of action where they all arise out of contract, express or implied, provided that they are consistent with each other, that they require the same judgment, and, except as otherwise prescribed by law, that they affect all the parties. Vol. 1, p. 26, § 2937. And this is the rule, although some of the causes of action arise upon sealed agreements, and some of them upon unsealed ones, and whether the liability is founded upon express or upon implied promises. A cause of action for goods sold, services rendered, etc., may be joined with a right of action upon a bond or other sealed instrument.

Several promissory notes may be sued on in the same complaint. *Dorman v. Kellam*, 14 How. 184. And an action upon a justice's judgment in those cases in which it may be sued may be joined with causes of action upon accounts, promissory notes, bills of exchange, or other demands of that nature, or with sealed contracts. Under the old forms of actions and pleadings, an action would not lie to recover upon an account, or a promissory note, if it was joined with a right of action upon a bond, or a judgment, because one of them ought to be sued in *assumpsit*, and the other in debt or covenant. But those forms having been abolished there can be no objection to their joinder in the same action, because the same kind of answer, judgment and execution would be appropriate in each case.

A cause of action against the maker of a promissory note, and a cause of action against the guarantor of the same instrument upon a

Joinder of causes of action for tort— Causes joined must be consistent, etc., etc.

contract distinct from the instrument signed by the maker, though indorsed thereon, cannot be joined in the same complaint. *Harris v. Eldridge*, 5 Abb. N. C. 278; *Barton v. Speis*, 5 Hun, 60. But in an action against a constable and his sureties on his official bond the plaintiff may unite in the same complaint, a count that the constable levied upon sufficient property of the defendant's to satisfy the plaintiff's execution; a count alleging a failure to return the execution according to its requirement; and a count that the constable keeps and detains the money received on the execution. *Moore v. Smith*, 10 How. 361.

§ 4. **Joinder of causes of action for tort.** The Code authorizes the plaintiff to join in the same complaint two or more causes of action where they all arise out of personal injuries, and injuries to property, or either, provided it appears upon the face of the complaint that all the causes of action so united arise out of personal injuries, or injuries to property, or either, that they are consistent with each other, that they require the same judgment, and except as otherwise prescribed by law, that they affect all the parties. Vol. 1, p. 26, § 2937. The causes of action embraced in the terms "personal injuries" and "injuries to property" include every demand for a tort of which a justice of the peace has jurisdiction. See vol. 1, p. 169.

The plaintiff may join in the same complaint as many causes of action as he may have against the defendant, for trespasses committed by him, whether the trespass was to real or to personal property, or to both of them. This rule will include actions for the conversion of personal property. Several penalties may be joined in the same action, when they all exist in favor of the same plaintiff, and against the same defendant.

§ 5. **Causes joined must be consistent and require the same judgment.** The Code requires that all causes of action joined in the same complaint shall be consistent with each other and require the same judgment. Vol. 1, p. 26, § 2937. For example, the plaintiff cannot join in the same complaint a cause of action for the recovery of land by virtue of ownership in fee-simple, and a cause of action for damages arising from an obstruction of a qualified right to its enjoyment. *Smith v. Hallock*, 8 How. 73. So a plaintiff cannot have a recovery for the violation of an ordinance, and at the same time have such violation restrained. *Lamport v. Abbott*, 12 How. 340. So a plaintiff cannot join a cause of action for a warranty of a horse, and a cause of action for fraud and deceit in concealing the defects of the same horse, as these causes of action are inconsistent with each other. *Sweet v. Ingerson*, 12 How. 331; *Springstead v. Lawson*, 23 id. 302; S. C., 14

Each cause of action must affect all the parties.

Abb. 328. The two causes of action demand a totally different line of proof, a different judgment, and different process for enforcing a final recovery. *Ib.* See *Quintard v. Newton*, 5 Rob. 72.

An executor or administrator is now required by the Code to bring every action in his representative capacity where the cause of action belongs to him in that capacity. He cannot include in the same action a claim in his individual right and a claim as administrator of another. *Lucas v. New York Central R. R. Co.*, 21 Barb. 245. But see *Armstrong v. Hall*, 17 How. 76.

§ 6. **Each cause of action must affect all the parties.** Except as otherwise prescribed by law, each cause of action set forth in the plaintiff's complaint must affect all the parties to the action. Vol. 1, p. 26, § 2937. Separate causes of action against several estates cannot be joined, even though some of the defendants represent all the estates. *Viall v. Mott*, 37 Barb. 208. If the plaintiff has a good cause of action in tort against two persons, he cannot join with it a similar cause of action against one. *Rodgers v. Rodgers*, 11 Barb. 595. A cause of action upon a judgment against the defendant only cannot be joined with a cause of action against such defendant and another. Causes of action upon several judgments cannot be united in one action unless all the debtors in the judgments are the same, and are made defendants. *Barnes v. Smith*, 1 Rob. 699; S. C., 16 Abb. 420.

A constable and his sureties may be joined in the same action, when it is founded upon the neglect of the constable to return a justice's execution within the time required by law, or for keeping moneys collected, etc. *Moore v. Smith*, 10 How. 361; *Sloan v. Case*, 10 Wend. 370. But where one count in the complaint states a cause of action against a part of the defendants, and another count states a cause of action against them all, it is a misjoinder of causes of action. *Wells v. Jewett*, 11 How. 242.

Where one of the causes of action against the defendant is against him individually, and another as trustee, etc., they cannot be joined. *Alger v. Scoville*, 6 How. 131; S. C., 1 Code Rep. (N. S.) 303. So, where the complaint demands judgment against one defendant individually, and against the other as a trustee, etc., they cannot be joined. *Ib.*

Several causes of action can be properly united in the complaint, in those cases only in which each cause of action affects all of the defendants. It is not enough that some of the defendants are affected by all of them. *Lewington, etc., R. R. v. Goodman*, 15 How. 85. It is not necessary, however, that the several causes of action should affect each of the defendants *equally*, it is sufficient that each cause of action affects

Remedy for misjoinder.

each defendant in some degree. *Vermeule v. Beck*, 15 How. 333; *Beal v. Finch*, 11 N. Y. 128; *O'Shea v. Kirker*, 8 Abb. 70; S. C., 4 Bosw. 120.

§ 7. **Remedy for misjoinder.** The Code does not specify the remedy of the defendant in case of a misjoinder of causes of action in the plaintiff's complaint. In the Supreme Court the remedy is by demurrer. But the only demurrer to a complaint allowed in justices' courts by the present law is where the complaint is not sufficiently explicit to be understood, or where it does not state facts sufficient to constitute a cause of action. Vol. 1, p. 26, § 2939. See *Lapham v. Rice*, 63 Barb. 485. A demurrer upon the last ground will be undoubtedly the proper remedy, where the complaint sets forth a cause of action against all the defendants, and also a cause of action against some but not all the defendants. In such case, a defendant not affected by a cause of action separately stated in the complaint may demur to that cause of action upon the ground that, as to him, it does not state facts sufficient to constitute a cause of action. The plaintiff must then amend his complaint or the justice must disregard the part demurred to. But the demurrer to a cause of action set forth in the plaintiff's complaint is authorized only where the cause of action is separately stated. Vol. 1, p. 26, § 2935. And the remedy by demurrer is available only to the defendant against whom the cause of action so separately stated does not show a cause of action. If the plaintiff has blended two distinct causes of action in a single count, one of which affects all the defendants and the other affects only a part of them, a demurrer is not the proper remedy, for the reason that in such case it is an unauthorized pleading. In that case, as in all other cases of misjoinder of causes of action, the defendant must point out to the justice the existence of two distinct causes of action in the complaint, and the fact that they cannot properly be joined, and move that the plaintiff be compelled to elect to which cause of action he will be confined. This motion should be made upon joining issue, or at least before proceeding to trial. *Burdick v. McAmbly*, 9 How. 117.

If the defendant omits to raise an objection to the misjoinder by motion or demurrer the objection will be waived. And if the plaintiff proves a cause of action under either of the counts in his complaint, he will be entitled to recover, and the judgment will not be reversed for such misjoinder or causes of action. *Willard v. Bridge*, 4 Barb. 361; *Dunham v. Simmons*, 3 Hill, 609; *Whiting v. Crim*, 1 id. 61; *Lovett v. Pell*, 22 Wend. 369.

Splitting single causes of action, or entire demands.

§ 8. **Splitting single causes of action, or entire demands.** The reverse of joining distinct causes of action is the splitting of a single indivisible cause of action into two or more demands. The law does not encourage, nor does it tolerate a plaintiff in making the defendant any unnecessary expense and trouble by splitting a cause of action, and bringing separate suits on each part of it. And, therefore, when a plaintiff has a single cause of action arising upon *contract*, although there may be many items of it, he must join them all in the same action; and, if he sues and recovers for a portion of the items, he will be precluded from bringing an action and recovering for the residue. *Bancroft v. Winspear*, 44 Barb. 209; *Nathans v. Hope*, 77 N. Y. 420; *Bendernagle v. Cocks*, 19 Wend. 207; *Coggins v. Bulwinkle*, 1 E. D. Smith, 434; *Guernsey v. Carver*, 8 Wend. 492; *Smith v. Jones*, 15 Johns. 229; *Phillips v. Berick*, 16 id. 136. But the cause of action must arise out of a single contract or transaction, for, where two bills of goods were sold to the defendant, at different times, and a credit of six months was given on one bill, and none as to the other, it was held that the causes of action were separate and distinct, and that a recovery upon the bill first sold was no bar to an action upon the second. *Staples v. Goodrich*, 21 Barb. 317.

Where there are several items of account for goods sold or work performed at different times, there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items, to make them a single or entire demand. *Secor v. Sturgis*, 16 N. Y. 548, 554, 555, 558. This last case was decided by the Court of Appeals, and it is an elaborate exposition of the correct rule.

The same rule applies to actions for torts. Where a claim arises upon a contract or from a tort, the entire claim must be prosecuted in a single suit, and several suits cannot be brought for separate parts of such claim. *Nathans v. Hope*, 77 N. Y. 420. And whenever a right of action exists for taking or injuring several articles of personal property, if they were all taken at the same time, or by a single wrongful act, the articles must all be sued for in a single action; and if an action is brought to recover for taking a portion of such articles, and the plaintiff recovers judgment, he will be barred from maintaining another action for the residue of them. *Farrington v. Payne*, 15 Johns. 432.

But where a plaintiff sued for the recovery of the value of several articles, and it appeared on the trial that but a portion of the articles had been converted at the time when the suit was commenced, it was

Splitting single causes of action, or entire demands.

held that the plaintiff might strike out of his complaint the cause of action for the articles which were not converted, and that this was not splitting up a single cause of action, so as to bar a right to the residue of the property. *Doty v. Brown*, 4 N. Y. 71.

So where a plaintiff has a right of action against two on a joint demand as partners, if he sues one and recovers a judgment against him, that will be a bar to an action against the other joint debtors. *Olmstead v. Webster*, 8 N. Y. 413; *Robertson v. Smith*, 18 Johns. 459; *Benson v. Paine*, 9 Abb. 28.

If one or more of the debtors cannot be served with process because of absence beyond the jurisdiction of the court the plaintiff may insert the names of all the debtors as defendants, and then proceed against all of them, even although but a portion of them were served with process.

Where a constable has brought an action against the obligors in a bond conditioned to keep him harmless and indemnified of, from and against all damages, costs, charges, trouble and expense that he may be put to, sustain or suffer by reason of a levy upon and sale of property on execution, he may recover in the suit not only the amount he has actually expended in the defense of an action brought against him by one claiming to be the owner of the property levied upon, but also the costs and counsel fees of his attorney and counsel in defending such suit, although they have not been actually paid. And if in such action he does not recover such costs and counsel fees, he cannot afterward maintain another action upon the bond to recover them. *Bancroft v. Winspear*, 44 Barb. 209.

The rule that an entire indivisible demand cannot be split up into several claims, so as to make it the subject of two or more separate actions, does not interfere with the prosecution of separate suits for distinct causes of action which are not connected with each other and do not constitute an entire claim. Hence it follows that there is no rule of law or principle which prevents the prosecution of several promissory notes in separate and distinct actions, although they were given upon the settlement of one and the same demand. *Nathans v. Hope*, 77 N. Y. 420. The same rule applies to separate trespasses, and a separate suit may be brought for each one of them. *Ib.*

When several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability inures. Still, if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in the one first brought

Election as to kind of action.

will be an effectual bar to a second action brought to recover the other claims that were due when the first was brought. *Reformed Protestant Dutch Church of Westfield v. Brown*, 54 Barb. 191. So if two demands accrue for distinct failures to perform the same covenant in an instrument under seal, and after both demands have become due, an action is brought to recover one demand, and afterward, and during the pendency of the first action, another action is brought to recover the other demand, a judgment in the second suit and its payment, although occurring during the pendency of the first, may be pleaded by way of supplemental answer, and constitute a defense to the action first brought. *Jew v. Jacob*, 19 Hun, 105. In the case last cited, an action was brought to recover \$6,615 for two quarters' rent due the plaintiff from the defendants under a covenant in a lease. At the time this action was commenced there was also due under the same covenant a balance of \$150 on a prior quarter. A second action was brought to recover this sum, and judgment was recovered therein, and paid before the termination of the first action. The recovery and payment of this judgment was pleaded in the first action by a supplemental answer, and on demurrer to this answer it was held to be a good defense.

The effect of a recovery for a part of an entire demand has been treated in another volume. See vol. 2, p. 745.

§ 9. **Election as to kind of action.** Under the old practice, where there were several different forms of action, it was frequently a matter of some consequence what form of action was adopted. But since the Code, there are but few cases in which any election can be made, because forms of action are abolished. Before the Code, if property was unlawfully taken or wrongfully converted, the owner might waive the tort and sue in *assumpsit* for the value. *Putnam v. Wise*, 1 Hill, 235, 240, note *a*; *Cummings v. Vorce*, 3 id. 282; *Berly v. Taylor*, 5 id. 577, 584, note *a*; *Osborn v. Bell*, 5 Denio, 370; *McKnight v. Dunlop*, 4 Barb. 36. And it has been held that the rules are the same since the Code. *Hinds v. Tweddle*, 7 How. 278, 281; *Doughty v. Crozier*, 9 Abb. 411. But if the plaintiff has an election to waive the tort, and sue for the value of the goods as though they were sold on contract, it is important to remember that by adopting that method, the defendant may introduce a set-off, which he could not do if sued in tort. And again, the plaintiff will also waive the right to arrest the defendant or to imprison him on the execution, if he elects to waive the tort. But, unless the defendant has actually sold the goods, the tort cannot be waived so as to sue for the goods sold, or for money had. 4

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and received. *McKnight v. Dunlop*, 4 Barb. 36, 42; *Putnam v. Wise*, 1 Hill, 240, note *a*.

But there is one kind of remedy which may frequently be desirable. If an individual sell goods to an irresponsible person, who obtains the possession by a fraudulent statement, or if he by any means obtains possession of them fraudulently, it will be important to obtain the goods themselves. So, in other cases in which one person has personal property of another, and he refuses to deliver it to the owner, an action of replevin is then preferable, as the identical property will then be recovered.

CHAPTER XVI.

GENERAL RULES OF PLEADING.

SECTION 1. **General principles.** All *forms* of actions, and all *forms* of pleadings have been abrogated by the Code. The abolition of these forms was a necessity, when the principles of the Code became rules of law. The plain intention and spirit of the Code is, that every party, whether plaintiff or defendant, shall state fully and truly all the facts which constitute the cause of action, or the ground of defense. The old system permitted the litigation of causes under general pleadings, of which there were numerous forms, which were adapted to corresponding forms of action.

But the Code has introduced a system of special pleading which requires a statement of the particular facts of each case.

It must not be understood, however, that the abrogation of the *forms* of actions, or of pleadings, has also abrogated the *principles* of actions, or of pleadings.

If the facts, in a given case, would not constitute a cause of action before the Code, they will not constitute a cause of action now. *Cropsey v. Sweeney*, 27 Barb. 310.

The changes which the Code has made relate exclusively to the *manner* of stating the facts which constitute the cause of action, or the ground of defense, and to the proper parties to an action. It has no reference whatever to the rules of law by which it is determined, whether a particular state of facts is sufficient to constitute a cause of action or a ground of defense.

The law, in that respect, remains unchanged by the Code, unless it relates to the statute of limitations, or the assignment of demands, etc.

The fundamental *principles* of pleading have not been abrogated; and the rules which were observed under the old law are mainly the same as those now in use; or, in other words, it was the intention of the legislature to preserve all of the old rules that were applicable to the new system. *Knowles v. Gee*, 8 Barb. 300.

At the time of the enactment of the old Code, the rules of pleadings provided by it were the same in all courts. But since that time the law has been changed in that respect; and now two distinct systems of

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pleading have been devised, one for courts of record, and one for courts not of record. In many respects these systems are the same, or changed only so far as became necessary to adapt the somewhat complicated rules of practice of courts of general jurisdiction to the simpler practice of courts of limited jurisdiction. In some particulars the provisions of the statute as to pleadings in courts of record are made by the statute applicable to similar pleadings in a justice's court.

But it does not follow, as of course, that these principles do not apply to a justice's court, merely because the Code does not so apply them. The principles which the Code has adopted are, many of them, nothing more than the common-law rules of pleading, and they were always as applicable to a justice's court as to a court of record. And those common-law principles which have not been abrogated are as applicable now to a justice's court as they ever were, unless in those cases in which the Code expressly changes the rule. But there is more than this to be observed.

The statute which confers jurisdiction upon justices' courts expressly provides that these courts shall be vested with all the *necessary powers* which are possessed by courts of record in this State. Vol. 1, p. 3, § 2868. This section is clearly broad enough, both in language and spirit, to confer authority upon justices' courts to control all matters of pleadings, which are proper to be observed in these courts.

Form of pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. Vol. 1, p. 27, § 2940. They may be oral, or in writing, except in certain specified cases in which the law requires them to be in writing, as when the defendant pleads title to lands. *Ib.*; vol. 1, p. 29, § 2951. Or, where a verified complaint has been served with the summons. *Id.*, p. 177.

If the pleadings are oral, the justice is required to enter the substance of them in his docket. *Id.*, p. 27, § 2940. The term "substance" must be understood to embrace all the material allegations which the party makes, and which are essential to constitute a cause of action or defense.

The justice is not bound to enter in his docket any allegations but those which are made by the parties. And if the complaint or answer is defective, because it does not state sufficient facts, the opposite party may demur to the pleading. The defendant may demur to the complaint before he puts in his answer. And the plaintiff may demur to the answer after it is put in.

The practical effect of the rules prescribed by the Code is to cause the pleadings to be in writing, because if the party does not furnish

Must be pleadings and issue.— Facts are to be stated.

written pleadings, the justice must reduce the material allegations to writing, and enter them in his docket. When the parties furnish written pleadings, the justice is required to file them and make an entry in his docket referring to them. *Ib.*

In common practice, the allegations are very carelessly made, and there are very few complaints or answers which contain facts sufficient to constitute either a cause of action or a ground of defense. Parties have a right to litigate their causes in that way if they choose, but it will be found to be for the interest of both parties, if they each require the other to state fully and clearly all the material facts upon which they rely. There will then be less need of making amendments, and there will not be so many disputes as to the questions which are at issue for trial.

A fuller statement of the requisites of pleadings as to form will be given hereafter in discussing the requisites of a complaint, answer or demurrer.

Must be pleadings and issue. The statute imperatively requires that there shall be pleadings in the action. And at the time of the first appearance of the parties, either to join issue voluntarily, or upon the return of process, the parties must join issue before an adjournment is had, except in those cases in which the defendant shall neglect or refuse to plead. Vol. 1, p. 26, § 2934; *Fanning v. Trowbridge*, 5 Hill, 428. And see *Thompson v. Sayre*, 1 Denio, 175. If the defendant does not appear, or if he does appear, but neglects or refuses to answer to the complaint, there will, of course, be no issue joined. But the plaintiff must put in his complaint, and it ought to show on its face a good cause of action, especially in those cases in which the defendant does not appear so as to waive any defects, either expressly or by implication.

Where a return from the Marine Court certified that the defendant did not appear in the cause, that no pleadings were put in, and that the justice received a statement of facts from the attorneys of the respective parties, whereon he rendered judgment, without examining any witnesses, it was held that the judgment could not be sustained. *Heidenheimer v. Lyon*, 3 E. D. Smith, 54.

Facts are to be stated. No question seems to have perplexed the courts more than to determine *what* are the *facts* which are to be alleged. It is difficult to frame an exact definition which shall include every case, or to reduce to practice any of the numerous rules which have been stated.

The principle is this, that each party must allege some acts or things

Facts are to be stated.

which the other has done or omitted to do, in consequence of which there is a cause of action on the one hand, or a ground of defense on the other. This rule excludes the allegation of those facts or matters of evidence which go to prove that the other party has done or omitted to do the alleged acts or things, and it also excludes any allegation of the legal conclusion which follows or results from the doing or the omission of the acts or things alleged in the pleadings to have been done or omitted.

Suppose that an action is brought to recover the value of goods sold; the complaint will allege that at a certain named time and place the plaintiff sold and delivered certain specified goods to the defendant at his request, that they were of a specified value, and that they are not paid for, those would be the facts, which, if admitted to be true, would be the plaintiff's cause of action.

He ought not to allege that on a certain day, at a specified place, the defendant *admitted* that he had purchased such goods; because that would be mere *evidence* of the allegation in the complaint that the goods were sold, etc. So, on the other hand, the plaintiff ought not to allege that the defendant is liable to pay for the goods sold and delivered; because that is a mere *conclusion of law* upon the facts alleged, if they are admitted or proved to be true.

Thus, when an action is brought to recover back money paid on compulsion, or by duress of goods, the complaint must state the facts showing that the payment was compulsory and not the mere conclusion of law that the plaintiff draws from the facts. A general allegation that the payment was compulsory, and not voluntary, is not sufficient. It is for the court to determine on the facts stated whether the payment was compulsory in such a sense as to bring the party within the rule of law applicable to such cases; and if the complaint does not state facts from which the court can determine that such was the character of the payment the pleading is demurrable. *Commercial Bank of Rochester v. City of Rochester*, 41 Barb. 341.

It may be said that the *admission* of the party is a *fact*, and the remark is true; but it is also a fact which is mere *evidence* of the truth of the *facts* or *allegations* which the law requires to be stated.

It may be said, too, that the liability of the defendant is a *fact*; but that fact is a *conclusion of law* which the *court* is to draw from the facts which are properly alleged in the pleadings, and established as true. See also the very appropriate remarks of DUEK, J., in *Mann v. Morewood*, 5 Sandf. 566, and in *Lawrence v. Wright*, 2 Duer, 674, 675, and of JEWETT, J., in *Allen v. Patterson*, 7 N. Y. 478.

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Another illustration may not be inappropriate. It is a principle of law that when one person unlawfully converts to his own use the property of another, the wrong-doer is liable to respond in damages for his acts.

A complaint for such a cause of action ought not to state this principle of law; but it ought to allege that the defendant, at a specified time and place, wrongfully and unlawfully took and converted to his own use certain property belonging to the plaintiff. No allegation of evidence of the truth of these facts ought to be made, such as the admissions of the defendant, or that a certain named witness will swear to the truth of these allegations. If the wrong complained of is the wrongful detention of the plaintiff's property, the *wrongful detention* is the *fact* to be established; and the manner in which the wrongful detention was accomplished is only evidence of it; and whether the unlawful detention consists in the refusal of the defendant to deliver it when demanded, or whether, by any improper act of his, he detains it from the plaintiff, is a matter of evidence and need not be set out in the complaint. *Simser v. Cowan*, 56 Barb. 395. But while the case cited is a good illustration of the rule that it is the facts and not the evidence of the facts that must be alleged in a pleading, it must not be understood that the bold allegation that property is "wrongfully detained" from the plaintiff, is a sufficient allegation of every fact necessary to show that the detention is wrongful. For example, in an action of replevin, it is not sufficient to allege that the defendant has become possessed of and wrongfully detains from the plaintiff a certain chattel of a specified value, without also alleging that the plaintiff has a general or special property in the chattel and the right of immediate possession. Unless he has such property and right of possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property and right of possession. The last is the conclusion; the first is the fact upon which the conclusion is based; and it is the fact, and not the conclusion, which must be alleged in pleading. *Scofield v. Whitelegge*, 49 N. Y. 259. In other words, the essential fact that the plaintiff is the owner, or has a special property in the chattel entitling him to its immediate possession, is not sufficiently alleged by a mere statement that the defendant wrongfully detains the chattel from the plaintiff, although, as a matter of argument, the detention could not be *wrongful* without such ownership or special property and right to possession. This general or special property in the chattel sought to be recovered must be alleged, because the action can be maintained only by one who has the general

State enough to show cause of action or ground of defense.— Questions of fact.

or special property in the thing taken or obtained, and not merely to show that the detention is wrongful. But, in certain cases, the facts showing that the detention is wrongful must be set forth. Code of Civil Pro., § 1721.

The rule is this, the complaint ought to contain *allegations* which logically and legally show that the defendant is liable to an action; or that the plaintiff is entitled to the relief demanded.

So an answer, if it is not a mere denial, ought to contain such *allegations* as show a defense, if admitted to be true. There need not be any confusion on account of the rule introduced by the Code which requires the *facts* to be alleged; because the truth is, the whole system of pleadings is a mere method of making *allegations*, though those allegations relate to facts.

State enough to show cause of action or ground of defense. The rule which requires the pleadings to state the facts constituting the cause of action or the ground of defense means that all the material facts which are requisite for that purpose must be stated. Every fact which either party is required to prove at the trial must be alleged. *Allen v. Patterson*, 7 N. Y. 478, per JEWETT, J. This rule, however, may be waived by the parties, and if neither party demurs to the pleadings of the other, the most informal and insufficient pleadings will answer. And if no demurrer is interposed the pleadings will be held sufficient to permit evidence to be given in support of any cause of action or defense which may have been intended to be pleaded, although that may have been very objectionably done. *Catlin v. Gunter*, 11 N. Y. 368; *Ayer v. O'Farrel*, 10 Bosw. 143; *Simser v. Cowan*, 56 Barb. 395. In *White v. Spencer*, 14 N. Y. 247, at page 251, DENIO, Ch. J., said: "If the court can plainly see, as in this case, what the matter attempted to be pleaded is, the issue is not immaterial though it may be defectively stated." And see *Mayor, etc., of N. Y. v. Mason*, 1 Abb. 345; *Hall v. McKechnie*, 22 Barb. 244, 245.

Questions of fact. There are many allegations in pleadings which may be said to involve questions of fact; by which is to be understood, that certain allegations in the pleadings are mere conclusions from evidence.

Indeed a great portion of the allegations in any pleading is but the expression, in a logical and legal form, of the conclusions or deductions of facts which are drawn from other facts, or in other words, from the evidence which proves their existence.

When a complaint alleges that goods were *sold* to the defendant, the allegation of a sale is a mere conclusion of fact deduced from the evi-

Questions of law.

dence of the circumstances or transaction which constitutes a legal sale.

The intention with which an act was done is sometimes material, as that fact will sometimes form an important element in constituting a cause of action, or in the measure of damages. *Ives v. Humphrey*, 1 E. D. Smith, 197. An allegation of the unlawful conversion of personal property is a question of fact. *Covell v. Hill*, 6 N. Y. 381. So is the question whether a person assented to a specified transaction; *Kemey v. Richards*, 11 Barb. 312; whether a fraud has been committed; *Erwin v. Voorhees*, 26 Barb. 127; so as to the actual possession of land; *Parsons v. Brown*, 15 Barb. 590; that the plaintiff became the owner of certain property or choses in action, by purchase. *Prindle v. Caruthers* 15 N. Y. 425. And it may be stated, as a general rule, that every fact which is put in issue by the pleadings, and is to be determined by the court or a jury upon the evidence adduced, is a question of fact. There are also questions which are said to be mixed questions of law and of fact, which must be determined by the court or by a jury under the instructions of the court as to the law; or in a justice's court by the jury who are judges of both the law and the facts.

Questions of law. A question of law arises when the law is to be determined upon *undisputed* facts. For, until the facts are determined, no question of law can arise upon them; although it has been incorrectly said that there may be mixed questions of law and fact, in which the law is declared conditionally, and it is to be applied in accordance with the findings of facts. As a general rule, conclusions of law are not to be alleged in the pleadings. *People v. Commissioners of Highways*, 54 N. Y. 276; S. C., 13 Am. Rep. 581. An allegation that a party released a claim without stating that it was a written sealed instrument, etc., is alleging a conclusion of law. *Hatch v. Peet*, 23 Barb. 575.

A statement in a complaint that by means of a contract which is set forth, it became the duty of the defendant to perform certain acts, is not sufficient unless the facts necessary to show the duty are stated. *City of Buffalo v. Holloway*, 7 N. Y. 493, 498. So, an allegation that the defendant has failed to fulfill his obligations by virtue of an agreement which is set out, without alleging any facts which show a breach of it, is an allegation of a conclusion of law and defective. *Van Schaick v. Winne*, 16 Barb. 90, 95. So, an allegation that the plaintiff was entitled to the possession of land, and to the rents and profits, or that he owned the rents, is a mere conclusion, and is clearly insufficient without an allegation of the facts from which such conclusion could have been drawn. *Sheridan v. Jackson*, 72 N. Y. 170. But there is a class of

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cases in which a conclusion of law may be alleged in connection with other facts constituting a cause of action.

In an action for the conversion of personal property by the defendant, it is proper to allege the facts which show a conversion of it, and then to allege that the acts of conversion were *wrongfully* or *unlawfully* done. The law intends that every act done is lawful and innocent unless it affirmatively appears that it was not so; and, therefore, the complaint would not show an unlawful or wrongful conversion if this allegation were omitted. *Walter v. Lockwood*, 23 Barb. 228, 233; *Ensign v. Sherman*, 14 How. 439; *Decker v. Mathews*, 12 N. Y. 313; *Hunter v. Hudson River, etc., Co.*, 10 Barb. 493; *Sheldon, etc., Co. v. Hoy*, 11 How. 12, 16. So, in actions to recover damages for a fraud, the complaint ought to state the facts which constitute the cause of action, and then allege that the acts were fraudulently done, or the representations fraudulently made. So, in actions for negligence, the complaint ought to allege that the acts stated were negligently done, etc. *Brown v. Harmon*, 21 Barb. 511. So, in an action of replevin to recover the possession of personal property, the complaint may allege that the defendant unjustly detains the property, etc. *Childs v. Hart*, 7 Barb. 370. In an action of replevin, brought in a court of record, the mode of pleading the wrongful act of the defendant is regulated by statute. "Where the complaint contains a sufficient statement of the plaintiff's title, a general allegation, that the defendant wrongfully took the chattel, is sufficient, without setting forth the facts, showing that the taking was wrongful. Where the taking of the chattel is not complained of, but the action is founded upon its wrongful detention, the complaint must set forth the facts, showing that the detention was wrongful." Code of Civil Pro., § 1721. This provision of the statute is not, in terms, made applicable to actions in justice's court, but it furnishes a safe rule to follow.

The brief form of alleging a wrongful conversion of chattels, or of fraud, or of negligence, or of unjust detention of property, etc., is permitted as a matter of convenience, when the complaint sets out all the necessary facts to show a conversion, a fraud, negligence, and the like, and when this allegation is made merely to show that the acts alleged were wrongful or unlawful. But a party is always at liberty to allege such facts as will show that the act is wrongful, fraudulent and the like, without making such allegation, if that is deemed advisable. If, on all the facts alleged, it can be declared as a matter of law, that a wrongful conversion is shown, no such allegation will be necessary, since it would be merely alleging a conclusion of law, which sufficiently ap-

pears from the facts stated. And, in all cases, if the complaint shows an unlawful conversion, etc., the allegation of a wrongful conversion would at most be mere surplusage.

Questions of law and fact. There are questions which are said to be mixed questions of law and fact. Strictly speaking, there cannot be such a question, because there cannot be a question of law raised until the facts are settled, and when the facts are settled, there can be nothing left but questions of law.

The phrase, “mixed questions of law and fact,” originated in the practice which is adopted in courts of record. There are frequently questions to be decided in which no rule of law can be laid down except conditionally. The jury are instructed that if they find a given state of facts, then the law to be applied will be one thing; but if a different state of facts is found, then the law will be different in the case. In such cases the jury render a general verdict, including the questions of fact and of law; but that does not by any means make any question decided by them a mixed one. On the contrary, they are expressly instructed to determine the questions of fact first, and then to apply the law according to the facts found. *Purvis v. Coleman*, 1 Bosw. 321, 326; S. C., 21 N. Y. 111; *Carroll v. Upton*, 3 id. 272.

The cases in which this question most frequently arises are those in which it is important to determine whether certain articles are necessities for which an infant is liable; whether a bill or note has been duly presented; whether due diligence has been used; whether a reasonable notice has been given; whether a proper demand has been made, and other cases of a similar nature. In pleading, the party ought always to allege such facts as will show that he has performed what he was bound to do, or that the other party has not done so.

Statement of evidence. The law requires that the facts constituting the cause of action or defense shall be stated; and the parties ought never to state the evidence which shows those facts to be true. *Pattison v. Taylor*, 8 Barb. 250; *Badeau v. Niles*, 9 Abb. N. C. 48. A complaint in an action for a breach of promise of marriage alleged, in substance, that in a conversation between the parties at a time and place specified, the plaintiff asserted, among other things, that the defendant had promised to marry her, and that, at the same time and place, the defendant said to the plaintiff he acknowledged he had done wrong, in promising her as he did, and hoped that she would forgive him; but if he should marry her, as they had talked, and she go to his house, it would make both miserable for life; and it further alleged,

 Legal presumptions.—Fictions in pleadings.

that the defendant said to the plaintiff, in reply to her entreaties, she must try to forget it, and acknowledged he had done wrong, and that he was sorry for it; but there was no other allegation of a promise by the defendant, it was held, on demurrer to the complaint, that it did not state facts sufficient to constitute a cause of action. *Buzzard v. Knapp*, 12 How. 504. See, also, *Page v. Boyd*, 11 id. 415. It is not sufficient to allege such facts as would be good evidence to authorize a jury to infer those facts which ought to be stated in the complaint. Such facts ought to be stated, that the court alone can determine what the law is, without the aid of a jury to find any facts, or without finding any facts for itself. *Page v. Boyd*, 11 How. 415, 417; *Buzzard v. Knapp*, 12 id. 504. This was the rule before the Code. *Fidler v. Delavan*, 20 Wend. 57, 60; *Benjamin v. De Groot*, 1 Denio, 151.

Legal presumptions. Those things which the law presumes need never be stated in the pleadings. In an action of slander, the plaintiff need not allege his good character, as the law presumes that. This illustration is convenient. But it will be remembered that a justice has no jurisdiction of actions for slander. When a plaintiff's complaint shows that he was once the owner of property, at some time before the action was brought, he need not allege that he is still the owner, or that he never transferred it to another; because the law will presume, in the absence of allegation of proof, that the ownership continues. *Van Rensselaer v. Bonesteel*, 24 Barb. 366; *Niblo v. Harrison*, 7 Abb. 447.

Where an action is brought upon a contract required by the statute of frauds to be in writing, it is not necessary to aver in the complaint that the contract was in writing, as, for the purposes of the pleading, that will be presumed. *Marston v. Swett*, 66 N. Y. 206; S. C., 23 Am. Rep. 43; *New York Trust and Loan Co. v. Helmer*, 12 Hun, 35; *Hilliard v. Austin*, 17 Barb. 141; *Horner v. Wood*, 15 id. 371; *Stern v. Drinker*, 2 E. D. Smith, 401; *Livingston v. Smith*, 14 How. 490; *Elting v. Vanderlyn*, 4 Johns. 237.

Fictions in pleadings. One of the objects in view in enacting the Code was to abolish the former system of fictions in the pleadings.

In the old action of trover, the plaintiff alleged that he had lost certain goods, which the defendant found and converted to his own use. But, under the present rules of pleading, no such statement is proper.

The object of the present system is, that the parties shall state truly, clearly and fully the facts upon which they rely. In an action for goods sold, there is seldom an express promise to pay for them, especially

Positively.—Hypothetical allegations.

in those cases in which there is a running account existing between the parties. But, in all such cases, there is an implied promise to pay for them, arising from the legal liability to pay.

In such cases no promise need be alleged in the complaint. It will be sufficient to state such facts as show a legal liability for the debt.

Positively. The allegations and pleadings ought to be directly and positively made, and when all the material facts are thus stated, there will be a distinct and direct issue to try. The Code expressly requires that the complaint and answer shall state the facts in a plain and direct manner. Vol. 1, p. 26, §§ 2936, 2938.

Hypothetical allegations. The parties are required to make plain and direct allegations, as we have just seen. But it is a part of the system that the pleadings shall be true. It was the intention of the legislature to provide such rules of pleadings as would enable and also require parties to state nothing but the truth.

The result of this rule in practice is, to compel a party either to admit or to deny the allegations of a preceding pleading. A defendant, therefore, must either deny the material allegations in the complaint, or a part of them, or he must admit their truth, either expressly or by implication, by not denying them. If he denies all the allegations in the complaint, that will put them all in issue. If he denies a portion of the allegations, and is silent as to the others, or if he expressly admits the truth of a portion of them, the result will be that the facts which are denied will be in issue, while the remainder of them will be admitted as true.

The importance of this rule is greatest in those cases in which the defendant sets up an affirmative defense in his answer. If there is no denial interposed, the complaint will stand admitted, and the whole defense will rest upon the answer of new matter. In such cases, the answer cannot say, hypothetically, that *if* the facts stated in the complaint are true, that he then has a defense such as the answer sets up. Such an answer would neither be a denial nor an admission of the allegations in the complaint, and it is, therefore, bad pleading. *Dovan v. Dinsmore*, 33 Barb. 87; *McMurray v. Gifford*, 5 How. 14; *Boyce v. Brown*, 7 Barb. 80; *Conger v. Johnson*, 2 Denio, 96. But see *McCormick v. Pickering*, 4 N. Y. 277. Such an answer may be demurred to, because the pleading is not sufficiently explicit to be understood, since it neither denies, nor confesses and avoids the complaint. Vol. 1, p. 26, § 2939. The answer may, however, refer to the cause of action in the complaint by calling it the "alleged" or the

Duplicity.

“supposed” cause of action, because that assumes that there is a cause of action alleged which required an answer by way of defense.

Duplicity. One of the advantages of the Code is, that it reduces the system of pleadings to a plain, simple and brief statement of the facts in the case, without any unnecessary repetitions. Each separate cause of action ought, therefore, to be stated in a separate count in the complaint.

If several distinct and independent causes of action are blended together in a single count, confusion may naturally be expected to result. But if each distinct cause of action is separately stated, the court and the opposite party can readily see what is to be answered. And, besides this, it will facilitate a defense by requiring the defendant to answer each cause of action separately, when the defense is any thing more than a mere denial.

There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. *Hall v. McKechnie*, 22 Barb. 244, 247; vol. 1, p. 27, § 2940.

After a single cause of action is stated, a convenient method would be to allege that the plaintiff, for a further and other cause of action, says, etc. Each separate cause of action may thus be pointed out, and the allegations will then be seen to relate to a new and different cause of action instead of being a portion of the allegations pertaining to the previous cause of action. But there are other objections than that of stating several causes of action together in a single count. It is sometimes the case that a plaintiff sets out a single cause of action in several different counts. This is in direct violation of the letter and the intention of the Code. Liberal rules have been provided in relation to variances between the pleadings and the evidence, and also for amendments in those cases in which justice will be promoted by granting them. There is no need, therefore, for more than a single statement of any cause of action. In actions in the Supreme Court, if several unnecessary counts are thus added, they will be struck out on motion. *Churchill v. Churchill*, 9 How. 552; *Dunning v. Thomas*, 11 id. 281; *Stockbridge Iron Co. v. Mellen*, 5 id. 439; *Dickens v. N. Y. Central R. R.*, 13 id. 228.

A justice's court possesses the same power to protect itself and the defendant from any violation of the rules of pleading. Vol. 1, p. 3, § 2868. The proper method would be for the justice, on motion of the defendant, to require the plaintiff to elect which count he will proceed

 Certainty as to time, place, quantity, and value.

upon, and then to strike out the others. But, it must be remembered, that if there are several distinct causes of action, the plaintiff not only may but he ought to set them out in separate counts.

Certainty as to time, place, quantity, and value. The time when any material traversed fact occurred ought to be stated. *Gillet v. Fairchild*, 4 Denio, 80. But, if time is not essential in the particular instance, a demurrer will not lie for an omission to state it. *People v. Ryder*, 12 N. Y. 434. In the case cited the court said: "In contemplation of the Code is the *time* generally when a fact happened, a *fact*? If the *time* when a fact happened is material to constitute the cause of action, it should undoubtedly be stated. The fact without the time would be insufficient to constitute the cause of action; but, if the time is immaterial, I do not think a demurrer will lie for omitting to state it." When a complaint or answer is not sufficiently explicit to enable the opposite party to understand it, because of an omission to state the time, a demurrer is expressly given by the Code, as to cases in justices' courts. Vol. 1, p. 26, § 2939. So if the right of action or defense depends upon the time when the adverse party did the wrongful act constituting the cause of action or defense, that time must be alleged in the pleading or it may be demurred to as not stating facts sufficient to constitute a cause of action or defense. *Patterson v. Baker*, 6 N. Y. Sup. Ct. (T. & C.) 76; S. C., 3 Hun, 398.

The same rules apply to allegations as to place. And when the place is a material fact in the case, it ought always to be truly alleged. In many actions the place where an act was done may be material as a jurisdictional question, and in others it may be material in order that a cause of action shall appear to exist. A demurrer will lie for an omission to state the place where an act was done, if that is material to the cause of action. *Gillet v. Fairchild*, 4 Denio, 80.

It is a general rule of pleading, that if the matters alleged are local in their nature, the truth of the venue is material and of the substance of the issue. *Vermilya v. Beatty*, 6 Barb. 429; *Rightmyer v. Raymond*, 12 Wend. 51; *Morgan v. Lyon*, id. 265.

Where a party seeks, in the courts of this State, to enforce a contract, which, by its laws is forbidden and declared void, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid. *Thatcher v. Morris*, 11 N. Y. 437. Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a good

Facts necessarily implied need not be stated.

complaint. *Clark v. Dales*, 20 Barb. 42, 65. When time and place are not material facts, in constituting a cause of action, and they are not necessary for the purpose of making the pleading intelligible, a demurrer will not lie for omitting to state them.

The quantity or number of articles involved in the action ought generally to be alleged when that allegation is important.

But a party may always obtain a bill of particulars, if he demands it in the manner prescribed by law. Vol. 1, p. 27, § 2942.

As a general rule the value of articles or services are not material allegations.

If a cause of action is stated, the value relates merely to the amount of damages, not to the right of recovery. And an omission to deny the value of property is not an admission of the value alleged in the complaint; but the value must be proved at the trial. *Connoss v. Meir*, 2 E. D. Smith, 314; *Hackett v. Richards*, 3 id. 13; *Woodruff v. Cook*, 25 Barb. 510. In replevin the rule is otherwise.

Facts necessarily implied need not be stated. Those facts or conclusions which are necessarily implied from the facts which are stated need not be alleged in the pleadings. There are numerous cases which illustrate this rule, and a few of them will be given for the purpose of showing the application of the principle. In all those actions which are founded on contract, and in which the liability of the defendant arises by implication of law, or, as it is sometimes expressed, from an implied promise, there need not be any allegation of a promise to pay unless a promise was actually made. And even then, the promise does not add any thing to the validity of the demand, or to the liability of the defendant, because if he is already liable to pay, any number of promises could not do more than make a liability, and that already exists. See *Burke v. Ashley*, 12 Hun, 637.

In all such cases of implied promises, it is not necessary to allege a promise to pay, but the complaint should *state the facts* which show such liability, and it will then be a conclusion of law from those facts, that the defendant is liable to pay. *Cropsey v. Sweeney*. 27 Barb. 310. Such conclusions of law are not to be alleged in the pleadings. See *ante*, "*Conclusions of Law*," etc.

In a complaint which states a cause of action for a breach of a written contract, and the contract purports to be made "for value received," which contract is set out in the complaint, it is not necessary for the complaint to allege that there was a consideration, nor to allege what the consideration was, and in such a case, if the complaint alleges that the contract became the property of the plaintiff by purchase, that will

Facts necessarily implied need not be stated.

be sufficient without stating when, from whom, or upon what consideration the purchase was made. *Prindle v. Caruthers*, 15 N. Y. 425. But enough must appear to show that there was a consideration. *Spear v. Downing*, 22 How. 30. An allegation of purchase necessarily implies that in some legal manner the plaintiff acquired the title to the property.

All such matters as are impliedly averred may be traversed by the defendant, and a general denial puts them all in issue. *Prindle v. Caruthers*, 15 N. Y. 429; *Bellinger v. Craigie*, 31 Barb. 534. An allegation that the defendant *accepted* a bill of exchange is sufficient, without stating that the acceptance is in writing, although the law requires it to be in writing. *Bank of Lowville v. Edwards*, 11 How. 216.

In a complaint by the payee of a promissory note against the maker, it is not necessary to allege that the plaintiff has not parted with the note, or that he is the holder. A complaint which shows that the defendant made the note payable to the plaintiff and delivered to him, and that it has not been paid is sufficient on demurrer. *Niblo v. Harrison*, 7 Abb. 447. And see *Keteltas v. Myers*, 19 N. Y. 231.

In an action by the payee against the maker of a promissory note, it is sufficient to allege that the defendant *made* his promissory note, etc. It is not necessary to allege that the note was *delivered*, because that is implied in the term *made* his note, etc. *Chappell v. Bissell*, 10 How. 274; *Peets v. Bratt*, 6 Barb. 662; *Keteltas v. Myers*, 19 N. Y. 232, per ALLEN, J.; *Burrall v. De Groot*, 5 Duer, 379.

There is a numerous class of cases under the statute of frauds which requires certain agreements to be in writing in order to make them valid. But in all such cases it will be sufficient to state the agreement or promise without alleging that it was in writing. As a rule of evidence, it will be necessary to prove a valid written agreement or promise, if issue is taken upon it, but as a rule of pleading, there need be no allegation that the agreement or promise is written. The averment that an agreement, etc., was made necessarily implies that it was a valid one, and such as the common law or the statute requires. *Stern v. Drinker*, 2 E. D. Smith, 401; *Horner v. Wood*, 15 Barb. 371; *Livingston v. Smith*, 14 How. 490, 492; *Hilliard v. Austin*, 17 Barb. 141; *ante*, 288.

When a plaintiff sues upon a claim which has been assigned to him no consideration need be alleged for the assignment. *Richardson v. Mead*, 27 Barb. 178.

An allegation "that the property, after being in the possession of the plaintiff, came into the possession of the defendant, who, although

Judicial notice.—Negating defense.

requested so to do, has not delivered the same to the plaintiff, but *wrongfully detains* the said goods," is sufficient to show a *conversion*. *Sheldon v. Hoy*, 11 How. 12, 16. The conversion is a legal inference and need not be stated, though the statement would do no harm.

Judicial notice. Those things of which the courts take judicial notice need not be alleged in a pleading. It is not necessary or proper to state what the common law is in relation to the case, for it is the business of the court to know and administer the law. *Shaw v. Tobias*, 3 N. Y. 188, 190.

So it is not necessary to refer to or allege a public statute, under which an action is brought, unless the action is for the recovery of a penalty given by statute, when a proper reference must be made. *Shaw v. Tobias*, 3 N. Y. 188, 190; *Brown v. Harmon*, 21 Barb. 508; *Methodist Ep. Church v. Pickett*, 19 N. Y. 482, 486; *People v. Herkimer*, 4 Cow. 345; *Brown v. Scofield*, 8 Barb. 239, 241; *Carris v. Ingalls*, 12 Wend. 70, 72; *Bayard v. Smith*, 17 id. 88; *Goelet v. Cowdrey*, 1 Duer, 132, 139. Private statutes must be pleaded. 1 Bla. Com. 85; Steph. Plead. 347. So of the by-laws of a municipal corporation. *Harker v. Mayor of N. Y.*, 17 Wend. 199. And this rule includes the by-laws of every incorporated city or village. *Ib.* The laws of other States must be pleaded. *Holmes v. Broughton*, 10 Wend. 75. So of the laws of foreign countries. *Monroe v. Douglass*, 5 N. Y. 447. The public divisions of the State need not be pleaded because the courts take judicial notice of them. *Chapman v. Wilber*, 6 Hill, 475; *People v. Breese*, 7 Cow. 429; *Bronson v. Gleason*, 7 Barb. 472. So of the days of the week, as of Sunday. *Mechanics' etc., Bank v. Gibson*, 7 Wend. 460. There is a large number of things, besides these which have been named, of which the courts take judicial notice; and it is a general rule that a party need not allege in pleading any of those facts of which the courts take such notice.

Negating defense. It is sufficient for a plaintiff to state facts sufficient to constitute a cause of action; and it is not necessary for the complaint to negative such facts as would constitute a defense, if well pleaded and proved in evidence by the defendant. *Cohen v. Continental Life Ins. Co.*, 69 N. Y. 300; *Claflin v. Taussig*, 7 Hun, 223. It is not necessary, therefore, for the complaint to allege that the cause of action accrued before the action was commenced; that is a ground of answer, or of nonsuit at the trial; but the omission to allege it is not a ground of demurrer to the complaint. *Smith v. Holmes*, 19 N. Y. 271.

A policy of insurance against fire, upon which the action was brought, contained this clause: "Camphene, spirit gas, or other burning fluid,

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when used as a light, subject the goods, etc., etc., to an additional premium of ten cents per \$100, and premium for such use must be indorsed in writing upon the policy." The complaint did not aver that camphene, etc., was not used as a light, or, if used, that the premium was indorsed upon the policy; and it was held that it was not necessary to negative in the complaint a breach of this provision; its observance not being necessary to be proved on the trial as one of the facts constituting the cause of action; and that if broken, the breach was a matter of defense, which, as such, should have been stated in the answer. *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer, 481. An action was brought against a canal commissioner for a neglect of his duties as such officer, in not repairing the banks of the canal, in consequence whereof the plaintiff was damaged, etc. It was held that the complaint need not allege that the defendant had funds for that purpose, because that ought to be alleged as a defense. *Griffith v. Follett*, 20 Barb. 620. And see *Adsit v. Brady*, 4 Hill, 631.

There are some cases in which a justice of the peace is authorized to render a judgment for a sum greater than the ordinary jurisdiction. In an action, in such cases, all that the plaintiff need allege or prove is, that there is a valid cause of action. He need not allege or prove any facts which ought to be pleaded as a defense. *Humphrey v. Persons*, 23 Barb. 313, 314. So, in actions for goods sold and delivered, it is not necessary to allege that the purchase-price of the goods has not been paid, nor that it remains due and unpaid at the time of commencing the action. *Salisbury v. Stinson*, 10 Hun, 242. So, in actions upon claims, which are barred by the statute of limitations, the complaint need not allege a new promise nor a part payment; that is a matter of defense, and must be set up in the answer. *Clark v. Atkinson*, 2 E. D. Smith, 112; *Esselstyne v. Weeks*, 12 N. Y. 635; *Sands v. St. John*, 36 Barb. 628; vol. 1, p. 118, § 413.

When the facts which constitute the plaintiff's cause of action are supposed to be within the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required in the complaint than would otherwise be necessary. *Van Rensselaer v. Jones*, 2 Barb. 643.

In an action for the recovery of a penalty for a violation of a statute, if there is a proviso in it which excuses certain persons from the penalty, the complaint need not negative that fact as to the defendant. He must plead it to avail himself of the defense. *Sheldon v.*

Surplusage.—Repugnant, inconsistent, etc.

Clark, 1 Johns. 513; *Bennet v. Hurd*, 3 id. 438; *Hart v. Cleis*, 8 id. 41.

But when the exceptions in a statute are contained in the enacting clause, and not in a proviso, the complaint in an action for a violation of the statute must negative the exceptions. *Trustees, etc., v. Utica, etc.*, *R. R.*, 6 Barb. 313.

Surplusage. Surplusage consists of useless and immaterial statements, in addition to those which are necessary to constitute a cause of action, or a ground of defense.

If the pleading is legally sufficient without such surplusage, the insertion of such useless and immaterial matter will not vitiate the pleading. *Nellis v. DeForest*, 16 Barb. 61, 66; *Thomas v. Roosa*, 7 Johns. 461; *Chapman v. Smith*, 13 id. 80.

In courts of record, matters which are clearly surplusage will be struck out on motion. *Stone v. De Puga*, 4 Sandf. 681; *Lee v. Elias*, 3 id. 736.

There are instances in which a pleading may be so framed as to cause an unnecessary allegation to be a subject of much inconvenience.

In an action for the conversion of personal property, or for an injury to it, it will be sufficient to state such facts as show a cause of action. But, if the plaintiff in such an action should allege that a trespass was committed on certain real estate, which is described, and also that the conversion or injury of the personal property was done at the same time and place, and as a part of the trespass upon the real estate, he will be bound to prove all the allegations. In actions for torts it is generally sufficient to prove a portion of the allegations, if they constitute a cause of action, and any unnecessary allegations need not be proved. But, where the cause of action is alleged to be a trespass to lands, and the injury to personal property is an incident or matter of aggravation, the trespass to the real estate must be proved or the whole action will fail. *Frost v. Duncan*, 19 Barb. 560; *Schermerhorn v. Buell*, 4 Denio, 422, 424; *Howe v. Willson*, 1 id. 181; *Houghtaling v. Houghtaling*, 5 Barb. 379.

Repugnant, inconsistent, etc. All pleadings ought to be true; but if they are repugnant or inconsistent they cannot possibly be true as to all the allegations. And they would be liable to a demurrer, because they would not be sufficiently explicit for the opposite party to understand them.

If a single, separate, affirmative defense in an answer should deny the allegations in the complaint, and should also plead a tender, these

How facts ought to be stated.

would be inconsistent defenses. *Livingston v. Harrison*, 2 E. D. Smith, 197.

But a defendant may plead a general denial, and then set up a separate and affirmative defense, because both answers may be true. A person may not owe another any thing, even if such a claim is made, and yet he may tender something for the purpose of avoiding costs in case an unjust claim is proved against him.

In an action to recover the possession of personal property, the defendant may answer by a general denial, and may also set up as a separate defense such facts as constitute a justification. *Hackley v. Ogmun*, 10 How. 44; *Stiles v. Comstock*, 9 id. 48; *Mott v. Burnett*, 2 E. D. Smith, 50.

How facts ought to be stated. It has been seen, *ante*, 282, that the pleadings ought not to state the evidence of the facts, nor the conclusions of law which arise upon them. The true rule is, for the pleader to allege the facts according to their logical and legal effect. *Bown v. Champlin*, 66 N. Y. 214. That was the rule before the Code. *Bayley v. Onondaga, etc., Co.*, 6 Hill, 476; *Scott v. Leiber*, 2 Wend. 479; *Grannis v. Clark*, 8 Cow. 36. But, in stating a written agreement, it was also proper under the former practice to set out the paper itself and leave the court to construe it according to its legal effect. See cases just cited.

These principles of pleading have not been changed by the Code, for it has been held in numerous cases, that it was sufficient to state a contract according to its legal effect, whether the contract was verbal or written. *Brown v. Champlin*, 66 N. Y. 214. In an action against a principal, for a fraud committed by his agent, the complaint alleged that the frauds were committed by the principal; but no reference was made to the acts of the agent, and the Court of Appeals held this to be correct. *Bennett v. Judson*, 21 N. Y. 238, 240; *Sherman v. N. Y. Central R. R.*, 22 Barb. 239. The principle of this decision is, that the act of an agent within the scope of his authority is the act of his principal, and, therefore, it ought to be alleged according to its legal effect. The same principle was applied in the following cases: *Boyce v. Brown*, 7 Barb. 80; *Pattison v. Taylor*, 8 id. 250; *Dollner v. Gibson*, 3 Code Rep. 153; *Stewart v. Travis*, 10 How. 148, 153; *Cady v. Allen*, 22 Barb. 388, 395. The same rule applies to cases under the statute of frauds, for it is not necessary to allege that the contract was in writing, nor to state those other acts which make such a contract binding. See *ante*, 288; *Livingston v. Smith*, 14 How. Pr. 490, 492. So in relation to sales, or assignments, it is sufficient to allege that goods

 Recitals.— Facts not denied are admitted.

were sold, or that a chose in action was assigned, without stating the particular acts which constitute the sale or assignment. *Ante*, 292, 293. But it has also been held that there is no harm in stating the facts just as they were, as, for instance, it may be alleged that a contract was made by an agent duly authorized, etc.; *Ives v. Humphreys*, 1 E. D. Smith, 196, 201; *St. John v. Griffith*, 1 Abb. 39; or, a written contract may be set out in the complaint; *Fairbanks v. Bloomfield*, 2 Duer, 349; or, in an action for money had and received, the complaint may state how the defendant received the money. *Lienan v. Lincoln*, 2 Duer, 670. But when a party elects to state the facts of the case instead of their legal effect, he must be careful to avoid the statement of mere evidence, or of legal conclusions. *Ante*, 282.

In declaring upon written agreements, it is always easier to set out the contract itself, and then make such additional allegations as constitute a cause of action. And, when the cause of action or defense is founded upon an account, or an instrument for the payment of money only, it is sufficient for the pleader to deliver it to the court, and state that there is a specified sum due to him thereupon from the adverse party, which sum he claims to recover or set off. Vol. 1, p. 27, § 2941.

Recitals. When a written instrument is sued upon, and a copy of it is set out in the complaint, or when a written instrument is set out in an answer, the recitals in the instrument set out will constitute a part of the allegations in the pleading. But, if the instrument set out does not show a cause of action or defense upon its face, as for instance, if it does not show any consideration, there must be allegations to show a consideration. *Spear v. Downing*, 22 How. 30. If the instrument shows a consideration, then a recital of its contents is a pleading of facts. *Prindle v. Caruthers*, 15 N. Y. 425; *Slack v. Heath*, 1 Abb. 331; *Spear v. Downing*, 22 How. 30. And see *Keteltas v. Myers*, 19 N. Y. 231; *Farron v. Sherwood*, 17 id. 227.

Facts not denied are admitted. It is a rule of very extensive application, that any material fact in a pleading which is not denied in a subsequent pleading is admitted. And this principle was well settled before the Code. *Raymond v. Wheeler*, 9 Cow. 296, 302; *Jack v. Martin*, 12 Wend. 311; S. C., 14 id. 507. This rule is expressly applied to courts of record by the Code, and is equally applicable to justices' courts. *Walrod v. Bennett*, 6 Barb. 145. But, in a justice's court, the rule cannot be applied except in those cases in which allegations in the complaint are not denied in the answer.

There is no reply in those courts, and, therefore, no denial can be made of those matters of defense which are stated in the answer.

Facts not denied are admitted.

Every material allegation in an answer is considered as denied, and, besides that, all new matter by way of avoidance of the answer is admissible without any reply. *Hodges v. Hunt*, 22 Barb. 150. But even in relation to the complaint, the rule is, that if there is a general denial of the facts in the complaint, or a special denial of a portion of them, any answer which sets up new matter will not admit the facts so put in issue by the previous denial. *Swift v. Kingsley*, 24 Barb. 541; *Troy, etc., R. R. v. Kerr*, 17 id. 581.

The rule itself has no application except as to material allegations which are necessary to constitute a cause of action, and an omission to deny immaterial allegations, or mere matters in aggravation, or mere conclusions of law, is not an admission of them. A party is not estopped by not taking issue upon a matter of law averred in his adversary's pleading. *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467; *Bonnell v. Griswold*, 68 id. 298; *Dillon v. Brainard*, 21 Wall. 430; *People v. Commissioners of Highways*, 54 N. Y. 276.

An allegation in a pleading of an amount of unliquidated damages, or of a value, is not to be taken as true by an omission to deny it except to sustain jurisdiction or to show the performance of a contract requiring such value, or the like. *Stuart v. Binsse*, 10 Bosw. 436.

An admission of the facts stated in the complaint may be made by expressly admitting their truth, or they may be admitted by implication. If an answer is interposed, and there is no denial of any of the allegations in the complaint, then the whole complaint is admitted by implication. If a part of the allegations are denied, and there is no denial as to a part of them, then those allegations which are not denied are admitted by implication. If the complaint is not verified, and the defendant does not appear and answer in the action, there is no implied admission, and the plaintiff must prove his case in the same manner as though a general denial had been interposed. Vol. 1, p. 9, § 2891; *Perkins v. Stebbins*, 29 Barb. 523; *Swift v. Falconer*, 2 Sandf. 640; *Carter v. Dallimore*, id. 222; *Jones v. Pridham*, 3 E. D. Smith, 155; *Howard v. Brown*, 2 id. 247. If the defendant appears and joins issue, but does not appear at the trial, the plaintiff must still prove his case. *Alburtis v. McCready*, 2 E. D. Smith, 39. But that must relate to a case in which the answer put in issue the facts alleged in the complaint. If the defendant should appear and answer in an action, and his answer should not deny any allegation in the complaint, but should set up an affirmative defense to the cause of action alleged in the complaint, the plaintiff would not be bound to prove a cause of action, whether the

What are material allegations.

action were tried at the joining of issue or at an adjourned day. *Dennison v. Carnahan*, 1 E. D. Smith, 144, 146; *Walrod v. Bennett*, 6 Barb. 144; *Bridge v. Payson*, 5 Sandf. 210; *Gregory v. Trainor*, 4 E. D. Smith, 58; S. C., 1 Abb. 209. But there may be cases in which such an admission may not admit any thing more than that there is a cause of action for nominal damages. And if that is all that is admitted, then the plaintiff must prove the amount of damages in the same manner as though a general denial had been interposed.

A failure to answer or demur to a verified complaint served with the summons in the action is deemed an admission of the truth of every allegation therein; and the court, on filing the summons, complaint, and proof of service, must enter judgment for the amount demanded in the complaint, without further proof. Vol. 1, p. 177.

Facts admitted by the pleadings cannot be disproved by evidence. They are to be taken as true for the purposes of the action. *Bridge v. Payson*, 5 Sandf. 210; *Walrod v. Bennett*, 6 Barb. 145; *Crosbie v. Leary*, 6 Bosw. 312; *Dyke v. Maguire*, 57 N. Y. 429; *Robbins v. Codman*, 4 E. D. Smith, 315.

What allegations are material will be next discussed.

What are material allegations. A material allegation is one which is necessary to constitute a part of the facts upon which the plaintiff relies to recover a judgment; or one which is necessary to constitute a part of the matters of defense. It is an allegation which it is material to establish on the trial, either by evidence or by some rule of law which stands for proof in relation to such allegation. *Fry v. Bennett*, 5 Sandf. 54; *Newman v. Otto*, 4 id. 668. A test of materiality is to strike out the allegation which is deemed superfluous, and, if a good cause of action or ground of defense is still stated, then the allegation is not material; but if there is no cause of action or ground of defense stated without the allegation, then it is material. *Mayor, etc., of Albany v. Cunliff*, 2 N. Y. 170, 171, Cady, J.; *Oechs v. Cook*, 3 Duer, 161, 165.

Allegations may be material in one point of view and immaterial in another. Special damages and matters in aggravation may be material to be alleged for the purpose of allowing proof of them at the trial, but they are not material for the purpose of constituting a cause of action; and, therefore, an omission to deny them is not an admission of their truth. And besides that, such allegations are not traversable, because no issue can be formed upon such allegations alone. An affirmative defense which does not deny any allegation in such a complaint merely admits a case for nominal damages. *Gilbert v. Rounds*,

Facts not alleged cannot be proved.

14 How. 46, 49, 50; *Moloney v. Dows*, 15 id. 265; *Batesy v. Loomis*, 5 Wend. 134; *Root v. Foster*, 9 How. 37.

Facts not alleged cannot be proved. This rule does not possess the same importance in relation to variances that it did under the former practice when a variance was fatal, and when amendments could not be made as they now may. But, as the rule now stands, a plaintiff cannot declare for one cause of action and prove a different one under an objection of the defendant. There can be no recovery for a cause of action entirely different from that set forth in the complaint. *Arnold v. Angell*, 62 N. Y. 508; *Hollister v. Englehart*, 11 Hun, 446.

The plaintiff can have no relief that is not consistent with the case made by his complaint and embraced within the issue. He must establish his allegations and bring his case within the allegations as well as within the proof. *Stevens v. Mayor, etc., of New York*, 84 N. Y. 296, 305; *Bradley v. Aldrich*, 40 id. 504. Notwithstanding the liberal rule of construction applied to pleadings under the Code there is no case or principle upon which the plaintiff may recover, not only upon facts not stated, but upon evidence which disproves those which are stated. The principle still remains that the judgment to be rendered by any court must be "*secundum allegata et probata*." *Neudecker v. Kohlberg*, 81 N. Y. 296; *Wright v. Delafield*, 25 N. Y. 266; *Allen v. Mercantile Mut. Ins. Co.*, 46 Barb. 642; *Coe v. Cassidy*, 6 Daly, 242, 245.

Although a defective statement of facts in a pleading will render evidence admissible to prove the pleading, the rule is not extended so far as to allow evidence in proof of facts which ought to have been alleged but have been omitted. Facts proved but not alleged are not available to the party proving them. *Kelsey v. Western*, 2 N. Y. 501; *Field v. Mayor, etc., of New York*, 6 id. 179; *Brazill v. Isham*, 12 id. 9; *N. Y. Central Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb. 468.

For instance, the plaintiff cannot complain upon contract and prove and recover for a tort. *Waldhein v. Sickel*, 1 Hilt. 45. And see *Volkening v. DeGraaf*, 12 Jones & Sp. 424. And when the complaint states a cause of action for a tort, it is not competent at the trial to convert it into a cause of action on contract. *Neudecker v. Kohlberg*, 81 N. Y. 296; *Degrav v. Elmore*, 50 id. 1; *Ross v. Mather*, 51 id. 108; S. C., 10 Am. Rep. 562; *Matthews v. Cady*, 61 N. Y. 651; *Walter v. Bennett*, 16 id. 250; *Combs v. Dunn*, 56 How. 169; *Barnes v. Quigley*, 59 N. Y. 265; *People v. Denison*, 19 Hun, 137; *Bernhard v. Seligman*, 54 N. Y. 661. And when a case has

Matters in aggravation, etc.—Special damages.

been tried as one sounding in tort, the pleading cannot be changed on an appeal to an action on contract. *Andrews v. Bond*, 16 Barb. 633. But see *Doughty v. Crozier*, 9 Abb. 411. And when special damages are sought to be recovered, they ought to be allowed, in order to admit proof of them. *Vanderslice v. Newton*, 4 N. Y. 130; *Low v. Archer*, 12 id. 277, 282; *Moloney v. Dows*, 15 How. 265.

But there is one point of view in which this rule is now of far greater importance than under the old practice.

Every affirmative defense whatever must now be set up in the answer, or no evidence will be admissible to prove it.

A general denial will permit the defendant to disprove any allegation in the complaint, if it is a material one, or it will permit the defendant to disprove such facts as the plaintiff may prove to establish his cause of action. But every defense which is founded upon the assumption that the complaint states a cause of action, but to which there is a valid defense, even if the complaint is true, must be set out in the answer. For instance, in an action upon a promissory note, the defendant may have made the note, but he has paid it; now payment must be set up in the answer, or it cannot be proved; and so of every affirmative defense.

But, in justices' courts, if the parties set out a cause of action or defense ever so defectively, and no demurrer is interposed to it, the justice must permit any evidence which is proper to prove such cause of action or defense, in the same manner as though the cause of action or defense were properly stated. *White v. Spencer*, 14 N. Y. 247; *Chapman v. Carolin*, 3 Bosw. 456; *Young v. Rummell*, 5 Hill, 60. And if the pleadings are ever so defective, or if a defense not set up in the answer is proved without objection, the judgment will be valid, and will not be reversed on an appeal. *Tift v. Tift*, 4 Denio, 175; *Hall v. McKechnie*, 22 Barb. 245; *Neff v. Clute*, 12 id. 466; *Bell v. Davis*, 8 id. 210; *Young v. Rummell*, 5 Hill, 60.

Matters in aggravation, etc. When an action can be maintained, and the circumstances attending it are of an aggravated character, such circumstances may be alleged, so as to authorize evidence in relation to the measure or amount of damages. *Root v. Foster*, 9 How. 37; *Gilbert v. Rounds*, 14 id. 46, 50; *Brewer v. Temple*, 15 id. 286; *Bates v. Loomis*, 5 Wend. 104. And the same rule applies to special damages.

Special damages. General damages are such as necessarily result from the injury complained of, and may be recovered without a special averment in the complaint. But such damages as are the natural

Scienter, etc.—Duly, etc.

but not the necessary result of the injury are special, and must be stated in the complaint to prevent a surprise upon the defendant. *Vanderslice v. Newton*, 4 N. Y. 130, 133; *Low v. Archer*, 12 id. 277, 282; *Armstrong v. Percy*, 5 Wend. 535; *Moloney v. Dows*, 15 How. 265; *Briggs v. Vanderbilt*, 19 Barb. 222; *Bogert v. Burkhalter*, 2 id. 525. A justice may permit an amendment at the trial, by inserting a claim for special damages, when no injury will result to the defendant, and substantial justice will be promoted, and upon such terms as may be just. *Miller v. Garling*, 12 How. 203.

In actions for a breach of contract or in actions on an indemnity bond, if the plaintiff states no special damages in his complaint, he is confined in his recovery to such only as arise from the breach, and then only to such as are proximate, and are the fair legal and natural result of the act provided against. *Hallock v. Belcher*, 42 Barb. 199.

Scienter, etc. There are instances when knowledge upon the part of the defendant will make him liable for his acts or representations, when, without such knowledge, he would not be liable. And knowledge and intent are frequently important in their influence upon the amount of damages. Whenever knowledge by the defendant is essential to a cause of action, such knowledge must be alleged in the complaint. The cases in which this principle is applicable are those which relate to mischief done by domestic animals, representations as to the solvency of third persons, and the like. The cases will be noticed in appropriate places.

Duly, etc. There are frequent instances in which it is alleged that some act was duly done. When the question arises upon undisputed facts, it is a matter of law; and when the question is whether the act was properly done in fact, then it is a question of fact.

The general rule is, that such facts should be stated in the pleading as will show that the alleged act was duly performed. It has been held that it was a proper allegation to allege that a chose in action was duly assigned. *Fowler v. N. Y. Ind. Ins. Co.*, 23 Barb. 143.

It has also been held that in an action against the indorser of a note payable at a particular place, an allegation that, at the maturity of the note, it was duly presented to the maker for payment, is a sufficient averment of presentment at the place of payment. *Farner v. Williams*, 37 Barb. 1; S. C., 14 Abb. 215; *Gay v. Paine*, 5 How. 107; *Adams v. Sherrill*, 14 id. 297. So an allegation that a bill of exchange was duly protested has been held sufficient. *Woodbury v. Sackrider*, 2 Abb. 402. But see contra, *Price v. McClave*, 6 Duer, 544, 548, 549. In an action by a receiver of an insolvent corporation,

Profert, etc.—Construction of pleadings.

such, for instance, as fire insurance companies, on premium notes, it is not sufficient to allege that the plaintiff was duly appointed receiver, etc. He must allege the facts which show a valid and legal appointment. *White v. Joy*, 13 N. Y. 83, 91; *Gillet v. Fairchild*, 4 Denio, 80, and cases. On the other hand it has been held that, in an action brought by a receiver, an allegation that the plaintiff was, by an order of a justice of the Supreme Court, *duly* appointed receiver upon the application of the judgment creditor, is sufficient to let in proof on the trial of all the facts conferring jurisdiction. *Rockwell v. Merwin*, 45 N. Y. 166. See *Scroggs v. Palmer*, 66 Barb. 505; *Manley v. Rassiga*, 13 Hun, 288.

Profert, etc. The system of making a formal profert of papers, by stating in the pleadings that they are so offered, is not now the practice even in courts of record. *Supervisors, etc., v. White*, 30 Barb. 72; *Mayor, etc., v. Doody*, 4 Abb. 128; *Welles v. Webster*, 9 How. 251. In justices' courts the justice is authorized, on the request of either party, to require the other to exhibit his account or demand to the party who asks for its production. Vol. 1, p. 27, § 2942.

Construction of pleadings. The construction which is put upon pleadings depends materially upon the time when, and the manner in which the question is presented. If, at the joining of issue, either party demurs to a pleading of the other, on the ground that it does not contain sufficient facts to constitute a cause of action or a ground of defense, the justice must decide this issue. And in such a case his decision is not a mere discretionary one. He must decide it according to the rules of law. And if the pleading demurred to is not legally sufficient, he must sustain the demurrer and order the opposite party to amend such defective pleading. But a demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. *Marie v. Garrison*, 83 N. Y. 14. In deciding upon the sufficiency of a pleading which is demurred to, the justice ought always to give it a reasonable construction with a view to substantial justice between the parties. *Allen v. Patterson*, 7 N. Y. 476, 480. The cases upon this question

Complaints.— Number of parties.

will be fully considered when treating of demurrers. If no objection is made by way of demurrer to the pleadings they must be construed liberally, and a party ought to be permitted to give evidence of any cause of action or defense which he has pleaded in any manner, however defectively or informally. *Ross v. Hamilton*, 3 Barb. 609; *Willard v. Bridge*, 4 id. 361, 365; *White v. Spencer*, 14 N. Y. 247. See *ante*, 302. If no objection is taken to the pleadings in the justice's court, none can be made on an appeal. See *ante*, 302.

§ 2. **Complaints.** We have already discussed some of the general rules of pleadings, which are equally applicable to either complaint or answer.

It is now proposed to explain with more particularity those rules which apply to each of them separately; and this will include complaints, answers and demurrers, which are the only pleadings permitted in justices' courts. The first pleading in a cause is the complaint of the plaintiff. And in this he is required to state those facts, or to make those allegations which he claims will constitute his right of action when those facts are admitted by a demurrer or answer, or when established by proof at the trial.

There are some formal matters to be observed in drawing a written complaint, when the party draws such a one; or when the justice takes down the substance of the allegations of the plaintiff.

Every complaint ought to state the name of the court, the name of the justice, the names of the parties, plaintiff and defendant, the right or character in which the parties sue; and the name of the county and town in which the action is brought.

The formal part of the commencement of a complaint may be framed thus:

JUSTICE'S COURT — FULTON COUNTY, ss.:

John Doe <i>agst.</i> Richard Roe.	}	Before JOHN FROTHINGHAM, Esq.
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Number of parties. There are some rules in relation to this formal part of the complaint which are worthy of a more particular notice than merely to give their form, because the complaint must correspond with the process in certain particulars.

The complaint must correspond with the summons in the number of parties to the action, whether plaintiffs or defendants.

If two persons are named as plaintiffs in the summons, they must

Names of parties.— Character or right in which action is brought.

also be both named in the complaint as plaintiffs, and so in relation to defendants. But if the parties join issue voluntarily, without any objection, the proceedings will be regular as to those who so join issue, and the case may be treated as one in which a voluntary issue is joined by the parties without process. Vol. 1, p. 5, § 2876.

But if objection is made by the defendant, the justice ought to require the complaint to correspond with the summons as to the names and the number of parties.

Names of parties. The names of all the parties ought to be stated in the title of the complaint. Though if they are not all stated in the title, but are all stated correctly in the body of the complaint, that will be sufficient. *Hill v. Thacter*, 3 How. 407; S. C., 2 Code Rep. 3.

The name of each of the parties ought to be stated in full, except middle names, which may be represented by the initial letters.

In an action by a firm of partners, it is not sufficient to state the names of the firm as "Dunn & Davis," when the names of the partners are James Dunn and George P. Davis. Their names ought to be stated in full. So if there are several partners, and a portion of them are named, but there is the addition of "& Co." to the names, this is not sufficient, for the names ought to be stated in full. *Bentley v. Smith*, 3 Caines, 170. See *Crawford v. Collins*, 30 How. 398; S. C., 45 Barb. 269.

Under the old practice a defendant might plead as matter in abatement that his name was not correctly stated. *Mann v. Carley*, 4 Cow. 148. But under the present practice a defendant may be sued by a fictitious name when his real name is unknown, and on the discovery of the true name the summons and all subsequent proceedings may be amended by the insertion of the true name. Vol. 1, p. 7, § 2884. A mistake in the name of a party may always be amended.

Character or right in which action is brought. When the action is brought in the name of a person who sues in a representative capacity, the complaint ought to show that fact.

There are numerous cases in which actions may be brought in justices' courts, by plaintiffs in a representative capacity, such as administrator, executor, assignee for benefit of creditors, trustee of an express trust, receiver, or public officer of a town or county. In all these cases, and in others of a similar character, the complaint must show clearly that the plaintiff has a right to sue, and that he does sue in such capacity.

Assignee for benefit of creditors. When a plaintiff sues as assignee of an insolvent debtor, the complaint ought to state such facts as will show that he is such assignee, and how he became such. It will

Administrator or executor.—Complaint by infant and guardian.—Receivers.

not be sufficient to name him as assignee in the title of the action, but the body of the complaint must show clearly, by proper allegations, that he is assignee, and that he sues as such. A trustee must sue *as such* to avoid a personal liability for costs. And when he sues in his own right and is defeated, he is liable for costs. *Murray v. Hendrickson*, 6 Abb. 96 ; S. C., 1 Bosw. 635. But if he sues as assignee, and acts in good faith, he is not chargeable personally with the costs in case of defeat. *Cunningham v. McGregor*, 12 How. 305.

Administrator or executor. When the plaintiff sues as administrator or executor, he must show, in the body of the complaint, by proper allegations, that he sues as such, and not in his individual capacity. The proper allegations will be stated in the form of complaint given in this work.

Complaint by infant and guardian. When an infant is plaintiff and a guardian *ad litem* has been appointed for him, the complaint ought to show in the body of it that the plaintiff is an infant, and that a guardian *ad litem* was properly appointed to prosecute the action. This is a traversable fact and must be so stated that it may be traversed. If there is no allegation of the infancy or of the due appointment of the guardian, the complaint will show a departure from the summons in the character in which the plaintiff sues ; and if the infancy is alleged and the due appointment of the guardian is not averred, the complaint will show an appearance by one under a legal disability to sue, or an unauthorized appearance by a third person for a party under such disability. See *Hulbert v. Young*, 13 How. 413 ; *Stanley v. Chappell*, 8 Cow. 235 ; *Grantman v. Thrall*, 44 Barb. 173. As the Code requires the appointment of a guardian for an infant plaintiff before a summons is issued in the action, and impliedly prohibits the infant from maintaining an action before such appointment, it would seem that there is the same necessity for alleging and proving the due appointment that there is for alleging and proving an order granting leave to sue where the statute prohibits the bringing of an action before such leave is granted. In the latter case, the lack of authority to sue is not a matter of defense to be pleaded and proved affirmatively by the defendants, but it is a matter to be alleged, or at least proved by the plaintiff in order to maintain his action. See *Scotfield v. Doscher*, 72 N. Y. 491.

Receivers. In actions by receivers the complaint must show that they were legally appointed as such. The proper averments will be found in the precedent of complaint.

Public officers.—General rules.—Contract, complaint on.—Complaint, when special.

Public officers. The same rule applies to public officers which has been shown to apply to receivers, executors, etc. The complaint must show authority to sue. See "*Form of Complaint.*"

General rules. There are so many cases in which plaintiffs may sue in a representative capacity, in a justice's court, that it will not be convenient to enumerate them all. The same rule is applicable to all such cases, and that is, that the complaint must clearly show in the body of it that the party is entitled to sue, and that there is a cause of action. In every instance, the complaint ought to agree with the process as to the character in which the plaintiff sues, and when it does not, the justice must set aside the complaint on motion, if that is made before issue is joined. *Tuttle v. Smith*, 14 How. 395; S. C., 6 Abb. 330; *Allen v. Allen*, 14 How. 248; *Blanchard v. Strait*, 8 id. 83. But if no objection is made until after issue joined, it will then be too late, and the issue must be tried as one which was voluntarily joined, as though no process had been issued.

Contract, complaint on. We will now proceed to notice what facts ought to be stated in the body of the complaint in an action arising upon contract. If the cause of action is local, the complaint ought to show affirmatively that the action is brought in the proper county or town. *Vermilya v. Beatty*, 6 Barb. 429.

If the cause of action is a transitory one, and it is illegal by the laws of this State, though it was legal where the contract was made, the complaint must show where it was made and what the law was there, so as to show it legal here. *Thatcher v. Morris*, 11 N. Y. 437. A complaint need not be dated, nor need it show affirmatively that the debt for which the action is brought was due before the suit was commenced. *Maynard v. Talcott*, 11 Barb. 569; *Smith v. Holmes*, 19 N. Y. 271. If the complaint shows on its face that the action was commenced before the cause of action accrued, it will be defective, and may be demurred to. *Cheetham v. Lewis*, 3 Johns. 42. The right of action must be complete at the time when the action is commenced; and, if it is not, though it becomes perfect before the trial, that will not be of any avail, and no amendment of the pleadings will aid the matter. *McCullough v. Colby*, 4 Bosw. 603; *Hare v. Van Deusen*, 32 Barb. 92, 99. The nature of the action is determined by the facts which are alleged, and not by the name which the plaintiff may choose to give the action. *Cornes v. Harris*, 1 N. Y. 223; *Burdick v. Worrall*, 4 Barb. 596.

Complaint, when to be special. When an action is brought for the breach of an executory agreement, whether verbal or written,

Inducement.—Plaintiff's interest in the subject-matter of the action.

sealed or unsealed, or upon a justice's judgment, the complaint must set out the facts which constitute the cause of action; or, in other words, the cause of action must be specially declared on in the complaint. The exceptions to this rule are those cases in which the plaintiff may recover his demand under the common counts; and those cases in which an account is claimed, or some instrument is sued on which is for the payment of money only. In all cases in which damages are claimed for the breach of a contract, in consequence of a neglect or refusal to perform it, the complaint must be special, and must state all the facts which are necessary to constitute a cause of action; unless it is an instrument for the payment of money only, as has been just explained.

It will be found in practice that there is a very large class of cases in which the complaint must be special, because the cause of action is not upon an account, nor upon an instrument for the payment of money only. And it is for this reason that a knowledge of some of the principal rules of pleading is essential to justices and to all persons who practice in justices' courts. One great advantage will be obtained by those who know how to allege a cause of action properly, viz.: they will know accurately what fact it is important to prove to make a case. And this is a very great advantage, whether one is prosecuting, or is defending a cause.

Inducement. There are many cases in which it is important to make some statements, by way of explanation or introduction to the main cause of action. Any such statements are called the inducement. In an action against a carrier for the non-delivery of goods, delivered to him for carriage, it is proper to state that he was a common carrier, etc., by way of inducement, and then to allege the delivery of the goods to him as such carrier, etc.

Matters stated by way of inducement must be such as are important to show a cause of action, when taken in connection with all the other facts stated. In some instances, it is important to state that the plaintiff is an officer, or that he is acting in some representative capacity, or some similar fact, and such allegations will be proper in all cases, and in some cases indispensable to the statement of a cause of action.

Plaintiff's interest in the subject-matter of the action. Every action must be brought in the name of the real party in interest, with few exceptions. *Ante*, 60 to 70. And, therefore, the complaint ought in all cases to show that he has the real interest in the subject-matter of the action, if he sues in his own individual right. And

 Consideration.— Promise by the defendant.

when he sues for the benefit of another person, the complaint must state such facts as show his right to maintain an action. See "*Executor, Assignee,*" etc., *ante*, 61, 65, 71.

Consideration. In every action founded upon contract, the complaint must show affirmatively that there was a sufficient legal consideration for the promise or agreement of the defendant, or it will not state facts sufficient to constitute a cause of action. Suppose, for instance, that the complaint should allege that on a certain day, at a specified place, the defendant was a carpenter, and that he then and there promised to build a house for the plaintiff by a specified time, which the defendant had not done. It is very evident that such a complaint is defective, because it does not show any consideration whatever for the promise of the defendant, and, therefore, he was under no legal obligation to perform his promise. Such a complaint would be liable to a demurrer.

When an action is brought upon an instrument in writing which does not show any consideration, such allegations must be made in the complaint as will show that there was in fact a sufficient consideration. And this is the rule, even when the instrument purports to be for the payment of money only. *Spear v. Downing*, 22 How. 30. If the instrument recites a consideration, as for instance, "for value received," that will be sufficient to show a consideration for the promise of the defendant. *Prindle v. Caruthers*, 15 N. Y. 425; *Miller v. Cook*, 23 id. 495; S. C., 22 How. Pr. 66.

Promise by the defendant. In every action which is founded upon an actual and express promise of the defendant, such promise or agreement must be alleged in the complaint. If the agreement is in writing, a copy of it may be set out in the complaint, which will show precisely what was promised, and the court can then decide upon the legal effect of such promise or agreement. *Prindle v. Caruthers*, 15 N. Y. 425. If the right of action is not founded upon an express promise, but is founded upon an implied promise, or one which arises by implication of law, the promise need not be alleged, but it will be sufficient to allege such facts as will show a legal liability on the part of the defendant, and the court will adjudge a liability as a matter of law. *Cropsy v. Sweeney*, 27 Barb. 310; *Farron v. Sherwood*, 17 N. Y. 227. If the promise is one which the statute requires to be in writing in order to be binding, it is not necessary to allege in the complaint that such promise is in writing. *Ante*, 288, 293.

The agreement or promise ought to be truly and accurately stated, although under the liberal rules which now exist in relation to variances,

Profert.—Averment of performance by plaintiff.

it is not as important now to be as particular in that respect as it was under the old practice. It is always sufficient to state enough of the contract to show the defendant's liability. When the contract is in the alternative, it must be set forth and the alternative shown. *Stone v. Knowlton*, 3 Wend. 374; *Hatch v. Adams*, 8 Cow. 35.

Profert. In general it is not necessary in a pleading to set out a copy of an instrument sued on, nor to offer a copy of it. But it is generally the most convenient mode of pleading to set out a copy of such paper. And if it is not set out in the pleadings at the joining of issue, the justice, on the request of the opposite party, may require a copy of it to be furnished to him by the party pleading it. Vol. 1, p. 27, § 2942. But when one sues as executor, he need not offer to produce his letters testamentary, etc. If he alleges in due form that he is executor, etc., and issue is taken upon it, he will have to prove his authority at the trial. It is a matter of allegation in the pleadings and proof at the trial. *Bright v. Currie*, 5 Sandf. 433; *Supervisors, etc., v. White*, 30 Barb. 72. And in all cases in which the plaintiff sues in a representative capacity, he does not make a profert of his authority. He may properly allege that he has it, and then, if the allegation is put in issue, it will be a matter of proof at the trial. It will be remembered, however, that when an instrument is sued on as a cause of action, the opposite party has a right to see it and take a copy, and the justice must order it to be given, if demanded at the joining of issue. Vol. 1, p. 27, § 2942.

Averment of performance by plaintiff. When it appears, by the terms of the contract or agreement which is set out in the complaint, that the plaintiff was bound to do some act before the defendant was required to perform the contract, etc., the complaint must allege that the plaintiff has performed all such acts on his part, either by alleging due performance in the manner allowed by the Code (§ 533), or by other appropriate averments. If the plaintiff does not allege performance in the manner authorized by the Code it will not be sufficient to merely allege the fact by way of allegation of a conclusion of law, nor by way of mere evidence, but the facts showing performance by the plaintiff must be distinctly alleged. *Hatch v. Peet*, 23 Barb. 575; *Smith v. Brown*, 17 id. 431.

When the plaintiff has not performed such conditions precedent, but he has a legal excuse for the non-performance, he must allege the facts which show such excuse, instead of alleging performance. *Kelley v. Upton*, 5 Duer, 336, 342; *Smith v. Brown*, 17 Barb. 431; *Rider v. Pond*, 18 id. 179. But if the action is not brought upon the

Request, notice, demand, etc.—Breach of the agreement, etc.

contract, but upon *quantum meruit*, the plaintiff need not allege the excuse for non-performance. *Wolfe v. Howes*, 20 N. Y. 197. See vol. 1, p. 236.

Request, notice, demand, etc. It is frequently the case that the plaintiff is required to make some request, give some notice, or make some demand of the defendant, before a right of action becomes perfect. In all cases in which such request, etc., is necessary to perfect the right of action, the complaint must allege that such request, etc., was made, and such facts must be alleged as will show that it was properly done. There are also numerous cases in which no demand, etc., is necessary before an action is brought, and in such cases no demand, etc., need be alleged in the complaint.

Breach of the agreement, etc. In every action founded upon contract, whether written or unwritten, sealed or unsealed, the main ground of the action is that the defendant has broken the contract. This is true of the most ordinary cases, such as accounts, promissory notes, and the like. The breach of the contract, in such cases, is the non-payment of the debt. And in all cases of special contracts, there is some non-performance alleged, or some act done which the defendant agreed not to do. In short, the basis of all actions upon contracts rests on the ground that the defendant is guilty of a breach of the agreement. And every complaint will be defective if it does not, in some manner, show that there has been a breach of the contract by the defendant. And, even under the common counts, it is alleged that the money due to the plaintiff is unpaid. Under the old practice a complaint for goods sold and delivered, which simply alleged the sale and delivery of the goods to the defendant and his agreement to pay a stipulated price therefor, would probably have been bad on special demurrer for not alleging a breach. But special demurrers, as known to the former practice, have no place in our present system of pleading. *Marie v. Garrison*, 83 N. Y. 14. And under the Code an allegation of the sale and delivery of goods and an agreement to pay a stipulated price therefor is sufficient, although the addition of an averment of non-payment, or that the sum remains due and unpaid, is the usual and more complete form of pleading. *Salisbury v. Stinson*, 10 Hun, 242.

When the action is founded upon a special agreement, the facts which show a breach on the part of the defendant must be stated fully; and a mere allegation that the defendant has broken the contract will not do, but the particular manner in which it is broken must be stated, so that the court and the defendant can see in what respect

 Damages.— Conclusion of complaint.

it is claimed that the contract has been violated. When the action is for the recovery of money under the common counts, and no demand is necessary before suit brought, it will be sufficient to allege the breach in general terms, such as that the money is due, unpaid, etc.

Damages. Nearly all the actions which are brought in a justice's court, are instituted for the recovery of damages, either for the breach of some contract, express or implied, or for some injury wrongfully done. The complaint must allege such damages as the plaintiff claims to recover. In some cases, the facts showing that the plaintiff has sustained damage must be pleaded, and a more general allegation that by reason of the facts stated the plaintiff was damaged in a specified amount, without the averment of any fact from which the court can draw the inference that the plaintiff has sustained damage, is insufficient. *Thompson v. Gould*, 16 Abb. (N. S.) 424. Damages are general or special. General damages may be claimed by a general allegation of damages; but special damages must be stated with particularity. See *ante*, 302, "*Special Damages*," and *ante*, 301, "*Facts not alleged*," etc.

Conclusion of complaint. The conclusion of the complaint shows what judgment the plaintiff demands. It may be for the recovery of damages, or it may be for the recovery of specific personal property, with damages, etc. In every case the complaint ought to show clearly what judgment the plaintiff demands.

In courts of record, the complaint *must* contain a demand of the judgment to which the plaintiff supposes himself entitled. Code of Civil Pro., § 481. But in justices' courts this is not required by the Code. All that can be demanded is that the complaint shall state in a plain and direct manner the facts constituting the cause of action. Vol. 1, p. 26, § 2936. When this is done, the law will determine the relief to which the plaintiff is entitled, and the omission to demand that relief will not render the complaint demurrable if the pleading is sufficient to enable a person of ordinary understanding to know what is intended. It will, however, be better in all cases to demand in the conclusion of the complaint the judgment to which the plaintiff supposes himself entitled. The plaintiff has the right to demand any kind of relief to which he supposes himself entitled on the facts stated. *Hall v. Hall*, 38 How. 97. If he makes a mistake in the nature of his demand, the error will not be fatal, for if the facts stated in the complaint show that the plaintiff is entitled to any relief, he will not be turned out of court merely because he has demanded the wrong judgment. *Emery v. Pease*, 20 N. Y. 62; *Redfield v. Frear*, 9 Abb. (N.

 Several counts.—Common counts.

S.) 449; *Denman v. Prince*, 40 Barb. 213; *Whitney v. Whitney*, 44 id. 319. If the complaint is verified it must specify the amount actually due from the defendant to the plaintiff, and pray judgment against the defendant for the amount so claimed to be due to him. Vol. 1, p. 177. In any case, when the complaint contains a demand for judgment, the judgment demanded should be one which the justice has jurisdiction to render. *Bellinger v. Ford*, 14 Barb. 250; *Gould v. Glass*, 19 id. 179. But a defect in this respect is amendable. *Woolley v. Wilber*, 4 Denio, 570; *Bull v. Colton*, 22 Barb. 94.

Several counts. When the plaintiff has several different causes of action arising upon contract, and they are not recoverable under the common counts, but require a special count for that purpose, each separate cause of action ought to be separately stated in the complaint. And the plaintiff may insert as many separate counts as he has separate causes of action which require to be stated in special counts. Each of these causes of action ought to be separately stated, and the commencement of each new cause of action, or count, may commence thus: "And for a further and separate cause of action," etc. It is a very convenient method to number the causes of action, when there are several of them, as this will facilitate a reference to each cause of action, when the defendant is answering them. And, besides that, it will tend to render the issues themselves plain and familiar to the parties, to the court, and to the jury if one is called. In courts of record, where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separated and numbered. Code of Civil Pro., § 483. But there is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in justice's court. Any mode which apprises the defendant of what is intended is sufficient. *Hall v. McKechnie*, 22 Barb. 244.

It is a fundamental rule in pleading, that where there are separate counts in a complaint, each must disclose a distinct right of action; and the separate counts are, for all purposes, as distinct as though they were in separate complaints, and, consequently, they must contain all necessary allegations, or the latter must expressly refer to the former. *Simmons v. Fairchild*, 42 Barb. 404; *Victory Webb, etc., Manuf. Co. v. Beecher*, 55 How. 193.

Common counts. There has been some difference of opinion upon the question whether the Code did not abolish the common counts, and require every cause of action to be stated specially.

It has been held at Special Term that in an action to recover money

Common counts.—Bill of particulars.

alleged to have been lost at play the complaint must be special, setting forth the facts, and that a complaint containing merely the common counts is not sufficient. *Moran v. Morrissey*, 28 How. 100; S. C., 18 Abb. 131. But it is now entirely settled that the mode of declaring upon the common counts is as proper now as it was before the Code. *Farron v. Sherwood*, 17 N. Y. 227; *Allen v. Patterson*, 7 id. 476; *Cudlipp v. Whipple*, 4 Duer, 610; *Graham v. Camman*, 5 id. 697; *Merwin v. Hamilton*, 6 id. 245, 253. But in framing such counts they are drawn more fully and particularly than some of the old forms of the common counts. The forms which will be hereafter given will show what it is necessary to allege in them under the practice introduced by the Code. The plaintiff cannot recover under the common counts in such cases as those in which a special count is necessary; as for instance, in those cases in which the plaintiff claims to recover damages for the breach of an agreement other than for the payment of money. See *ante*, 308, "*Complaint when to be Special.*"

The Code has not changed the former rule of pleading, that a party who has fully performed a special contract on his part may count upon the implied *assumpsit* of the other party to pay him the stipulated price, and he is not bound to declare specially on the agreement. *Farron v. Sherwood*, 17 N. Y. 227. But the kind of special contracts which will authorize a recovery upon the common counts must be of that nature, that when the plaintiff has fully performed the contract on his part, the defendant has nothing to do on his part but to pay a sum of money. For instance, a contract may be a special one for the building of a house and the furnishing of the materials, and if the builder has fully performed the contract on his part, he need not set out the contract specially, but may recover the money due to him on the common counts, if they are properly framed. *Farron v. Sherwood*, 17 N. Y. 227; *Clark v. Fairchild*, 22 Wend. 576, 583. But the principal convenience of these common counts is found in those cases in which the plaintiff claims to recover for labor done, professional services rendered, or for goods, wares and chattels sold, for money lent, etc., etc. And in all such cases, where the plaintiff seeks to recover upon either an express or an implied agreement, these counts will generally be proper.

The use of this form of pleading is recommended by its obvious convenience. And if the defendant desires particular information of the items of the claim or demand against him, he may demand a bill of particulars.

Bill of particulars. The Code has greatly enlarged the powers of

Bill of particulars.

justices of the peace in relation to ordinary bills of particulars to be furnished by either of the parties to the other. "The court may, upon the request of either party, made when issue is joined, require the adverse party to exhibit his account or demand or to state the nature thereof, as far as it is in his power so to do, at that or another specified time; and in case of his default, it may preclude him from giving evidence of such parts thereof, as have not been so exhibited or stated." Vol. 1, p. 7, § 2942.

By the very terms of the statute this demand must be made at the time issue is joined in the action, and the justice has no authority to require a party to exhibit his account or demand, or to state its nature, when the request is made at any other stage of the action.

When the pleadings are general, as they are under the common counts, the only information which either party can have of the claims made by the other must be derived from such an exhibition of the other's demand; or it must be derived from the knowledge which they each have of the past transactions between them. But there are many instances where such knowledge would be of little value to a party in preparing his cause for trial. If either of the parties has purchased or taken an assignment of an account or demand which exists against the other, the party against whom it is presented for the first time at the trial may be greatly surprised, and gross injustice may be done to him if he is not permitted to meet the claim by evidence, which he could not possibly have procured before the trial.

But it is not the duty of the justice to require either party to exhibit his claim unless it is demanded by the other; and, if there is an omission to make such request, it is the neglect of the party himself, who must abide by the consequences.

The statute says the claim or demand must be *exhibited*, or the nature of it must be stated, etc. The object of permitting each party to demand such information was, that it might be useful to him in preparing for trial. *The People v. Monroe C. P.*, 4 Wend. 200; *Bowman v. Earle*, 3 Duer, 694. And, for that reason, the justice ought to require each party, if a proper request is made at the proper time, to furnish the other with a written copy of the items of his demand; or at any rate, he ought to require him to furnish the original, so that the party applying may copy it for himself if he desires to do so.

If neither party is prepared to do this at the time of joining issue, or if one of the parties is not prepared at that time, the justice is authorized to specify some other time when the account, etc., shall be exhibited. And there are few things in practice, in which the justice

Bill of particulars.

may render himself more instrumental in advancing the cause of truth and justice than in requiring a full compliance with the spirit of this section. When the accounts, etc., are not exhibited at the joining of issue, and the justice specifies another time for the purpose, that time should be such as to give either party ample time to secure his evidence before the trial, to meet the claim so exhibited, etc.

The party who is required to exhibit his demands ought to be careful to furnish all the items of it, for the penalty which is annexed to a neglect or refusal to do so is to be debarred at the trial from proving any of the items which were not so exhibited or stated.

The statute is not imperative that the evidence shall be excluded in case of a default in exhibiting a claim. The court may preclude him, is the language of the statute. If a party by mistake should omit to furnish all the items the justice may permit an amendment of the items just as he would do in relation to a pleading, because the particulars are nothing more than a complete specification of the claims of the party. If an amendment is allowed it ought to be on the same terms as the amendment of a pleading.

If either of the parties willfully refuses to exhibit his account, etc., as required by the justice, the justice ought to exclude evidence in support of the accounts, or items thereof, which were not exhibited. But, if such a party has any reasonable excuse for not exhibiting such account or demand, the justice may permit him to do it at any time before the trial, or during the trial, on such terms as shall be just. But if an adjournment will be necessary for the other party in consequence, an adjournment ought to be made the condition of granting the favor. And, besides that, such costs ought to be imposed as will be necessarily incurred by the opposite party, such as the witnesses' fees for those witnesses who are present at the time when such amendment is permitted.

Where the complaint is founded upon the breach of a special contract, and it sets forth the terms of the contract and its breach, and the consequential damages arising therefrom, this is not a matter of account, and a bill of particulars cannot be required. *Ives v. Shaw*, 31 How. 54.

Where a party claims on an account stated, and he refuses to furnish the items of his demand in pursuance of the Code, he ought, on the trial, to be precluded from giving evidence of such items of his account any further than may be necessary to prove the settlement of the sum due as an account stated. *Goings v. Patten*, 1 Daly, 168; S. C., 17 Abb. 339.

 Complaints in actions for torts.—Plaintiff's interest in thing injured.

A bill of particulars in an action for an indebtedness should state the items of the demand, and when and how it arose, and the sum claimed. *Moran v. Morrissey*, 28 How. 100; S. C., 18 Abb. 131.

When an account is sued on, or when it is a subject of set-off, the parties ought to furnish the items in detail, specifying the date, the price and the amounts, as near as may be done, or as it is in the original account. *Humphrey v. Cottleyou*, 4 Cow. 54. If the bill is defective, the justice may order it to be made more definite. *Kellogg, etc., v. Paine, etc.*, 8 How. 329; *McKinney v. McKinney, etc.*, 12 id. 22. Neither party is bound to do more than to furnish the items which he claims against the other. He is not required to state any credits, or set-offs, in favor of the other party. *Williams v. Shaw*, 4 Abb. 209; *Ryckman v. Haight*, 15 Johns. 222. A variance between the items furnished and the proof ought to be disregarded if no injury is done to the opposite party. *Seaman v. Low*, 4 Bosw. 345; *Brown v. Williams*, 4 Wend. 360. The question of variance ought to be disposed of like a variance between pleadings and evidence, and an amendment should be granted in like cases as in pleadings.

Complaints in actions for torts. The general rules in relation to the formal parts of a complaint in an action for a tort is the same as in an action upon contract.

In actions for wrongs there are some matters in which the complaint will differ in its details from that of a complaint in an action upon contract. And the general rules which ought to be observed in framing complaints in actions for torts will be now noticed.

Actions for torts may affect personal rights, as when a person wrongfully persuades a servant to leave his employer, or when a fraud is perpetrated. They may also relate to injuries to personal property, or they may relate to real estate and to injuries done to it. And, therefore, the first thing which the body of the complaint ought to show is, that there are such rights, or property, which may be affected. The manner in which allegations ought to be made will be shown in the precedents of complaints in such actions.

Plaintiff's interest in thing injured. The complaint must allege those facts which show that the plaintiff has such an interest in the thing injured as will authorize an action in his favor for the injury done. A mortgagee of personal property has an interest in the property so mortgaged, but in an action for a conversion of the property, he must allege such facts as show that he is a mortgagee. Merely saying that he has a mortgage is not sufficient; such facts must be stated as will authorize the court to decide whether the instrument is a mort-

 Motives, intent or neglect of the defendant.

gage. *Fairbanks v. Bloomfield*, 2 Duer, 349. And see *Truthill v. Wheeler*, 6 Barb. 362. A constable who has an execution, by virtue of which he has levied upon personal property, has such an interest as will authorize an action against a wrong-doer who takes the property, but the complaint must show his right to the property. And whenever the plaintiff claims an interest in the property, or right of action in any manner except in his own individual right, the complaint must state such facts as will authorize an action. There are instances in which the plaintiff may merely allege that the defendant wrongfully took the property out of the possession of the plaintiff, and he need not allege how his interest in it arose, even when he claims as bailee, or as an officer having a levy upon it, etc. The precedents given will show the necessary allegations. When the action is for an injury to personal property, or for a conversion of it, if the plaintiff sues as owner, he will show that fact by proper allegations in the complaint. Injuries to real estate are generally charged to be injuries to the possession, which is all the right a plaintiff need have to maintain trespass.

Motives, intent or negligence of the defendant. The general rule is, that when a person does an unlawful act to the injury of another, he must respond in damages, although he did not have any wrongful or unlawful intent in doing the act. For this reason, it is not necessary, in ordinary cases, to allege a wrongful intent on the part of the defendant.

If a justice is sued for making a false return on an appeal, it is not necessary to allege or prove that his motives were corrupt. *Houghton v. Swarthout*, 1 Denio, 589. So, where the defendant injures the plaintiff by blasting rocks on the defendant's land, and the fragments fly upon the plaintiff's premises and injure his buildings, it will not be necessary to aver negligence on the part of the defendant. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, id. 163.

In such cases of unlawful acts, an action will lie, although no improper motive existed on the part of the defendant. See the last three cases cited, and *Vandenburgh v. Truax*, 4 Denio, 464. But there are cases in which the gist of the action is the manner and the intent with which the act was done, as where a constable acts in an oppressive and unlawful manner in executing an execution, and in such cases, the complaint must allege those facts which show his acts to be unlawful. *Rogers v. Brewster*, 5 Johns. 125; *McDonald v. Neilson*, 2 Cow. 182.

In some cases the motive with which an act was done may be material on the question of damages, and in those cases, an allegation of the motives, and of the circumstances in aggravation of the action may be

Statement of wrongful acts of defendant.

properly alleged. *Gilbert v. Bounds*, 14 How. 46, 49, 50; *Molony v. Dows*, 15 id. 265; *Bates v. Loomis*, 5 Wend. 134; *Root v. Foster*, 9 How. 37. In common practice, nearly all complaints for trespasses to lands, for conversions of personal property, or for injuries to it, or for detaining it, allege that the acts were wrongfully or unlawfully done. But an act may be unlawful, or legally wrongful, when the defendant is not guilty of any intentional wrong, so far as his motives are concerned. That points out the precise distinction shown by the cases cited upon this subject, since there may be an unlawful act without any actual wrongful intent or motive. And in all complaints where an unlawful or wrongful act is charged, the legal effect of the allegation is to show that the act was not legal, although the motives may have been ever so proper in the given case, unless it is in those cases where the motive is the ground of action, or it relates to the measure of damages.

There is one class of cases which may deserve notice here, and that is infancy. If an infant intentionally injures property, he is liable for the tort, when he could not be made liable otherwise. *Fish v. Ferris*, 5 Duer, 49; *Campbell v. Stakes*, 2 Wend. 137. In such cases the wrongful intent must be alleged as well as the fact of infancy.

Statement of wrongful acts of defendant. Every complaint in an action for a tort must state such facts as will show clearly and affirmatively that the acts of the defendant are wrongful and unlawful in such a manner as to give a legal remedy in consequence of them.

A complaint must set forth *facts* by which the court can see that the plaintiff has sustained a legal injury, or it is bad on demurrer. A general averment that the acts of the defendant are contrary to the statute, without setting forth in what manner, is not sufficient. *Smith v. Lockwood*, 13 Barb. 209.

In an action for negligence, a statement in the complaint, that by means of a contract which is set forth it became the duty of the defendant to perform certain acts, is not sufficient unless the facts necessary to show the duty are stated. *City of Buffalo v. Holloway*, 7 N. Y. 493.

When an action is brought to recover damages for an injury sustained in consequence of falling into a vault which was insecurely covered, if it is sought to make the defendants liable on other grounds than those of negligence, in not constructing the cover of the vault properly, or in not keeping it in a proper condition, such as that the area is within a public street, or that a duty imposed by some municipal ordinance has been violated, those grounds should be stated in the com-

plaint, so that issue can be taken upon them, and the defendants may come prepared to try them. *Congreve v. Morgan*, 4 Duer, 439.

In actions for injuries resulting from a fraud, the complaint must allege the facts which show that a fraud has been committed; a mere allegation that the defendant has committed a fraud is entirely insufficient. *McMurray v. Gifford*, 5 How. 14.

In an action for *false and fraudulent* representations, the complaint must state what the representations were, so that the court may judge whether they were sufficient to mislead; otherwise the plaintiff does not show a cause of action; and it ought also to state that they were made with intent to deceive and defraud the plaintiff. *Wells v. Jewett*, 11 How. 242; *Addington v. Allen*, 11 Wend. 374, 386; *Zabriskie v. Smith*, 13 N. Y. 322, 330.

In actions for injuries to real property, or for injuries to personal property, or for a conversion of it, the complaint ought to allege what injurious acts were done; and the allegations ought to be so particular and specific that the court can adjudge as a matter of law that a cause of action exists.

The particular manner of stating the facts may be seen in the precedents.

When there are several defendants, the complaint must show a cause of action against all of them.

Corporations are liable for torts in the same manner that individuals are, but the complaint must state facts which show that the injurious acts were done by their legal agents or officers, and that they were acting within the scope of their duties, or within such instructions as the corporation has given them, and also it must appear what the injurious acts were. *Howell v. City of Buffalo*, 15 N. Y. 512; *Mayor, etc., of N. Y. v. Bailey*, 2 Denio, 433.

Time and place. The same rules are applicable in complaints for torts as are observed in actions on contracts. See *ante*, 291.

Scienter. The subject has been already discussed in relation to motives or intention. *Ante*, 303, 319.

But there is also a class of cases, in which *knowledge* on the part of the defendant in relation to certain things will render him liable to an action, when, without such knowledge on his part, no action could be maintained against him.

If a domestic animal is accustomed to do mischief to other animals, or to persons, and the defendant has knowledge of that fact, he will be liable for such injuries as the animal may do, although he did not desire the injury to be done, and even although he had no knowledge

Demand.

that the mischief would be done. But the complaint must allege that the defendant *knew* that such domestic animal was accustomed to do such mischief. *Fairchild v. Bentley*, 30 Barb. 147; *Lyke v. Van-Leuven*, 4 Denio, 127; *Buckley v. Leonard*, id. 500; *Wheeler v. Brant*, 23 Barb. 324.

In those cases in which knowledge is not necessary to create a liability on the part of the defendant, it need not be alleged in the complaint, as, for instance, when a dog *kills* or *wounds* sheep, because the statute makes the owner liable for such injuries whether he knew of their mischievous propensities or not. 2 R. S. 975, § 9 (5th ed.); *Fish v. Skut*, 21 Barb. 333.

But, if the action is merely for *chasing* and *worrying* sheep, then knowledge must be alleged. *Auchmuty v. Ham*, 1 Denio, 495.

There is another class of cases in which the owner of domestic animals is liable for such injuries as they may do to other animals, or to persons, although the owner did not know of their mischievous propensities; and those cases are, when the animal of the defendant is trespassing upon the lands of the plaintiff, and does the mischief there. In such cases knowledge need not be alleged or proved. *Van Leuven v. Lyke*, 1 N. Y. 515; *Dunckle v. Kocker*, 11 Barb. 387.

When knowledge is made the ground of proving a fraud, or of increasing damages, it is generally synonymous with motive, intent, etc., which words have been explained. *Ante*, 319. And see "*Damages*," in complaints for torts. It must be recollected, too, that knowledge is always an essential element of a fraud, and in such actions it must always be alleged in the complaint.

Demand. In actions for the recovery of the possession of personal property, or in actions for a conversion of such property, it is sometimes essential to a right of action, that some demand should be made of the defendant before an action is brought against him.

The general rule is, that when one person wrongfully and unlawfully takes or converts the property of another to his own use, an action will lie against such wrong-doer without any previous demand. *Far-ington v. Payne*, 15 Johns. 431; *Ladd v. Moore*, 3 Sandf. 589; *Tallman v. Turck*, 26 Barb. 167; *Tompkins v. Haile*, 3 Wend. 406. But when property has lawfully come into the possession of a person, and he has not converted it, a demand must be made before he is liable to an action. *Hall v. Robinson*, 2 N. Y. 293, 295; *Bliss v. Cottle*, 32 Barb. 322.

There are many cases in which a demand is indispensable to the maintaining of the action, and such demand must be proved at the trial,

Penalties.— Assignment of demand or right of action.— Damages.

and yet it is not necessary to allege a demand in the complaint. A demand and refusal to deliver property is *evidence*, upon which a conversion may be found ; but it is not proper to plead mere matters of evidence. *Ante*, 287. In complaints for converting personal property, it is the usual practice, therefore, to allege a wrongful and unlawful conversion, and then to prove the demand at the trial, if such proof is necessary. An allegation of a demand and a refusal in addition to an allegation of a wrongful conversion, would be useless, but it would not vitiate the pleading, since it would be mere surplusage. See *ante*, 296.

Penalties. In actions to recover penalties which are given by statute, it is sufficient to declare in the brief form prescribed by the Revised Statutes. 3 R. S. 633, §§ 1, 2, 3, 5th ed. ; id. 784, § 13, 5th ed. The Code has not changed the rule of pleading in such cases. *People v. Bennett*, 5 Abb. 384 ; S. C. affirmed, 6 id. 343 ; *Hall v. McKechnie*, 22 Barb. 244.

The general rule is that no reference need be made to the statute. *Ante*, 294. But in actions for penalties it is the general practice to refer to the chapter and section of the statute which gives the penalty. *Hall v. McKechnie*, 22 Barb. 244 ; *People v. Brooks*, 4 Denio, 469 ; *O'Maley v. Reese*, 6 Barb. 658. In suits to recover penalties where no general form of declaring is given, the plaintiff must set forth the particular acts and omissions which constitute the cause of action. *People v. Brooks*, 4 Denio, 469.

Public statutes need not be recited, *ante*, 294 ; and the most that can be required in actions for penalties is that a correct reference shall be made to the section and chapter of the statute. *People v. Brooks*, 4 Denio, 469 ; *O'Maley v. Reese*, 6 Barb. 658. As to negating defense, see *ante*, 294–296.

Assignment of demand or right of action. There are several instances in which a right of action for a tort is assignable. *McKee v. Judd*, 12 N. Y. 622 ; *Waldron v. Willard*, 17 id. 466. What causes of action are assignable and the manner of making the assignment has been elsewhere explained. Vol. 1, p. 812. When the action is brought for a tort upon an assigned demand, the complaint must first show a cause of action in favor of the assignor, in the usual form, and it must then show that such cause of action has been assigned to the plaintiff.

Damages. The damages, whether general or special, must be claimed and alleged in the same manner as in actions upon contracts. *Ante*, 313.

Conclusion.— Verified complaints.

Conclusion. The conclusion of the complaint is the same as in actions upon contracts when damages are claimed. But when the action is for the recovery of the possession of personal property, the demand of judgment is different as will be seen by looking at the precedent of a complaint in such an action.

Verified complaints. The discussion in the preceding pages of the requisites of a complaint in an action pending before a justice of the peace has reference to a complaint made at the time of the return of the summons or upon the joinder of issue by the parties without process, and the requisites of a verified complaint have been mentioned only incidentally. In courts of record, the right of the plaintiff to serve a verified complaint with the summons in the action is given in all cases. In inferior courts the right is limited to certain classes of actions. In an action brought in a justice's court of the city of Brooklyn to recover upon or for the breach of a contract, express or implied, the plaintiff may serve upon the defendant, with the summons, a copy of a written complaint, verified in like manner as a verified pleading in the Supreme Court. Vol. 1, p. 80, § 3126. In a proper case, a copy of the complaint may be served with the summons in an action pending in a District Court of the city of New York, or in the justice's court of the cities of Albany or Troy. Vol. 1, p. 89, § 3208. So in any action brought in any of the justices' courts of this State, arising on contract for the recovery of money only, or on an account, the plaintiff or his agent, at or before the time of the issuing of the summons, may make a written complaint stating in a plain, concise manner the facts constituting the cause of action, specifying therein the amount actually due from the defendant to the plaintiff in the action, and praying judgment against the defendant for the amount so claimed to be due to him. This pleading must be subscribed by the plaintiff or his agent, and verified in the manner and as provided by section 526 of the Code of Civil Procedure. See Laws of 1881, chap. 414, § 1; vol. 1, p. 177.

It will be noticed that so far as the statement of the cause of action is concerned, there is but little difference between the requirements of this statute and those of the Code of Civil Procedure. Under either statute the *facts* constituting the cause of action must be stated. Under the Code these facts must be stated in a plain and *direct* manner, and under the statute of 1881, they must be stated in a plain, *concise* manner. Both requirements mean substantially the same thing. Under this statute the plaintiff is expressly required to specify in his complaint the amount actually due him from the defendant, and to demand judgment

Verified complaints.

against the defendant for the amount so claimed to be due. This is not expressly required by the Code. *Ante*, 313. Under the statute the complaint must be in writing, subscribed by the plaintiff or his agent, and verified. Under the general provisions of the Code the complaint in an action may be oral or in writing; and in no case is it required to be subscribed by any person, or verified in any manner. Under this statute the complaint is made at or before the issuing of the summons, and is attached to and served with the summons. Except in the local courts before mentioned, no such procedure is authorized by the Code. Under this statute, the failure of the defendant to answer or demur to the complaint at the time of the return of the summons entitles the plaintiff, upon filing the summons and complaint with due proof of service, to a judgment against the defendant for the amount demanded in the complaint, with costs, without further proof. Under the Code, the plaintiff must prove his case notwithstanding the default of the defendant, except in the cities of Albany, Brooklyn, Troy and New York. Under this statute the answer of the defendant must be made in writing and under oath, while under the Code it may be oral, with a single exception, and unverified.

From this comparative view of the points of distinction between a verified pleading under the statute of 1881, and an unverified pleading under the general provisions of the Code, and of the rights of the plaintiff thereunder, a person who has a cause of action arising on contract, or on an account, may readily determine which form of pleading it is advantageous to adopt. To a person residing at a distance from the place of trial, the proceeding by a verified complaint possesses many advantages; and in all cases, the service of a verified complaint with the summons, where such procedure is allowable, will expedite the determination of the controversy by forcing the defendant to put in a sworn answer, thus shutting out defenses interposed merely for delay. It often happens that a defendant, by a general denial, puts in issue a fact material to the plaintiff's case, which he well knows to exist, but which the plaintiff cannot establish without foreign witnesses, or taking out a commission. When this fact is alleged in a verified pleading, it can be denied only at the risk of an indictment for perjury.

In setting forth in the complaint facts not within the personal knowledge of the pleader, it should be stated that such facts are alleged upon information and belief, so that the facts so alleged may readily be distinguished from those stated from personal knowledge. A convenient way of distinguishing such allegations is by using the phrase "and the plaintiff further alleges upon information and belief," or some

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other equivalent phrase. The affidavit of verification must be to the effect that the complaint is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. When it is made by a person other than the plaintiff, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party. Code of Civil Pro., § 526.

The form of a verified complaint will be seen by the precedents given in a subsequent place in this volume. The mode of serving the pleading, and the sufficiency of the proof of service have been sufficiently noticed. *Ante*, 134. When the complaint served with the summons is so defectively verified as to be entirely without the spirit and intent of the statute, the remedy of the defendant is to treat the pleading as unverified. See *Strauss v. Parker*, 8 How. 342. No subsequent amendment of the verification can cure the defect. When the parties appear and join issue before the justice, the fact that the complaint is verified will not debar the plaintiff from his right to amend the pleading in any other respect at any subsequent stage of the action. The defendant may, however, give in evidence any admission contained in the original complaint, although the pleading will not be conclusive evidence of the fact admitted. *Strong v. White*, 11 Abb. (N. S.) 319. By so doing the defendant will not be estopped from disproving that portion of the complaint which makes against him. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Gildersleeve v. Landon*, id. 609.

§ 3. **Answers.** When a defendant appears in court in obedience to process which has been duly issued, served and returned, his first question to determine is, whether he will defend the cause. He should, therefore, wait until the plaintiff delivers his complaint to the justice, so that he may see what cause of action is alleged against him. If the defendant concludes to defend the action, he must either demur to the complaint or answer it, because the law requires that an issue of fact or of law shall be joined. See *ante*, 281. A demurrer raises a question of law, which must in all cases be decided by the court as a matter of law.

Any answer, whether it is a mere denial, or an answer setting up an affirmative defense of new matter, will, in all cases, make an issue of fact which must be tried by a jury, or by the justice in the place of a jury, upon such evidence as may be introduced at the trial.

There is no reply nor any subsequent pleadings permitted in justices' courts, so that all issues of fact will be joined on complaint and answer,

General rules.

so far as pleadings are put in for that purpose. But, although no reply is allowed, the law has adopted a rule which supplies the place of a reply. If the answer sets up any new matter which would need to be denied if a reply were allowed, such matter is deemed to be denied. And not only that, the plaintiff may give in evidence any new matter by way of avoiding the new matter set up in the answer. *Hodges v. Hunt*, 22 Barb. 150. And, as a general rule, it may be further stated, that any matters which cannot be set up in the pleadings for want of a reply, etc., may be deemed at issue either by way of denial and avoidance, and that evidence ought to be admitted upon all such issues, precisely as though they were set up in pleadings.

The only pleadings which are permitted in justices' courts, besides complaints and answers, are demurrers. Either party may, in a proper case, demur to a pleading of the other.

Some general rules which relate to all answers will now be noticed, and the particular matters which are important to answers of each class will be discussed under each precedent.

Most of the general rules of pleading which have been stated, *ante*, 279, are as applicable to answers as to complaints. In every affirmative defense the answer must state facts *ante*, 281, and not conclusions of law; *ante*, 285; nor mere matters of evidence; *ante*, 287; nor need it state mere legal presumptions. *Ante*, 288. It must not state fictions but truth; *ante*, 288; must be positive; *ante*, 289; must not be hypothetical; *ante*, 289; nor double, although a party may state as many defenses as he has, if he states them separately, and no pleading will be double, if it does not state any facts but such as are necessary to constitute a single separate answer. *Patcher v. Sprague*, 2 Johns. 462; *McClure v. Erwin*, 3 Cow. 313, 320; *Tucker v. Ladd*, 7 id. 450; *ante*, 290. It must be certain as to time and place in relation to material facts. *Ante*, 291. Facts necessarily implied need not be stated; *ante*, 292; nor matters of which the court takes judicial notice. *Ante*, 294.

An answer need not negative such matters as are properly a subject of reply. *Ante*, 294. Surplusage will not vitiate it. *Ante*, 296. Each separate answer must be consistent with itself; *ante*, 296; but it is not necessary that separate answers shall all be consistent with each other. *Ante*, 297.

Facts ought to be stated in an answer in the same manner that they are alleged in the complaint, so far as the *mode* of alleging facts is concerned. *Ante*, 297. Recitals have the same effect in answers that they do in complaints. *Ante*, 298. Facts not denied are admitted. See *ante*,

Denials.

298. But that rule relates to material allegations of facts, and not to allegations of conclusions of law, nor of evidence, etc. *Ante*, 299.

Facts not alleged cannot be proved. *Ante*, 301. This is a most important rule in its effects upon the rights of defendants. Nearly, if not quite, every defense must be specially set up in the answer, unless the defense consists of a mere denial of the truth of the allegations in the complaint. *Ante*, 302. Under the precedent of a general denial, the rule will be fully explained, so that it will be evident what defenses may be introduced under a denial, and what defenses must be specially set up in the answer. See also vol. 2, pp. 651-659.

Matters in aggravation, special damages and *scienter* are all put in issue by a general denial. See *ante*, 302.

Every cause of action in the complaint must be put in issue, or it will be admitted; and if there are several counts in the complaint, each one must be put in issue, or it will be admitted. If there is a single count in the complaint, and a single cause of action stated in it, there cannot be a demurrer to a part of it and an answer to the residue. *Ingraham v. Baldwin*, 12 Barb. 9; S. C. affirmed, 9 N. Y. 45. But, if there are several counts and several causes of action, a demurrer may be interposed to one and an answer to another, etc. The answer must be adapted to the nature of the action. If the complaint is for a tort, a set-off cannot be pleaded in the answer. *Pattison v. Richards*, 22 Barb. 143. Nor can torts be set off against torts. *Murden v. Priment*, 1 Hilt. 75; *Pattison v. Richards*, 22 Barb. 143. And if the action is upon contract, a separate independent tort cannot be set up as a recoupment or otherwise. *Piser v. Stearns*, 1 Hilt. 86. Each separate answer must be a sufficient defense of itself without reference to the others joined with it.

Denials. An answer in a justice's court to an unverified complaint may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof, either with or without other matter constituting a defense or counterclaim. Vol. 1, p. 26, § 2938. The form of a general or specific denial will be given in the precedents of pleadings in the last chapter of this volume. The legal effect of such denials has been considered in a previous volume, and the matters which may properly be put in evidence under a general denial in a pleading have been there discussed. See vol. 2, p. 651.

A denial of knowledge or information sufficient to form a belief is not authorized by the Code in an answer to an unverified complaint. See *Dennison v. Carnahan*, 1 E. D. Smith, 144. But this form of

Counter-claims, etc.

denial is authorized by the statute of 1881, in a verified answer to a verified complaint. See Laws of 1881, chap. 414, § 2; vol. 1, p. 177. The addition of this form of denial to those allowed under the Code system of pleading became a necessity under a statute requiring the defendant to answer under oath the allegations contained in a verified complaint. In many cases, this form of denial is the only one which a defendant can conscientiously interpose to any or all of the allegations of the complaint. For example, when an action is brought upon an assigned demand, the defendant may be wholly ignorant of every proceeding relating to the transfer, and thus be unable to unqualifiedly deny the fact of the assignment, and at the same time may be unwilling to admit it. So where an action is brought against a principal upon a contract alleged to have been entered into in his behalf by a general agent, the defendant may be in a position in which he cannot truthfully deny all or any of the allegations of the complaint for want of personal knowledge of the facts alleged, and yet may not be willing to admit the truth of facts sworn to by a person of whose very existence he was ignorant. In these, and in all other cases in which the defendant has no personal knowledge, or means of personal knowledge, of the truth of the matters alleged against him, a denial of all knowledge or information of such facts sufficient to form a belief is allowable and proper.

But while the *propriety* of this form of denial is equally apparent whether the answer is verified or unverified, the *necessity* of its adoption is not so apparent in case of an unverified answer; and the law authorizes its use in justice's court only where the defendant is compelled to verify his answer.

Counter-claims, etc. The answer may set forth, in addition to a general or specific denial of each or any allegation in the complaint, new matter constituting one or more defenses or counter-claims. This new matter must be pleaded in a plain and direct manner. Vol. 1, p. 26, § 2938. In pleading a defense to a cause of action set forth in the complaint no particular form or language need be adopted. But enough should be stated to show to the court that if the facts set forth in this part of the answer are established on the trial the plaintiff will not be entitled to recover upon the cause of action so answered, or at least that he will not be entitled to recover the full amount of his demand. As has been stated, it is not necessary as an abstract rule of pleading that the defenses set up in the answer shall all be consistent with each other. But when the answer is verified, as it must be when a verified complaint has been served with the summons, the defendant may find it difficult to

Demand of judgment.

conscientiously verify an answer setting forth inconsistent defenses, such as a denial of the purchase of a horse, a breach of an express warranty made on the sale of the horse, and the payment of the purchase-price.

In setting forth a counter-claim, the defendant should state his cause of action against the plaintiff in the same manner that he would allege the same cause of action in a complaint. The rules governing the statement of facts in a complaint are applicable to the statement of facts constituting a counter-claim. If sufficient facts are not stated to show that the defendant could maintain an action upon the counter-claim, used as a complaint, against the plaintiff, or the person whom he represents, or from whom he derives title, the pleading will as a general rule be subject to a demurrer. See vol. 1, pp. 26, 27, § 2939.

The cases in which a defendant may properly interpose a cause of action as a counter-claim, and the cases in which he must interpose it or be forever precluded from maintaining an action upon it, have been defined by statute. *Id.* 27-29. The construction of these statutes has been discussed in a preceding volume, and the cases illustrating and explaining the law applicable to this form of answer have been there collected. See vol. 2. In the last chapter of this volume the mode of pleading a counter-claim or the various defenses to an action will be further illustrated by precedents of answers.

Demand of judgment. It will be noticed that the Code does not require that an answer in an action pending before a justice of the peace shall contain a demand for judgment. In courts of record, a defendant who deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counter-claim interposed by him, must demand the judgment in his answer. Code Civil Pro., § 509. Although no similar requirement is contained in the statute regulating pleadings in a justice's court, the rule prescribed for the demand of judgment in the higher courts is a safe one to follow. By the demand for affirmative relief the defendant clearly shows that the facts stated in his answer are not pleaded merely as a defense, but as an affirmative cause of action against the plaintiff, for which he claims an affirmative judgment.

Where a chattel has been replevied and the defendant has not required the return thereof pending the action, he may in his answer demand judgment for the return of the chattel, either with or without damages for the taking, withholding or detention. Vol. 1, p. 23, § 2930. In any case a demand of the relief appropriate to the facts set up in the answer will be proper for the purpose of apprising the plaintiff and the court of the nature of the defense intended, although an omission of such demand will not affect the sufficiency of the answer if it is otherwise sufficiently explicit to be understood.

Answer of title to land.

§ 4. **Answer of title to land.** The law does not permit questions of title to real estate to be settled in justices' courts. And the subject, so far as it relates to jurisdiction, has already been sufficiently discussed. *Ante*, 36. There are, however, in some cases important matters of practice to be observed if the defendant would fully secure his rights. It is not enough that title to real estate may be in question, unless it is so presented as to deprive the justice of the right to proceed with the action. And this section will be devoted exclusively to an explanation of the practice upon this branch of the law.

The statute gives the defendant a right to interpose title to land as a defense in *every action* which can be brought in a *justice's court*, provided the title to land really comes in question in such action. It may come in question when the plaintiff claims that the defendant has committed a trespass upon lands claimed by the plaintiff; and when the defendant insists, as a defense, that he himself is the true owner of the land, and that, therefore, the act done could not, in law, be a trespass. There are numerous other instances in which the title to land may be involved, besides that of an action of trespass to real estate; as for instance, when an action is brought for a taking, a detention or a conversion of personal property, and the title to the personal property depends upon the ownership of the lands from which such personal property was procured.

Under the Revised Statutes the right to interpose a plea of title was limited to the time of joining issue, but this has been changed by the Code, and under the present practice a plea of title may be interposed by way of amendment at any time before trial when substantial justice will be promoted thereby. *Weeks v. Stroble*, 36 How. 123; *Hinds v. Page*, 6 Abb. [N. S.] 58. And when the plea is interposed at the time of joining issue, but is defectively pleaded, it may be amended afterward in the same manner as any other answer. *Smith v. Mitten*, 13 How. 325.

The law declares, in general terms, that the defendant may interpose the defense. And if there were but one defendant there could be no question as to what persons might set up the defense. But where there are several defendants, and a defense of title to land would be available to some of the defendants, while it would not be available to others, a different question is presented.

Suppose that the plaintiff claims certain lands and he sues A. and B. for an action of trespass for entering upon it. Now, it may happen that A. is the true owner of the land and entitled to the possession, while B. may not have any title or right of possession. In that case

Answer of title to land.

the title of A. is a perfect defense for him, even though B. has no title, and even though he may be a trespasser as against the plaintiff who might be in the actual possession. In an action of that character, it is clear that justice would require that A. should be permitted to plead title, notwithstanding the fact that B. could not derive any advantage from that defense, because it would not be just to deprive one man of a full, legal and just defense, merely because some other person is not equally entitled to the advantages of the defense interposed. And if the action were trespass, it is very clear indeed that each defendant might set up any separate defense that he has, without any reference to any defense which the other defendants have. So in any other form of action either defendant is permitted to avail himself of any defense which he has, even though it is limited to himself. And besides this, when there are several separate causes of action, the statute permits a defense of title as to some of them, and retains the action in the justice's court as to others. Vol. 1, p. 31, § 2958. It may, therefore, be laid down as a safe, a clear and a just rule, that any defendant may plead title for himself if he chooses, even though the other defendants omit or refuse to do so.

The defense of title to lands is not limited to those cases merely in which the defendant claims to be the owner. For the person sued may not claim any title whatever to the lands, and yet he may have a perfect defense to the action brought by the plaintiff. If the defendant acted as the agent or servant of the true owner of the land, and by his directions in doing the acts alleged as the cause of action, such defense will be as available as though the owner himself had been sued. And whenever the defense of title to land is a legal defense for any person, whether that title be in himself or in a third person, he may avail himself of it by answer. But it must not be inferred from what has been said, that the best possible title in the world will, in all cases, and under all circumstances, constitute a legal defense. A person may be the actual owner of lands, and yet be liable to an action of trespass in favor of one who does not even claim to own them. The case of landlord and tenant will sufficiently illustrate this; for if a landlord commits a trespass upon lands in the lawful and peaceable possession of a tenant during the continuance of his term, an action lies, and the ownership of the land will not be any defense whatever.

In ordinary cases, the pleadings may be either written or oral, at the election of the party who puts them in. But when the title to lands is interposed as a defense, it is required by the statute that the answer shall be in *writing*, and *signed* by the *defendant* pleading it, or by his

Answer of title to land.

attorney or agent. Id., p. 30, § 2951. An oral answer would not be a compliance with the statute, and an omission to furnish such an answer as the statute requires would be a waiver of the right to insist upon a discontinuance of the action. For it is only by a compliance with the terms of the statute that the justice can be required to dismiss the action, and he who neglects or refuses to perform the acts specified by the statute is not in a condition to claim its advantages. *Randall v. Crandall*, 6 Hill, 342. If, however, a proper written signed answer is delivered to the justice, in due season, he must then countersign it and deliver it to the plaintiff, or to his attorney, when he appears by attorney, instead of in person. Vol. 1, p. 30, § 2951. But, if the answer be ever so legal in form, and put in at the proper time, this alone will not be sufficient to require the justice to dismiss the action. Before a justice is bound to do that, the defendant must also furnish such an undertaking as the statute requires. *Randall v. Crandall*, 6 Hill, 342; *Little v. Denn*, 34 N. Y. 452; *Fredonia, etc., P. R. v. Wait*, 27 Barb. 214. And if he merely answers orally that he is the owner of the land, or that title will come in question, but he does not furnish the proper undertaking, he will waive any right to set up title on his own part at the trial, even though such answer was received at the joining of issue, without objection on the part of the plaintiff. *Randall v. Crandall*, 6 Hill, 342.

When the defendant desires to show title as a defense, he must set forth in his answer such facts as show that title will come in question on the trial, and he must also give a proper undertaking; if he omits both, or either of these requisites, the justice will have jurisdiction, and the defendant will be precluded at the trial from showing title as a defense. *Fredonia, etc., P. R. v. Wait*, 27 Barb. 214.

The statute prescribes the condition of the undertaking, and the extent of the liability of the sureties. Vol. 1, p. 30, § 2952. The defendant need not join in the execution of the undertaking, and the execution of the instrument by a single surety is sufficient, if approved by the justice. *Ib.*

Answer of title in the defendant.

JUSTICE'S COURT.

John Doe agst. Richard Roe.	} PETER W. PLANTZ, <i>Justice.</i>
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The defendant, Richard Roe, answers the complaint in this action,

Answer of title to land.

and alleges that the plaintiff ought not to have or maintain his action, because, at the time of the alleged wrongful trespass upon the lands mentioned and described in the complaint, the defendant was then and before that time, and ever since has been the lawful owner in fee of said lands, having a full and lawful right to do and perform all the said acts which are alleged by the plaintiff to be wrongs and trespasses upon his rights. And the defendant further alleges that he claims title to said lands, and is the true owner of the same. Wherefore he demands judgment that this action be dismissed or discontinued by the said justice.

RICHARD ROE.

Answer of title in a third person.

(Same Title.)

The defendant, Richard Roe, answers the complaint in this action, and alleges that the plaintiff ought not to have or maintain an action against him, because the close mentioned and described in the complaint was, at the time of the alleged wrongful acts, the land, soil, and freehold of one James Denn, and not that of the plaintiff; that the said James Denn, at the time of the said wrongful acts, had full and lawful authority over the said lands as owner, with a legal right to the possession thereof; that this defendant did the alleged wrongful acts by the direction of the said James Denn as he lawfully might; that the said land, soil, and freehold was not the land or freehold of the plaintiff at the time of the alleged wrongful acts, nor was he then entitled to the possession thereof; and the defendant further alleges that the title to said lands was in the said James Denn, as aforesaid, and will come in question on the trial of this action. Wherefore, he demands judgment that this action be dismissed or discontinued by the said justice.

RICHARD ROE.

The answer may be signed by the defendant in person or it may be done by attorney. After it is delivered to the justice he is required to countersign it and deliver it to the plaintiff. There is no precise form necessary for this purpose, though the following form may be adopted and indorsed on the answer :

Countersigning by justice.

The within answer was delivered to me, at the joining of the issue in the within entitled action, on the 30th day of November, 1864, and I hereby countersign the same.

PETER W. PLANTZ, *Justice.*

Answer of title to land.

Another form.

Countersigned this 30th day of November, 1864.

PETER W. PLANTZ, *Justice*.

As countersigning is merely intended to identify the answer, either form will be entirely sufficient for the purpose. Where there are several causes of action, and the defendant does not wish or intend to plead title to more than one of them, he should so modify his answer as to show clearly which cause of action is intended.

In every case the defendant ought to set up a general denial before answering title, if he wishes or intends to put the plaintiff to proof of his title in the action in the higher court. By merely pleading title as an affirmative defense, without interposing a denial, the plaintiff's title will stand admitted and prevail unless the defendant can show title in himself. *Brotherton v. Wright*, 15 Wend. 237. And see, also, *Truthill v. Clark*, 11 id. 642.

The defendant should set up as many defenses as he has besides the answer of title, so that a complete issue may be joined in the action. And where there are other causes of action besides those to which title has been pleaded, the issues may be joined and tried in the same manner as though no question of title had arisen in relation to those causes of action which the justice may have dismissed on the answer of title. When the answer of title justifies as to all the causes of action set up in the complaint by setting up title to the land as a defense to them all, the justice cannot retain the action as to some of the causes of action, but must dismiss the action as to all. *Hall v. Hodskins*, 30 How. 15.

If the defendant answers in writing as required by the statute, and he also gives the proper undertaking, the justice will be bound to dismiss the action.

Form of the undertaking.

JUSTICE'S COURT.

John Doe <i>agt.</i> Richard Roe.	}	PETER W. PLANTZ, <i>Justice</i> .
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Whereas, the above named defendant Richard Roe is about to set forth in his answer facts showing that the title of real property will come in question in the above entitled action,

Now, therefore, we, Richard Roe and Daniel Stewart, of the town of

Answer of title to land.

Johnstown, county of Fulton, and State of New York, do jointly and severally undertake that if the plaintiff, within twenty days after the delivery of said answer and this undertaking to the justice before whom said action is pending, deposits with said justice a summons and complaint in a new action for the same cause to be brought in the proper court, the defendant will within twenty days after such deposit give a written admission of the service thereof; (*If the defendant was arrested in the action, add*) and that the defendant will at all times render himself amenable to any mandate which may be issued to enforce a final judgment in the action so brought.

Dated Nov. 30, 1864.

RICHARD ROE,
DANIEL STEWART.

This undertaking should be acknowledged, and show a proper justification and approval. See *ante*, 153, 154.

If the defendant fails to comply with the undertaking, the sureties are liable thereon to an amount not exceeding \$200. Vol. 1, p. 30, § 2952.

The plaintiff need only deposit a summons and complaint with the justice who dismissed the former action, in order to comply with the statute. He need not serve it on the defendant, because the defendant is required to give an admission of the service thereof within twenty days after such summons and complaint have been deposited with the justice. The plaintiff is not bound to give the defendant notice that such summons and complaint have been deposited with the justice. It is the duty of the defendant to attend to that matter for himself, and to be careful that he gives the admission in due time, which is within *twenty days* after the deposit with the justice. The admission of service must be in writing, and it ought to be indorsed on the summons and complaint, and signed by the defendant, or by his duly authorized attorney.

When the summons and complaint are deposited with the justice in accordance with the statute, the defendant must be careful to give a written admission of service within *twenty days* after such deposit. And if he omits to do so, and an action is brought by the plaintiff against the sureties upon the undertaking, the court has no power to relieve them. *Davis v. Jones*, 4 How. 340; S. C., 3 Code Rep. 63. The plaintiff may, however, waive a literal compliance with the statute. And, therefore, if the defendant omits to give a *written admission* of the service of the summons and complaint within the *twenty days* prescribed for that purpose; yet, if such defendant does,

Answer of title to land.

within that time, put in an answer to the action in the Supreme Court, and the plaintiff accepts it without objection, and without such admission, this will be held to be a waiver of the objection and a substantial compliance with the statute. *Wiggins v. Tallmadge*, 7 How. 404.

The answer of title before the justice must be delivered to the plaintiff, but the statute does not declare what shall be done with the undertaking given by the defendant. And in the absence of authority upon the question, the proper course of the justice will be to retain it himself as a part of the proceedings in the action, at least until a breach of its conditions. He will then be able to produce it for either party, if it is properly demanded. At all events, the justice ought to retain it until the expiration of forty days from the dismissal of the action by him. For the plaintiff has *twenty* days in which to commence a new action in the *proper court*, by depositing the summons and complaint with such justice. And the defendant then has *twenty* days in which to give a written admission of service. After a breach of the undertaking by an omission of the defendant to give a written admission of service of the summons and complaint, there is no legal objection to a delivery of the undertaking to the plaintiff for the purpose of bringing an action thereon if he desires to do so. After a breach of the conditions of the undertaking there is no good reason why the plaintiff should not have the instrument if he requires it, since he then has a subsisting right of action which is given by it, and of which it is the highest evidence.

The remarks already made have related chiefly, if not entirely, to a case in which the entire action was discontinued by the justice. But where there are several separate causes of action, the answer of title may not be applicable to more than a portion of them, and in such a case, the justice, on receiving a proper answer and undertaking, is to dismiss so much of the action as is covered by the defense of title. But as to the residue of the action he is to proceed in the usual manner. Vol. 1, p. 31, § 2958.

If title is not set up in the answer, and a proper undertaking given, the justice will have jurisdiction of the action, and the *defendant* will be precluded in *his defense* from drawing the title in question. Id., p. 30, § 2955.

If, however, it appears upon the trial from the plaintiff's own showing that the title to real property is in question, and the title is disputed by the defendant, the justice must dismiss the complaint with costs and render judgment against the plaintiff accordingly. Id., § 2956; *ante*, 36. 37.

Nature of a demurrer.

§ 5. **Demurrer.** A demurrer is an exception or objection by one of the parties to an action to some pleading of the opposite party, upon the ground of insufficiency in the matter stated to sustain the action or to constitute a defense, or upon the ground of some defect or irregularity in the statement of the matter pleaded which the law declares shall be sufficient to excuse the adverse party from traversing such matter while such defect or irregularity continues. In such cases the objecting party is said to *rest* or abide upon the question made, and to submit it to the judgment of the court whether such objection or exception is well taken. A demurrer raises a question of law which must, in all cases, be decided by the justice, and not by a jury.

In actions in justices' courts it is indispensable that a demurrer should be interposed if either party wishes to raise any question as to the form or the sufficiency of the pleading of the opposite party. *Neff v. Clute*, 12 Barb. 466; *Hall v. McKechnie*, 22 id. 244; *Mayor, etc., of N. Y. v. Mason*, 4 E. D. Smith, 142.

If either party wishes to object to a pleading of his adversary, on the ground that it is not sufficiently explicit, or that it does not state a cause of action or ground of defense, he must raise such objection by demurrer, and if he omits to do so, the objection will be waived. *Ib.* And if the parties go to trial on extremely defective pleadings, the judgment will not be reversed on account of their insufficiency, provided a good cause of action, or a sufficient ground of defense, is proved by the evidence. *Ib.* But if a complaint does not set forth a cause of action, and on the trial there is not sufficient evidence to prove a cause of action, a judgment in favor of the plaintiff will be reversed even though the defendant took issue upon the allegations of the complaint instead of demurring. *Tift v. Tift*, 4 Denio, 175, 178; *Stephenson v. Hall*, 14 Barb. 228, 229.

One of the rules relating to a demurrer is that it operates as an admission of the truth of all the material allegations which are contained in the pleading demurred to. The meaning and the extent of the rule, however, is this, it admits their truth for the purposes of obtaining the decision or judgment of the court upon the sufficiency of the pleading under consideration. But the admission does not extend beyond that, for if an issue of fact is subsequently joined upon the pleading demurred to, the admission by way of demurrer will not have any effect upon the trial of such issue of fact. Nor does the admission extend to conclusions of law alleged in the pleading demurred to. Facts and not conclusions of law are admitted by a demurrer. *Bonnell v. Griswold*, 68 N. Y. 294; *Dillon v. Brainard*,

In what cases a demurrer may be interposed.

21 Wall. 430 ; *People v. Commissioners of Highways*, 54 N. Y. 276 ; S. C., 13 Am. Rep. 581.

Another rule is, that the court, on rendering judgment on a demurrer, will examine the whole record, and render judgment against the party who committed the first fault in pleading. *Auburn, etc., Canal Co. v. Leitch*, 4 Denio, 65 ; *Lipe v. Becker*, 1 id. 568 ; *Schwab v. Furniss*, 4 Sandf. 704 ; *Ayres v. Covill*, 18 Barb. 260. And, therefore, if the plaintiff demurs to a defendant's answer, the defendant may attack the complaint, and if it is insufficient, judgment will be given against the plaintiff, who will be required to amend it by stating a sufficient cause of action. See *Allen v. Malcolm*, 12 Abb. (N. S.) 335. And when that is done the defendant will be required to answer anew or abide by his former answer as he may elect. But, after the plaintiff has amended his complaint, in such a case, he may then demur again to the answer if it is insufficient.

Where several separate affirmative defenses are set up in the answer, and the plaintiff demurs to one of them, if the defendant attacks the complaint on the ground that it is defective in substance, the plaintiff cannot supply the defects in such complaint by referring to or claiming the advantage of admissions contained in the other separate defenses not demurred to. *Ayres v. Covill*, 18 Barb. 260.

In what cases a demurrer may be interposed. The Code has provided a system of pleadings which must be observed in justices' courts. Special demurrers, as known to the former practice, have no place in our present system of pleading. The Code authorizes a demurrer for specific causes, and no pleading is demurrable unless it is subject to one or more of the objections specified in the section defining the grounds of demurrer. *Marie v. Garrison*, 83 N. Y. 14. In the Supreme Court, a demurrer may be taken when either of eight specified grounds of objection appear upon the face of the plaintiff's complaint, or when either of five specified grounds of objection appear upon the face of a counter-claim upon which a defendant demands affirmative judgment. Code of Civil Pro., §§ 488, 495. But in a justice's court there are only two grounds of demurrer to either a complaint or answer. A defendant may demur to the complaint, or to one or more distinct causes of action separately stated therein, when it is not sufficiently explicit to be understood, or where it does not state facts sufficient to constitute a cause of action ; and a plaintiff may demur to one or more counter-claims stated in the answer where it is not sufficiently explicit to be understood, or where it does not state facts sufficient to constitute a counter-claim. Vol. 1, p. 26, §§ 2935, 2939. In the Supreme Court

In what cases a demurrer may be interposed.

the plaintiff may demur to a *defense* consisting of new matter contained in the answer, "on the ground that it is insufficient in law upon the face thereof." Code Civil Pro., § 494. So under the old Code a plaintiff might demur to an answer in a justice's court, or to any part of the answer, when it was not sufficiently explicit to enable him to understand it, or where it contained no *defense*, although it be taken as true. Code of Pro., § 64, subd. 6. But under the present Code a demurrer to a *defense* set up in an answer is an unauthorized pleading, and consequently a nullity. The right of the plaintiff to demur to the defendant's answer is limited to a counter-claim or counter-claims stated therein. Vol. 1, p. 26, § 2935, subd. 4. For example, if a defendant pleads the usurious character of the obligation in suit as a *defense* to the action founded thereon, no demurrer can be taken to this answer, however defectively it may be pleaded, or however much the facts alleged may fall short of establishing this defense even if taken as true. The distinction between a plea of usury as a defense and as a counter-claim has been repeatedly recognized by the courts. See *Bates v. Rosekrans*, 37 N. Y. 409; S. C., 4 Abb. [N. S.] 276; *Equitable Life Assurance Society v. Cuyler*, 75 N. Y. 511. Whatever remedy the plaintiff may have against such defective answer, it is clearly not by way of demurrer. From the nature of the demurrer authorized by the Code to pleadings in justice's court, it is evident that the defect complained of must of necessity appear upon the face of the pleading demurred to, and that no express provision of the statute is required limiting the demurrer to defects so appearing. In courts of record, where a demurrer is given for a variety of grounds, some of which might not appear upon the face of the pleading, such a restriction is required and is, therefore, made a matter of statute.

Where a joint action is brought against two defendants, and there is a good cause of action set out against one of them, but the other party is improperly joined as a defendant, a joint demurrer will not lie in favor of both of the defendants. *People v. Mayor of N. Y.*, 28 Barb. 240; *Phillips v. Hagadon*, 12 How. 17; *Eldridge v. Bell*, id. 547. So, too, the misjoinder of too many defendants does not afford any ground for a separate demurrer by the party who is properly sued, and against whom a good cause of action is alleged. *N. Y. and New Haven R. R. v. Schuyler*, 17 N. Y. 592; *Pinckney v. Wallace*, 1 Abb. 82; *Brownson v. Gifford*, 8 How. 389. But where a defendant is improperly joined as defendant, and no cause of action is stated as against him, he may interpose a separate demurrer which will be sus-

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tained. *Chapman v. West*, 17 N. Y. 125; *Eldridge v. Bell*, 12 How. 547.

The time for interposing a demurrer is at the joining of issue in the action. If the complaint is defective it ought to be then demurred to if the defendant desires to raise the question. And if he omits to demur then, but joins issue upon the merits upon a question of fact, the right to demur to the complaint is gone. And the same rule applies to an answer, which must be demurred to at the time when it is interposed, or the right to do so will be waived.

There may be a demurrer to one of several causes of action or counter-claims, although no demurrer is allowed to a part of a single cause of action or defense. And for that reason there may be issues both of law and of fact joined in the same action.

If two distinct causes of action are separately stated in the complaint, the defendant may demur to one of them and join an issue of fact upon the other. So the plaintiff may demur to one of two counter-claims stated in the answer, and the other will be deemed at issue upon the question of fact set up therein. But a party is not permitted to demur and also to answer to the same matter. *Munn v. Barnum*, 1 Abb. 281.

A jurat forms no part of a verified pleading, and a demurrer is not a proper remedy for any defect appearing therein. *State Bank of Olean v. Shaw*, 5 Hun, 114. So, a demurrer will not lie to the prayer for judgment. *Garner v. Thorn*, 56 How. 452; S. C., 6 Abb. N. C. 212; *Mackey v. Auer*, 8 Hun, 180. Nor will the fact that a party has not demanded all the relief to which he may be entitled render his pleading subject to demurrer. *Buess v. Koch*, 10 Hun, 299.

Decision or judgment on the demurrer. As a general rule, the judgment on a demurrer ought to be given at the joining of issue, so that there may be an immediate amendment of any defective pleading, and so that the cause may be at issue upon questions of fact before any adjournment is made.

There is no legal objection, perhaps, to an adjournment for the decision of a question of law, and yet it does not fall within the general scope of adjournments, which are usually granted for the purpose of procuring evidence. The correct practice will be to decide a demurrer promptly after it is interposed and argued if argument is made. This mode of practice will avoid any necessity for adjournments, except in those cases in which it is important to obtain evidence for the trial of issues of fact. Where there are issues both of law and of fact, the issues of law ought first to be disposed of. *Wright v. Williams*, 2 Wend.

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632; *Pittstown v. Plattsburgh*, 15 Johns. 398. And this is especially true in those cases where the demurrer will dispose of the entire cause of action. *Booth v. Smith*, 5 Wend. 107; *Shaw v. Raymond*, 2 Cow. 512. In such a case, if the issues of fact were first tried, but the final judgment on the demurrer were in favor of the defendant, he would recover costs against the plaintiff on the whole record. *Ib.* But there is no provision for two separate trials of issues in a justice's court, except so far as it may be done in the mode already pointed out, of trying the demurrer immediately at the joining of issue, and then requiring the joinder of an issue of fact when that is proper.

Where there is an issue of law which disposes of the entire right of action, or the whole ground of defense, there will be no occasion to try any other issues joined upon the facts. *Love v. Humphrey*, 9 Wend. 500; *Jack v. Martin*, 14 id. 507; *Backus v. Richardson*, 5 Johns. 476.

In determining whether to sustain or overrule a demurrer the justice should first determine whether the demurrer is taken in a case authorized by the Code, and if it is not, should overrule it at once. If it is taken in a case authorized by the Code the next question to determine is whether the pleading demurred to is defective in the particular or particulars mentioned as the ground of demurrer. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment. *Marie v. Garrison*, 83 N. Y. 14; *Zabriskie v. Smith*, 13 id. 322, 330. And see *Bostwick v. Dry Goods Bank*, 67 Barb. 449; *Lynch v. Levy*, 11 Hun, 145; *Moffat v. McLaughlin*, 13 id. 449.

If the demurrer is taken to a distinct cause of action separately stated in the complaint, the sufficiency of this cause of action is to be tested in the same manner as if it were the only cause of action alleged. The separate counts in a complaint are for all purposes as distinct as if they were in separate complaints; and consequently they must contain all necessary allegations, or the latter must expressly refer to the former. A defective count cannot be helped on demurrer by an allegation in a subsequent count which in no way refers to the former one. *Simmons v. Fairchild*, 42 Barb. 404; *Victory Webb, etc., Manuf Co. v. Beecher*, 55 How. 193; *Anderson v. Speers*, 58 id. 68; *Ritchie v.*

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Garrison, 10 Abb. 246. The same general rules apply with equal force to a demurrer to a counter-claim or counter-claims set up in an answer.

If the objection to the pleading is that it is not sufficiently explicit to be understood, the justice must determine whether the pleader has complied with the requirements of the statute by setting forth the cause of action or counter-claim in a plain and direct manner so as to enable a person of common understanding to know what is intended.

Under the system of pleadings before the Code the court sometimes had a discretion to exercise whether the judgment on a demurrer should be final or whether it might be withdrawn, or whether a defective pleading might be amended. But under the present Code the rule is *imperative* that if the court deems the demurrer well founded, it must permit the pleading to be amended, and if the court deems the demurrer not well founded, it must permit the party making it to plead over at his election. Vol. 1, pp. 26, 27, § 2939. But the court does not, as under the old Code, *order* the pleading to be amended, but merely grants leave to amend. It was held under the old Code that whenever the justice decides that a pleading which has been demurred to is defective, he must order an amendment of such pleading, and if he gives final judgment instead of ordering an amendment, his judgment will be reversed on an appeal. *Hilliard v. Austin*, 17 Barb. 141; *Turck v. Richmond*, 13 id. 533; *Glasse v. Keulsen*, 13 Abb. 100; *Smith v. Mitten*, 13 How. 326; *Stern v. Drinker*, 2 E. D. Smith, 402.

A justice who grants leave to amend has no authority to dictate what the amendment shall be. And where an answer of title to land had been interposed and held defective on demurrer, it was held that the justice had no right to decide that the answer should not be so amended as to present the question of title again in the amended answer. *Smith v. Mitten*, 13 How. 326. A general demurrer is sufficient to reach every defect that exists in a pleading in a justice's court. *Stern v. Drinker*, 2 E. D. Smith, 402.

Where the defendant demurs to a complaint, and the justice overrules the demurrer, and the defendant then answers and joins an issue of fact, which is tried, the decision of the justice on the demurrer cannot be reviewed upon an appeal. *Irvine v. Forbes*, 11 Barb. 587; *Peck v. Cowing*, 1 Denio, 222; *Jones v. Thompson*, 6 Hill, 621; *Hayes v. Kedzie*, 11 Hun, 577.

If the demurrer is well taken, and the justice improperly overrules it, the party demurring may, if he chooses, refuse to amend or join any other issue, and if a judgment is rendered against him in the ac-

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tion, he may, on appeal, review the decision of the justice on the demurrer, and if it is erroneous it will be reversed. *Jones v. Thompson*, 6 Hill, 621 ; *Keteltas v. Myers*, 19 N. Y. 231 ; *Allen v. Patterson*, 7 id. 476.

The form of a demurrer and of a judgment thereon will be given in a subsequent place in this work.

CHAPTER XVII.

ADJOURNMENTS.

SECTION 1. **General principles.** The adjournment of the trial of a cause pending before a justice of the peace may be either a matter of convenience, or a matter of discretion, or a matter of statutory right. It may be a matter of mere convenience to the justice when other official duties prevent the hearing of the cause on the return day of the summons, and it may also, in a certain sense, be a matter of discretion whether he will not adjourn the trial upon his own motion, where his own convenience is not involved, when it appears upon the return day of the summons that substantial justice will be promoted by that course. See *Rose v. Stuyvesant*, 8 Johns. 426. An adjournment is a matter of right when the application is made by a party in a case and in the manner prescribed by the statute, and the justice has no discretion whether to grant or refuse it, although, subject to certain statutory restrictions, he has a discretion as to the length of time the trial shall be postponed. But the granting of an adjournment before trial upon the application of a party is never a matter of course, although the law graduates the amount of proof required to justify a postponement to meet the circumstances of the case, and permits one adjournment of a cause on slight proof of its necessity, or even without proof, if the adverse party does not require it. If a party who has obtained one adjournment asks for a further postponement of the trial, the law requires him to furnish a more satisfactory and detailed statement of the reasons rendering the adjournment necessary, and to show to the satisfaction of the justice that his inability to proceed to trial does not result from his own negligence, or is not a mere pretext for delay. Although upon furnishing proper and satisfactory proof, and the necessary security, when that is required, the party may be entitled to a second adjournment as a matter of right, yet where the circumstances attending the application are suspicious and the proof raises just doubt as to the good faith of the party making it, the adjournment is no longer a matter of right, but the granting or refusing it becomes a matter of discretion with the justice. See *Onderdonk v. Ranlett*, 3 Hill, 323; *Bush v. Weeks*, 24 Hun, 545.

On motion of the justice.

The parties may consent to any number of adjournments, and for any length of time, and the justice cannot control them in this respect so long as his fees for the adjournment are paid.

A party may oppose an application for an adjournment, and require that the adverse party shall furnish the proof or security prescribed by the statute, or he may waive the proof, or security, or both, and oppose the application merely for the purpose of having it appear upon the minutes that the adjournment was granted wholly at the instance of the adverse party and without his consent.

No adjournment can be had before the issue has been joined, where both parties appear upon the return of the summons, except when the defendant refuses or neglects to plead. Vol. 1, p. 26, § 2934.

After issue has been joined there may be one or more adjournments before the trial, or even upon the trial, as will be noticed hereafter.

§ 2. **On motion of the justice.** The Code provides that at the time of the return of the summons, or of the joinder of issue without process, the justice may, in his discretion, and upon his own motion, adjourn the trial of the action, but not beyond eight days. If the defendant has been arrested in the action no such adjournment can be made. Vol. 1, p. 31, § 2959. Nor can the justice adjourn the cause upon his own motion at any time except that specified by the statute. If he adjourns the cause at any other time the adjournment will be irregular. *Aberhall v. Roach*, 11 How. 95; *Gamage v. Law*, 2 Johns. 192. If the first adjournment is by consent of the parties, that will not authorize the justice to adjourn the second time of his own motion. *Kilmore v. Suydam*, 7 Johns. 530. But if the plaintiff consents, and the defendant does not object, it will be deemed an adjournment by consent of the parties. *Ib.*

The statute giving the justice power to adjourn the trial of a cause *upon his own motion* does not authorize him to act merely upon the motion of a party, and disregard the demand of the adverse party that the proper proof shall be made and the proper security given. If in such case the justice grants the adjournment upon the application of the party merely, and not upon his own motion, the adjournment will be irregular and, unless the irregularity is waived, the judgment rendered in the case may be reversed upon appeal. *Peck v. Andrews*, 32 Barb. 445. But the fact that a party has asked for an adjournment on the return day of the summons will not prohibit the justice from adjourning the cause upon his own motion, if the adjournment is in fact granted upon his motion and not merely upon the motion of the party. *Nellis v. McCarn*, 35 Barb. 115. It may be difficult for the

On application of the plaintiff.

party opposing the adjournment to determine how far the justice acted upon his own motion, and how far upon the application of the party, but this will not affect the question of power.

If the plaintiff asks for an adjournment and the defendant opposes it, but does not require the plaintiff to make oath to the absence of a material witness, the justice may properly adjourn the case without requiring the oath. *Kittle v. Baker*, 9 Johns. 354. This will not be an adjournment on motion of the justice. And it seems that when the justice has knowledge of facts which would render an adjournment of the trial a measure of justice to one of the parties, and a refusal to adjourn a gross injustice, he should, in the exercise of his discretion, adjourn the trial upon his own motion, and that a failure to do so will be a ground for reversal, although the facts so coming to his knowledge are not such, as under the statute, would authorize an adjournment, and although an application for such adjournment is made by the attorney for the party, and opposed by the adverse party. See *Rose v. Stuyvesant*, 8 Johns. 426. In the case last cited the defendant failed to appear in person on account of the dangerous illness of his child, but sent a written request to the justice to adjourn the trial. The justice refused to adjourn without further and more satisfactory proof. When the cause was called the father of the defendant appeared, made oath to the dangerous sickness of the defendant's child, and requested an adjournment, which the plaintiff opposed. The justice proceeded with the trial and gave judgment for the plaintiff. This judgment was reversed on account of the refusal of the justice to adjourn the trial upon his own motion. This case does not seem to have been followed in any subsequent case, and so far as has been observed, has been but once cited in subsequent decisions. See *President, etc., of Brooklyn v. Patchen*, 8 Wend. 47, 64.

§ 3. **On application of the plaintiff.** A plaintiff is presumed to be possessed of evidence sufficient to maintain his action, since it would be most unreasonable for him to commence an action without any evidence to support it. He has also the power to regulate the time of trial by delaying to commence the action, and can, therefore, generally be ready with evidence to prove his case at the time of trial. But as the means of evidence are not always at the command of the plaintiff at the time of issue, and as until then he cannot know the nature of the defense, the law gives him the right to one adjournment to a time fixed by the justice, not more than eight days, if he applies for it on the return of the summons or at the time of joining issue without process, and, if requested by the defendant, makes oath that he cannot

On application of the plaintiff.

for want of some material testimony or witness, specified by him, safely proceed to trial. Vol. 1, p. 32, § 2960. This oath may be made by the plaintiff or his attorney. *Ib.*

The plaintiff is entitled, as a matter of right, to one adjournment, at the time of joining issue, provided he complies with this statute. *Ib.*; *Nellis v. McCarn*, 35 Barb. 115. It is not necessary that the plaintiff should state, in terms, that the absent witness is material, if he states that he cannot safely proceed to trial without him. Or at any rate if that statement is material, the objection will be waived if the opposite party does not object on that account, nor examine the plaintiff on that point.

A plaintiff cannot, as a general rule, have more than one adjournment on his own motion. The exceptions to this rule will be noticed hereafter. The rule which denies the plaintiff a right of adjournment at any other time than the one mentioned is enforced quite strictly by the courts.

It is not important on whose motion the first adjournment is granted, for, whether it is done by mutual consent, on the motion of the plaintiff, or on motion of the defendant, neither contingency will authorize a further adjournment in behalf of the plaintiff.

The practice under the old statutes and under those now in force is the same. In one case issue was joined on the return of process, and the cause was adjourned for trial, and the plaintiffs appeared, but the defendant did not appear, on the adjourned day; and the plaintiffs stated to the justice, that they and the defendant had agreed to adjourn the cause until the defendant should be further notified, and that they had notified the defendant for a day, which was specified. The plaintiffs also made oath, that they could not safely proceed to the trial of the cause, for the want of a material witness who resided at a distance. The justice then adjourned the cause to the day specified, at which time the plaintiffs appeared, but the defendant did not appear, and the plaintiffs recovered judgment, which was reversed on the ground that the justice had no authority to adjourn the cause a second time, on the motion of the plaintiffs. *Proudfit v. Henman*, 8 Johns. 391.

In another case issue was joined on the return day of a summons, and the cause was adjourned by consent, and on the adjourned day, the parties appeared, and the plaintiff asked for a further adjournment, and made oath that a material witness had been subpoenaed, but that he did not attend. The defendant objected to a further adjournment, but the justice granted it for six days; at the expiration of that time, the defendant did not appear, but the plaintiff did, and he then proceeded,

On application of the plaintiff.

and took a judgment against the defendant, which was reversed for erroneously granting this adjournment. *Payne v. Wheeler*, 15 Johns. 492. And see *Bailey v. Delaplaine*, 1 Sandf. 11; *Horton v. Auchmoody*, 7 Wend. 200. If the defendant expressly consents, the justice may grant any number of adjournments to a plaintiff. So if a defendant is present, when a second or further adjournment is asked by the plaintiff, and no objection is made, such silence will be construed into an acquiescence that the adjournment may be made. *Kilmore v. Sudam*, 7 Johns. 529. When a material witness for the plaintiff is not within the county where the action is pending or within an adjoining county, the plaintiff may apply for and obtain a commission to examine the absent witness, as will be more fully explained hereafter. A plaintiff who has applied for and procured the issuing of such commission is entitled to one or more adjournments of the trial as may be necessary to procure the execution and return of the commission, not exceeding the length of time for which the trial might be adjourned upon the application of the defendant. Vol. 1, p. 37, § 2983.

No affidavit is necessary to enable a plaintiff to procure an adjournment of the trial pending the return of a commission, as the fact that the commission has not been returned can be positively known only by the justice to whom it must be addressed. The object of proof by affidavit is to apprise the justice of facts upon which he may properly act in granting or denying an application made by a party, and it would be an idle ceremony for a party to present to the justice an affidavit based upon information derived from the justice himself, as a ground for the judicial action of that officer.

The plaintiff cannot be required to furnish security as a condition of granting an adjournment. But if the defendant requires it the plaintiff may be required to make the statutory proof of the necessity of the adjournment. The proof furnished need not be in the precise language of the statute, if it plainly imports all that the statute requires. *Nellis v. McCarn*, 35 Barb. 115. It may be furnished in the form of an affidavit, or the plaintiff or his attorney may be sworn by the justice, and the substance of the oral testimony entered in the minutes of the justice. The oath administered on an application for an adjournment may be in the following form :

Oath on Application.

You do swear that you will true answers make to such questions as may be put to you in relation to an adjournment of the trial of the ac-

On the first application of the defendant.

tion now pending before me in which (John Doe) is plaintiff and (Richard Roe) is defendant.

After the administration of the oath, the justice or the defendant may examine the witness as to the matters required by the statute to justify an adjournment. The plaintiff cannot be required to state what he expects to prove by the absent witness, nor to give the substance of the testimony which he expects to produce on the adjourned day, nor can he be required to furnish any reason or excuse why the testimony or the witness could not be produced, or was not produced, on the return of the summons.

If an affidavit is substituted for the oral testimony of the plaintiff it may be in the following form.

JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.
--

} Before JOHN JONES, Esq., *Justice*.

COUNTY OF SARATOGA, ss.:

John Doe, being duly sworn, says that he is the plaintiff in the above-entitled action; that David Smith is a material witness for deponent upon the issues of said action; that said Smith is not in attendance before this court; and that without the presence and testimony of said witness, deponent cannot safely proceed to trial.

JOHN DOE.

Subscribed and sworn to before me, {
 this 15th day of June, 1882. }

JOHN JONES, *Justice of the Peace*.

§ 4. **On the first application of the defendant.** Applications for an adjournment are most frequently made by the defendant. He is not presumed to know what cause of action he is sued upon until the plaintiff has made his complaint, and therefore cannot be expected to be ready with his witnesses to meet any cause of action which may be alleged against him. On the other hand, he may have no meritorious defense to the action; or, if he has, he may have the means of evidence at his command at the time of the return of the summons. The statute, therefore, provides that at the time of the joinder of issue the justice *must*, upon the application of the defendant, adjourn the trial of the action upon his complying with the following requirements:

On the first application of the defendant.

1. The defendant or his attorney must, if required by the plaintiff or by the justice, make oath that he verily believes that the defendant has a good defense to the action, and that he cannot safely proceed to trial for want of some material testimony or witness specified by him.

2. If required by the plaintiff and the defendant has not been arrested in the action, an undertaking must be given to the plaintiff in behalf of the defendant, executed by one or more sureties, approved by the justice, to the effect that if the plaintiff recovers judgment in the action, and if, before the expiration of ten days after the plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns or in any way disposes of any part of his property, liable to levy and sale by virtue of an execution, except for the necessary support of himself or his family, and if an execution upon the judgment is returned wholly or partly unsatisfied, the sureties will, upon demand, pay to the plaintiff the sum due upon the judgment. Vol. 1, p. 32, §§ 2961, 2962, This undertaking need not be given in an action to recover a chattel. *Ib.*

Where the defendant has been arrested the trial must be adjourned upon his application, upon the same terms and in the same manner, except that the undertaking, above described, need not be given. If, however the defendant desires to be discharged from custody pending the adjournment, he must give an undertaking to the effect and in the manner heretofore pointed out in the chapter relating to arrest. See *ante*, 173 ; vol. 1, p. 32, § 2963.

In either case the adjournment must be for such a reasonable time fixed by the justice as will enable the defendant to procure the testimony or witness. *Id.*, § 2961.

When the application is made at the joining of issue, the defendant need not show that he has used diligence to procure his witnesses or his evidence, nor need he disclose what he expects to prove by his absent witnesses. The first adjournment on motion of the defendant may be for any time not exceeding ninety days. In determining the length of time for which the cause should be postponed, the justice must exercise his best judgment upon all the circumstances which are disclosed upon the application. If the parties live at a very great distance from the justice, so that it is not convenient for them to attend frequently, and it is probable that the desired witness cannot be procured on a short adjournment, it will be advisable to adjourn to such time, not exceeding ninety days, as will render it probable that the attendance of the witness may be secured at the time to which the cause is postponed. It ought, however, to be a case in which a witness

On the first application of the defendant.

is clearly a material one, and in which his attendance cannot be procured at an earlier day, to induce a justice to delay the trial so long, especially if the plaintiff is unwilling to assent to the arrangement. So much is left to the discretion of the justice in relation to the length of time for which a cause may be adjourned within the statutory limits, that no general rules can be given which will be applicable to every particular case. This discretion has been given for the express purpose of enabling a justice to protect the rights of the parties, and to see that justice is done to all concerned.

There are two classes of cases which will frequently come up for adjudication. One of them is when a defendant has no substantial or meritorious defense, and he desires to postpone the cause for the mere purpose of delay. This the law disapproves by requiring the defendant, on the request of the defendant or the justice, to make oath that he verily believes that he has a good defense to the action. This was not required under the Revised Statutes, except in actions commenced by warrant. The other class of cases is when a plaintiff is prepared for trial, but the defendant is not, and the plaintiff desires to press the cause on to an early trial. A plaintiff may have several reasons for taking this course: He may consider his claim a just one, and the defense unjust and unfounded, or he may have witnesses whose attendance he may not be able to procure at a distant day, or he may wish to avoid the expense and delay of several adjournments. But it is sometimes the case that a plaintiff desires to obtain an unfair and unjust advantage over a defendant who has a full and meritorious defense upon the merits, if his evidence is attainable, but whose witnesses cannot be procured without a long adjournment. Such reasons and motives will prompt a plaintiff who is prepared for trial to press the cause on to an early trial as against his opponent who is unprepared.

The justice, however, must look at both sides of the question, and so dispose of the matter as to secure the just rights of all the parties so far as that can be done. A plaintiff may urge an unjust claim as earnestly as a just one. And if the defendant has a legal defense to an unjust demand, he ought to have every reasonable facility for establishing his defense. So there are also unjust defenses which are improperly interposed. The law permits a defendant to raise such issues as he chooses, if the grounds of defense are such that if true they would be a legal bar to the plaintiff's right of action, or if they would abate an action in the form, or at the time at which it was brought. The truth or the falsity of a defense is a matter to be established at the trial. And it is not generally the case that a justice can determine

On the first application of the defendant.

what the merits of the action or defense are, upon a mere motion to adjourn the cause for the purpose of preparing to try that precise question. It is true that the circumstances which transpire on the application for a postponement sometimes indicate the probabilities of the result of the trial, if the cause was tried upon such evidence as may then be disclosed. But it is rarely the case that a defendant is willing, or that he is legally bound to disclose all the evidence upon which he relies to establish his defense. And all that a defendant need establish is, that he has a good defense and has material evidence which is necessary to his defense, unless the application is made at a time subsequent to the joining of issue, when other facts must be shown.

After an issue has been joined in the action there can be no adjournment on the application of the defendant without the statutory oath, if that is required by the justice or by the plaintiff. *Lynsky v. Pendegrast*, 2 E. D. Smith, 43; *Peck v. Andrews*, 32 Barb. 445. No mere statement of the defendant or his attorney will take the place of the proof required by the statute. *Edwards v. Drew*, 2 E. D. Smith, 55. So the defendant cannot have an adjournment without giving the undertaking, if that is required by the plaintiff. *Belshaw v. Colie*, 1 E. D. Smith, 213; *Peck v. Andrews*, 32 Barb. 445. The plaintiff may waive the right to the undertaking if he chooses, and this waiver may be express or implied. If the adjournment is opposed on the ground of insufficiency of the proof, and no objection is made on the ground that the undertaking is not furnished, the justice may treat the matter as a waiver of the undertaking. *Richardson v. Brown*, 1 Cow. 255. Where the defendant is a man of undoubted responsibility it is not usual to require an undertaking to be given. But the plaintiff may insist upon the undertaking if his demand is made at any time before the adjournment is actually granted. If he requires the defendant to give the undertaking and the justice adjourns the cause on the defendant's application without requiring it, it will be error. *Peck v. Andrews*, 32 Barb. 445.

The defendant need not join in the execution of the undertaking, and a single surety will be sufficient if satisfactory to the justice. The sureties must be approved by the justice, and the undertaking must be acknowledged by the person or persons executing it, and the usual affidavit of justification by the surety or sureties must be annexed to the instrument. Vol. 1, p. 32, § 2961; id., p. 124, §§ 810-812.

The form and requisites of an undertaking given by a defendant who has been arrested in the action will be found on a preceding page. See *ante*, 173.

On the first application of the defendant.

When no order of arrest has been issued the undertaking may be in the following form :

Defendant's undertaking on adjournment — No arrest.

JUSTICE'S COURT.

Daniel McDougall <i>agst.</i> Edward Whitfield.	} Before EUGENE HORTON, <i>Justice.</i>

The defendant having applied for an adjournment of the trial of this action, defendant not having been arrested in the action, the plaintiff having required that defendant give to him the undertaking required by law in such cases :

Now, therefore, we, Edward Whitfield, defendant, and John J. Astor and Stephen Girrard, his sureties, do hereby jointly and severally undertake to the plaintiff that if the plaintiff recovers judgment in the action; and if, before the expiration of ten days after the plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns, or in any way disposes of any part of his property liable to levy and sale by virtue of an execution, except for the necessary support of himself and his family, and if an execution upon the judgment is returned wholly or partly unsatisfied, the said sureties will, upon demand, pay to the plaintiff the sum due upon the judgment.

Dated the 16th day of June, 1882.

EDWARD WHITFIELD,
JOHN J. ASTOR,
STEPHEN GIRRARD.

STATE OF NEW YORK, }
County of , } ss.:

On this (16th) day of (June) 1882, before me, the subscriber, appeared Edward Whitfield, John J. Astor and Stephen Girrard, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

EUGENE HORTON, *Justice of the Peace.*

STATE OF NEW YORK, }
County of , } ss.:

John J. Astor and Stephen Girrard, being severally sworn, each for himself says, the said John J. Astor, that he is a householder of the

On the first application of the defendant.

county of in this State, and that he is worth the sum of (*double the amount of the plaintiff's claim*) dollars over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Stephen Girrard for himself, says that he is a householder of the county of in this State, and that he is worth the sum of (*double the amount of the plaintiff's claim*) dollars over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

JOHN J. ASTOR,
STEPHEN GIRRARD.

Severally subscribed and sworn }
to before me, this 16th day of }
June, 1882. }

EUGENE HORTON, *Justice of the Peace.*

I certify that I approve of the sureties in the foregoing undertaking.

EUGENE HORTON, *Justice of the Peace.*

The defendant's affidavit to procure an adjournment at the time of the joinder of issue may be in the following form:

Affidavit for adjournment.

JUSTICE'S COURT.

Daniel McDougall	} Before EUGENE HORTON, <i>Justice.</i>
<i>agst.</i>	
Edward Whitfield.	

COUNTY OF , ss.:

Edward Whitfield, being duly sworn, says that he is the defendant in the above-entitled action; that he verily believes that he has a good defense thereto; but that he cannot safely proceed to the trial thereof for want of a material witness, namely, John Doe.

And deponent further says that he is informed and believes that the said John Doe is temporarily absent from this State, and is now in the State of Kansas, but will return to this State and county on or about the first day of August next, at which time deponent expects to be able to procure the attendance of said Doe as a witness for the defense if the trial of this action is adjourned to that time. That the source of deponent's information and the grounds of his belief are statements made to deponent by Mary Doe, wife of said John Doe, to the effect that her husband left this county on or about the first of the present month for the purpose of buying cattle in the State of Kansas, and

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would return home during the last week in July. That deponent was unable to obtain her affidavit as to the facts in relation to her husband's absence and expected return in time for this application.

(*Jurat.*)

(*Signature.*)

The clause in the form above given as to the absence of the witness and the probable time of his return may of course be varied to meet the requirements of the case. No such clause is required by the statute, but when the defendant desires a long adjournment, there should be some fact stated in the affidavit from which the justice can determine what will be a reasonable time to enable the defendant to procure the attendance of the absent witness so that he may fix the length of the adjournment accordingly, and avoid the necessity of a second adjournment.

Instead of making proof by affidavit, the defendant may be sworn, and may then state orally the necessary facts, either voluntarily, or in answer to questions put to him by the justice, or the plaintiff. The form of the oath may be found on a preceding page.

When the defendant has made the proof, and given the undertaking prescribed by the statute, his right to an adjournment is absolute, and the justice should then fix the time for trial according to the circumstances of the case known to him, and enter the fact in his docket-book that he adjourned the cause, on the application of the defendant, to a time specified.

§ 5. **Second or further adjournment.** A defendant is entitled to a second or subsequent adjournment of the trial of the action upon giving such security and furnishing such proof of its necessity as the statute requires. There is a material difference between an application by a defendant for a first adjournment and an application for a further or subsequent one. On the first application at the joining of issue no diligence in procuring witnesses or evidence need be shown, since the law does not require any effort to be made to procure witnesses until the cause is at issue, so that each party may know what evidence will be material on the trial. On such application the defendant must "make oath," if so required, that he cannot safely proceed to trial for want of some material testimony or witness, specified by him; while on the second application he must "prove" this fact by his own oath or otherwise, "to the satisfaction of the justice," and also the further fact that he has used *due diligence* to obtain the testimony or witness. Vol. 1, p. 33, § 2965.

The defendant may have material evidence or witnesses, but if he

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has taken no steps to procure such evidence or witnesses on the trial, it is his own folly, and he must abide by the consequences which result from such negligence. A party may neglect to use due diligence because he is ignorant of the statutory requirements. But this is not a legal answer to the objection that there has been a neglect to comply with the law. Every man is presumed to know the law, and if he does not, he must submit to the inconveniences which his ignorance imposes. The law requires every person to act with promptness in legal proceedings, or to submit to such consequences as may follow neglect. And, therefore, the statute requires a defendant to show that he has used due diligence in preparing for trial, as a condition to granting a second or further adjournment. What is due diligence is a matter which depends upon circumstances. In some cases certain acts would clearly be using due diligence, while under other circumstances the same acts would be construed to be gross carelessness and neglect.

If at the time of joining issue, or if at any time before there is an opportunity to subpoena a material witness, he is absent and beyond the reach of such subpoena, and this is well known to both parties, or to the defendant, and such witness is to remain absent for a specified time, but will return in time to try the cause before the expiration of the ninety days fixed by law, the law will not require the defendant to do more than to show these facts to entitle him to an adjournment. And whenever it appears that no diligence would secure the attendance of an absent witness before a particular time which has not yet elapsed, nothing more is required than to show that the defendant has taken prompt action in ascertaining whether the witness could be procured. So if a witness is dangerously sick, so that he could not possibly be procured as a witness on the adjourned day, it will not be necessary to subpoena such witness, even though he may be within reach of the subpoena. In such cases the court is governed by the principle that impossibilities are not required. And whenever it appears that the defendant has taken the most effective means, or such reasonable means as may be in his power, to procure his witnesses, that will be due diligence. Good faith and an honest and practical effort to be ready for trial is what the law demands, and when this is shown the law will be satisfied. But when a witness might readily have been subpoenaed in due time, and this has been neglected, or when a defendant takes no steps whatever to prepare for trial, or when he commences to act so late a day that his efforts are unavailing, when an earlier and a reasonable attention to the matter would have secured the attendance of his witness, he cannot be said to have used due diligence. Still a defendant

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may sometimes have a reasonable excuse for his delay. He may have made reasonable inquiries, and have failed to ascertain the existence of facts which subsequently came to light, or he may have received erroneous impressions from mistaken or false representations made by others to whom he has properly applied for information as to facts of which he himself had no knowledge. In such cases, the justice will determine whether the acts done are not due diligence within the intent and meaning of the statute. And if he is satisfied that the defendant has thus used due diligence, it is always better to grant the adjournment upon such terms as may be just to both parties. The extreme views which will usually be urged are two in number. One side will insist that the utmost possible diligence must be observed, while the other side will claim that any convenient acts which he may have done are sufficient to constitute due diligence. Neither of these extreme views are such as the law contemplates, and neither of them will be apt to receive the sanction of an intelligent justice. See *Powers v. Lockwood*, 9 Johns. 133; *Easton v. Coe*, 2 id. 383.

The proof that the defendant cannot safely proceed to trial for want of some material testimony or witness, and that he has used due diligence to obtain the testimony or witness, may be made by the oath of the defendant, *or otherwise*, which means by any competent legal proof of the facts. The proof must be made "to the satisfaction of the justice," which means a legal satisfaction—a conviction brought about by means that are fit and ought to produce conviction in the mind acting judicially, and not an arbitrary or capricious conviction. He may no more be satisfied by that which the law will deem inadequate to produce conviction, than he may withhold his satisfaction when that proof is produced to him which the law will say he ought in reason to be satisfied with. *Folliard v. Wallace*, 2 Johns. 395; *People v. Sutherland*, 81 N. Y. 1. See *ante*, 117.

Nothing is more common, upon an application for a second adjournment, than for the plaintiff to insist that the defendant shall disclose the facts which he expects to prove by the absent witness or witnesses. The plaintiff never has the right to require this to be done. The only case in which this can properly be required is where the circumstances show that the application is not an honest and a just one, and the justice has just suspicions in relation to the good faith of the defendant. A defendant will not be permitted to trifle with the rights of a plaintiff, nor to impose upon a court of justice by obtaining useless and harassing adjournments. And when the facts fully convince a justice that an application is made for such a purpose, he may require the de-

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fendant to state on oath, or otherwise, what facts he expects to prove by such absent witness or witnesses. An examination upon that point need not be carried further than to show that the grounds of the application are well founded. And a justice ought never to permit a defendant who is acting in good faith to be compelled to disclose his whole evidence on such an examination. To tolerate such a practice would give a plaintiff an unfair advantage, since he would then know the evidence on both sides of the case, with the superior advantage of the right to open and close the case to the jury.

Where an application was made for a commission to take the evidence of a witness who was not a resident of this State, and the materiality of the witness was positively sworn to, it was held that the applicant was not bound to state what he expected to prove by the absent witness, and a refusal to issue the commission was held to be a sufficient ground to reverse the judgment obtained by the opposite party. *Eaton v. North*, 7 Barb. 631. The application is usually made orally, and the proof made by swearing the party or his witnesses as to the facts of the case. The application may, however, be made upon proper and sufficient affidavits. But when the affidavits are defective, or the application is evidently made in bad faith, the justice may require the applicant to be examined orally on oath.

In such cases, if the defendant refuses to be sworn, and to state what facts he expects to prove, the justice may deny the adjournment. *Onderdonk v. Ranlett*, 3 Hill, 323; *Irrroy v. Nathan*, 4 E. D. Smith, 68; *Bush v. Weeks*, 24 Hun, 545. The defendant's good faith in making the application is a proper subject of inquiry by the justice. If made in good faith, and upon sufficient grounds the application should be granted. It is then a matter of right. If made in bad faith it should be denied. And if the circumstances attending the application are suspicious, and the proof raises just doubt as to the good faith of the party making it, the granting or denying of the application becomes a matter of discretion, which will be reviewed on appeal only in a clear case of abuse. *Ib.*; *Weed v. Lee*, 50 Barb. 354; *Burgett v. Lee*, 4 Lans. 193. The plaintiff may oppose the application for an adjournment upon the insufficiency of the proof presented by the defendant, or he may introduce evidence showing that the application is not made in good faith, and is groundless. *Weed v. Lee*, 50 Barb. 354. The right of the justice to receive such evidence is undoubted. *Ib.*

So, in some cases, an admission by the plaintiff will dispense with the necessity for an adjournment. In one case the plaintiff agreed to admit what was expected to be proved by a specified absent witness, and the

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statement was reduced to writing by the justice, and the defendant acceded to this agreement. But he subsequently refused to abide by it, and demanded an adjournment, which was refused by the justice, and this was held to be proper. *Brill v. Lord*, 14 Johns. 341; *Brooklyn Oil Works v. Brown*, 38 How. 451, 453. The admission, however, must be that the facts stated are true, for it will be no answer to the application to say that the absent witness will testify to the proposed state of facts. *People v. Vermilyea*, 7 Cow. 369.

It sometimes happens that a justice is in doubt whether the facts proved are sufficient, or whether the application for an adjournment is made in good faith. In all such cases, the safer rule will be to grant the application, because the inconvenience of a brief delay will generally be the principal consequence which will result from granting the motion; while a denial of the motion might deprive a defendant of important evidence.

When the case is one on which the decision of the justice is final, whether he grants or refuses an adjournment, on the ground that the decision is one of fact upon all the evidence, it is frequently the case that a justice may impose reasonable terms upon the defendant as a condition of granting his request.

If the adjournment of the cause will deprive the plaintiff of evidence or witnesses who are then present in court, but who will be absent at the adjourned day, the justice may require the defendant to stipulate in writing that the plaintiff may have an adjournment if that becomes necessary in consequence of granting the defendant's application.

Such a stipulation is valid, and it is binding upon the party who gives it, and it ought to be fully enforced by the court, whenever a case arises in which justice requires the enforcement of it. In one case the parties agreed before the justice, on the return day of a warrant, that the cause might be adjourned for three days, and that if one S. Y., a witness whom both parties wanted, should not attend at the adjourned day, that then the justice might adjourn for such reasonable time as he might deem necessary, in order to procure the attendance of S. Y. On the adjourned day S. Y. did not attend, and the plaintiff made oath of the absence of S. Y., and asked a further adjournment, for the purpose of obtaining his attendance. The defendant objected to an adjournment, but the justice granted it for seven days; at this adjourned day the defendant did not appear, and judgment was rendered against him, which was affirmed by the Supreme Court. The court said: "Here was a valid and binding agreement between the parties, which neither had a right to rescind without the consent of the other. By this they

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had authorized the justice to adjourn. It is to be presumed, that had it not been for the agreement, an application would have been made and granted, on the return of the warrant, to adjourn for a longer time than three days. The oath of the plaintiff was merely to satisfy the justice that it was proper to exercise the power given by the agreement." *Richardson v. Brown*, 1 Cow. 255.

It must be remembered, however, that when a defendant makes a clear and plain case for an adjournment as a matter of right, no such stipulation can be properly required, since the law gives him an adjournment in that event, without any qualifications or conditions except such as the statute imposes. But, in those cases in which a clear case is not made out, the justice may frequently impose this condition in a manner which is at once legal and just to both parties. The stipulation need not be reduced to writing; but it will be advantageous to do so, since in that case there can be no dispute as to the fact of the agreement or as to its terms. And see *Staples v. Parker*, 41 Barb. 648.

It may be in the following form:

JUSTICE'S COURT.

A. B., plaintiff, <i>agst.</i> C. D., defendant.	}	Before E. F., Esq., <i>a Justice of the Peace of the town of New Scotland.</i>
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ALBANY COUNTY, ss.:

Whereas I, the defendant, C. D., have this day made application for an adjournment of this cause from the 13th day of December, 1864, to the 20th day of December, 1864, at 10 o'clock, A. M., at the office of the said Justice E. F., in the town of New Scotland: Now, in consideration that the said cause shall be adjourned on my motion and at my request now made, I do hereby stipulate and agree that a further adjournment shall be granted to the said plaintiff, for such time as to said justice shall seem proper, if such adjournment shall be necessary and if satisfactory proof of such necessity shall be made before the said Justice E. F., on the said 20th day of December, 1864.

Dated *December* 13, 1864.

C. D., *Defendant.*

After the execution of this agreement it should be left with the justice. And if, on the adjourned day, the plaintiff is not able to proceed safely with the trial, after due diligence to have his evidence and witnesses there, the justice ought to grant a further adjournment to the

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plaintiff, upon due proof of the absence of material evidence or witnesses, and of due diligence in attempting to procure them at the trial. The agreement or stipulation need not be in the precise form of the precedent given ; it may be varied according to the circumstances of the particular case, and in a proper case it may be an absolute agreement to adjourn upon the happening of some specified event, as, for instance, the absence or illness of a specified witness. This being an adjournment by the consent of parties, they may limit the time of adjourning to ninety days, or they may extend it beyond that time, if they so agree. And the agreement ought to state whether the further adjournment is to be for a specified number of days, and if so, that number ought to be stated ; or the agreement may leave the time to be fixed by the discretion of the justice.

There are other ways by which the plaintiff may have the benefit of the testimony of witnesses present at the time of the application, without stipulating for a further adjournment. The Code provides that upon granting the defendant's application for an adjournment, where the trial has been once adjourned, or where the plaintiff is a non-resident of the county, the justice may in his discretion, upon the plaintiff's application, direct that any witness on the part of the plaintiff, who is then in attendance, be then examined under oath before the justice. Thereupon the testimony of the witness must be reduced to writing, certified by the justice, and retained by him, to be read upon the trial with the same effect, and subject to the same objections, as if it was then given orally by the witness. Vol. 1, p. 33, § 2966. This provision of the statute removes many of the hardships which an adjournment of a trial necessarily imposes upon the plaintiff, and also tends to answer one objection frequently urged why an adjournment shall not be had. The statute applies to all second or further adjournments without regard to the party or person instrumental in procuring the first adjournment ; and it also applies to all adjournments where the plaintiff is a non-resident of the county.

A defendant who has given an undertaking upon a former adjournment need not give a new undertaking upon procuring another adjournment, unless it is required by the justice or by the sureties in the former undertaking. If no undertaking was given upon the first adjournment, and the plaintiff requires one upon the second or further adjournment, or if the defendant has given an undertaking, and the justice, or the sureties in that instrument, require that a new one be given, the defendant must furnish a new undertaking, to the same

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effect, and executed in the same manner, as if given upon a first adjournment. Vol. 1, p. 33, § 2965. See *ante*, 353, 354.

An undertaking is never required of a plaintiff upon an application for an adjournment. A plaintiff may be entitled to one or more adjournments upon the trial, or even before the trial. If a commission has been granted upon his application, he is entitled to as many adjournments of the trial as may be necessary to procure the execution and return of the commission, not exceeding the length of time for which a trial might be adjourned upon the application of the defendant. Vol. 1, p. 37, § 2983. So where a defendant has amended his answer after issue joined, or has pleaded over after the decision of a demurrer, the plaintiff may have an adjournment of the trial upon making the proper proof. Vol. 1, p. 27, § 2944. So he may have an adjournment upon the trial pending the return of a warrant of attachment against a defaulting witness. Vol. 1, p. 33, § 2967. But with these exceptions the right of a plaintiff to an adjournment upon his own application is limited to the day of issue.

The proof entitling a defendant to a second adjournment may be in the form of an affidavit, or of oral testimony given before the justice under oath. The oath usually administered to the witness has been given on a preceding page. *Ante*, 349.

After this oath is administered, the person sworn may be examined in relation to such matters as will show the necessity for an adjournment. When the party himself is sworn, he usually states the absence of his witness, his materiality, and the probability of his attendance at the adjourned day.

It is quite usual for the opposite party to examine the person sworn, somewhat in the manner of a cross-examination.

But this is a matter which rests in the sound discretion of the justice. He may permit such cross-examination, or if he is satisfied that an adjournment ought to be granted, he may dispense with any further examination, since the whole object of introducing proof is merely to satisfy the justice, by legal proof, of the propriety of granting an adjournment.

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Form of affidavit for an adjournment.

JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.	}	Before A. B., Esq., <i>a Justice of the Peace of Water-</i> <i>vliet, in Albany county.</i>
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ALBANY COUNTY, ss. :

Richard Roe, being duly sworn, says, that he is the defendant in the above-entitled action ; that C. D. and E. F. are material witnesses to the defense of this deponent, and that, without the testimony of each of said witnesses, he cannot safely proceed to the trial of said action. Deponent further says, that C. D., one of the said witnesses, resides out of the county of Albany, or of any adjoining county, and that he resides in the city of Buffalo, in Erie county, N. Y. Deponent further says, that the said E. F. is a resident of the county of Albany, and that he is at present absent from the county of Albany, as defendant is informed and verily believes, and that said E. F. is now in the city of New York ; that issue was joined in this action on the 14th day of December, 1864, and on the same day the cause was adjourned, by consent of parties, to the 22d day of December, 1864, for trial ; that on the said 14th day of December this deponent procured a subpoena from A. B., the justice before whom the said action is pending, and that on the same day and immediately after receiving said subpoena, this deponent went to the residence of the said E. F., for the purpose of subpoenaing him as a witness on the trial of said action ; that deponent was unable to find the said E. F., and was then and there informed by the wife of said E. F., that he had, on the 13th day of December, 1864, left the city of Albany to go to the city of New York, to attend to business which would require his absence from Albany, and his attendance in the city of New York, until the 1st day of February, 1865 ; but deponent was unable to obtain her affidavit to these facts ; that New York is not in Albany county, nor in any county adjoining thereto ; that deponent has used due diligence in procuring the attendance of said E. F. as a witness ; and deponent further says, that he expects to be able to procure the attendance of the said witness, E. F., within ninety days from the joining of issue in said cause.

Subscribed and sworn before me, this } RICHARD ROE.
 22d day of December, 1864. }

A. B. *Justice, etc.*

On amendment of the pleadings.

In the precedent just given, the affidavit is made by the defendant in person. But this is not necessary, for if any other person knows facts sufficient to make a proper case, the affidavit may be made by him. So there may be oral evidence given in addition to the affidavits. It is the usual practice to swear the witnesses, and let them state orally the facts which are required to be proved. But in some cases the defendant may be at a great distance from the justice's office, or he may be absent by reason of illness, and besides that he may be the only person who is able to swear to the facts which entitle him to an adjournment; in all such cases, or others of a similar character, the justice ought to act upon the affidavit when presented on an application made by the attorney or agent of the defendant.

The principal thing to be attained is, that there shall be a *bona fide* application for the adjournment, and sufficient legal proof of facts to authorize the justice to grant it.

§ 6. On amendment of the pleadings. When a party amends his pleadings after joinder of issue, or pleads over upon the decision of a demurrer, and it is made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of the amendment or pleading over, an adjournment must be granted. Vol. 1, p. 27, § 2944.

The only condition upon the right to an adjournment in such case is that it shall be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary in consequence of the amendment or pleading over. What is meant by the phrase "to the satisfaction of the court," has been already explained. *Ante*, 117. The justice must be reasonably satisfied by the facts and circumstances presented; and if the party applying for the adjournment was fully advised at the time of joining the issue that the matters embraced in the amendment of the pleading would be insisted upon as an issue to be litigated upon the trial, the justice has the right to consider what took place at the time of joining the issue in deciding whether he is satisfied. For example, if upon the joining of the issue the defendant orally pleads payment and a general denial, and the justice fails to note the defense of payment, telling the defendant that payment can be proved under the general denial, the justice has the right to consider what was said in the presence of the plaintiff in determining his right to an adjournment on a subsequent amendment of the answer by adding the plea of payment. Under such circumstances the plaintiff should meet these facts by an affidavit showing that he has labored under a misapprehension, if such was the case, or should name the witness or

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witnesses, and state the testimony which he relies upon as material to meet the issue made by the amended pleading. *Sherar v. Willis*, 5 Lans. 329. On the other hand, if the amendment of the answer by inserting a plea of payment is a genuine surprise to the plaintiff, and there are no facts in the case of the character above stated, less certainty in proof would be sufficient to entitle him to an adjournment. In that case the affidavit will be sufficient if it states in substance that the plaintiff, in consequence of the amendment, cannot safely proceed to the trial of the cause; that material witnesses are absent, by whom he expects to prove that there has been no payment, as alleged; and that an adjournment is necessary by reason of the amendment. Ib.

In all such cases the justice has a judicial discretion to exercise; and unless he abuses that discretion, his decision will not be disturbed upon appeal. Ib.

§ 7. **Upon the trial.** The amendments spoken of in the preceding section may be made at any time before trial, or during the trial, if substantial justice will be promoted thereby, and, therefore, an adjournment of the trial may be had at that time. So where upon the trial a warrant of attachment is issued to compel the attendance of a witness, who has failed to appear in obedience to a subpoena, the justice may in his discretion adjourn the trial for such a time as he deems necessary for the return of the warrant, not exceeding five days. Vol. 1, p. 33, § 2967. See *Aberhall v. Roach*, 3 E. D. Smith, 345. So when a witness attending before a justice in an action refuses to be sworn or affirmed in the form prescribed by law, or to answer a pertinent and proper question, or neglects or refuses to produce a book or paper which he has been duly subpoenaed or ordered to produce, and the party at whose instance he attended makes oath that the testimony of the witness, or that the book or paper is so far material that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the county jail. Vol. 1, p. 41, § 3001. The justice must thereupon, from time to time, at the request of the party in whose behalf the witness attended, adjourn the trial until the witness testifies, or produces the book or paper required, or becomes a lunatic, or is discharged according to law. Id., p. 42, § 3003. In either of these cases no bond is required by the statute as a condition of the adjournment, and except in the case specified in the preceding section of this chapter, no proof need be submitted to the court for the purpose of obtaining the adjournment, further than that required to procure the attachment or to authorize the justice to commit the witness to the county jail.

Upon the trial.

Except in the cases specified, no adjournment can be had by either party after the trial of a cause has commenced. In ordinary cases, if a party neglects to apply for an adjournment until a jury is impaneled and sworn, the application will be too late, and the justice will not have authority to grant the motion. *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Pollock v. Ehle*, id. 541; *Story v. Bishop*, 4 E. D. Smith, 423; *Aberhall v. Roach*, 11 How. 95; *Fairbanks v. Corlies*, 1 Abb. 150; S. C., 3 E. D. Smith, 582; *Parmelee v. Thompson*, 7 Hill, 77; *Fink v. Hall*, 8 Johns. 437. So, too, an application to adjourn comes too late after the trial has commenced before the justice without a jury. The swearing of a witness in the cause, and his examination partially or wholly, is a commencement of the trial in such a case.

There are cases, however, in which a justice may delay a cause for a short time, even after a trial has commenced, before the justice alone, or when the trial is by jury. And if an important witness is unexpectedly absent, or if a material witness is near the court, and can be procured in a short time, the justice may, in his discretion, hold open the cause a short time for that purpose. In one case a justice held open the cause for two hours after a jury was impaneled, to enable the plaintiff to procure witnesses, and this was held to be within the discretion of the justice. *Pease v. Gleason*, 8 Johns. 409. But this discretion is not an arbitrary one, and if the delay is unreasonable, it will be error. And where a trial had commenced, and the justice held open a cause for twenty hours to enable the defendant to go twelve miles to procure evidence, this was held to be unreasonable. And where the justice proceeded with the trial in this case, in the absence of the plaintiff, at the time fixed for resuming the trial, a judgment in favor of the defendant was reversed. *Green v. Angel*, 13 Johns. 469. And see *Aberhall v. Roach*, 11 How. 95; S. C., 3 E. D. Smith, 345. There are numerous cases in which the law authorizes a justice to hold open the cause for some considerable time. This frequently arises from the necessity of the case, when a jury has been demanded, and a venire issued, as it frequently takes a long time to procure a sufficient number of persons. In such a case the delay is unavoidable, and the delay excusable, even if it happens that the cause must be held open from one day to the next. *Day v. Wilber*, 3 Caines, 134. So, when a justice is engaged in the trial of a cause, he may delay the trial of another cause until the first cause has been disposed of. *Hunt v. Wickwire*, 10 Wend. 102. So, in case a jury disagrees and is discharged, it is proper to issue a new venire, which must be returnable within forty-eight hours, and the cause may be held open in the mean time. Vol. 1,

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p. 43, § 3008. This limitation of time may be waived by express agreement, or by implication arising from the acts of the parties. In one case a cause was tried by a jury on the 14th day of the month, and the jury disagreed and were discharged by the justice, and the justice then proposed to the parties to postpone the cause until the 17th day of the same month, to which neither party made any objection. There was no other consent than this, which was implied by the silence of the parties, and the justice then adjourned the cause until the 17th of the month. The plaintiff appeared on that day, but the defendant did not, and a judgment was rendered in favor of the plaintiff. This judgment was held to be regular, and the judgment valid. *Fiero v. Reynolds*, 20 Barb. 275.

After a trial has been had and the jury is discharged, because of an inability to agree upon a verdict, the defendant cannot insist upon an adjournment as a matter of right. Having once declared himself ready for trial, and having once proceeded to the trial, it is too late to insist that he could not procure his evidence or witnesses before the trial commenced. An action was pending before a justice, and a trial commenced before a jury called by the defendant, and after a partial trial of the cause, it was adjourned on motion of such defendant. On the adjourned day, five only of the jurors appeared, the sixth being absent on account of illness. The defendant refused to try the cause before the five jurors who appeared. He also objected to a new venire, or to having a talesman called. The justice, at the request of the defendant, then dismissed the five jurors. The plaintiff then insisted upon an immediate trial, and requested the defendant to take out a new venire, returnable immediately, which the defendant refused to do, but on the contrary, he made an application for an adjournment for the purpose of procuring the attendance of two witnesses, who resided eight miles from the place of trial, who had not been subpoenaed, nor had any effort been made to procure their attendance. A witness was sworn as to the materiality of the absent persons as witnesses. The justice decided to grant the adjournment on the terms that the defendant pay \$1.75 to the plaintiff, which was the amount of fees payable to material witnesses of the plaintiff then in attendance. The defendant refused to comply with these terms, and the plaintiff insisted upon proceeding immediately with the trial, and he also consented to issuing a new venire returnable immediately. The justice offered to issue such new venire returnable immediately, but the defendant objected to an immediate trial, and insisted that the cause must be tried by a jury, though at a subsequent day. The plaintiff then asked to have the cause tried

Length of the adjournment.

without a jury, which request the justice granted, and the cause was tried without a jury, and the plaintiff had judgment. This was held to be regular and the judgment was affirmed. *Babcock v. Hill*, 35 Barb. 52. It was held that the neglect to subpoena the witnesses named was a want of due diligence, and that the justice would have been justified in refusing an adjournment upon any terms. So, it was also held that the conduct of the defendant amounted to a waiver of a jury, for he had refused to have a venire to obtain a jury on the trial day, although he wished for one for a subsequent day, and this amounted to a refusal to have a jury at the time the cause was tried.

§ 8. **Length of the adjournment.** A trial may be adjourned by consent of parties without limit as to the length of time which will elapse before the day fixed for the hearing.

A justice cannot adjourn a cause upon his own motion for a longer period than eight days. Vol. 1, p. 31, § 2959. An adjournment upon the application of the plaintiff at the time of joining issue cannot exceed eight days, and may be for a less time if the justice deems a short adjournment will serve the ends of justice. Id. 32.

An adjournment upon the application of the defendant at the time of joining issue must be for such a reasonable time fixed by the justice as will enable the defendant to procure the testimony or witness for the want of which the adjournment is necessary, subject, however, to the general limitation hereafter noticed. Ib. The second or subsequent adjournments on the application of the defendant may be for such time as may be necessary to procure the necessary testimony or the attendance of the absent witness, subject to the same limitation. Id. 33. An adjournment after the issuing of an attachment against a defaulting witness may be for such time as the justice deems necessary for the return of the warrant, not exceeding five days. Ib. There is no statutory limit to the length of an adjournment granted in consequence of the amendment of a pleading, or in consequence of the adverse party pleading over upon the decision of a demurrer, further than the general limitation that the trial shall not be adjourned to a time beyond ninety days from the joinder of issue without the consent of both parties. Where an adjournment is had upon the commitment of a witness for a refusal to be sworn or to testify, or to produce a book or paper, there is no statutory limit to the length of time consumed by the successive adjournments other than the ultimate obedience of the witness to the subpoena, his death, insanity, or legal discharge. Vol. 1, p. 42, § 3003.

But as a general rule the trial of an action cannot be adjourned to a

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time beyond ninety days from the joinder of issue without the consent of both parties. Vol. 1, p. 33, § 2967.

To this rule there are three exceptions which are clearly pointed out in the statute cited. It is, therefore, unnecessary to enumerate them here.

§ 9. **Irregular adjournments, or erroneous refusal.** The application for an adjournment must be made at the place at which the process is returnable, or at the place to which the trial has been adjourned. A justice has no right to try a cause in the absence of the defendant at a place different from the place named for his appearance, if the trial proceeds on the return day. *Stewart v. Meigs*, 12 Johns. 417; *Case v. Van Ness*, 1 Johns. Cas. 243. But where both parties have appeared, the justice may adjourn the cause for trial at another place, whether the parties consent or not. *Morrell v. Near*, 1 Cow. 112. In that case, the application must be made at the place fixed for trial if the application is made on the day so fixed for trial.

When an adjournment is sought, there must in every case be an appearance for that purpose by the party who desires the adjournment. This appearance may be in person or by attorney or agent. But there must be an appearance by some one. A cause was adjourned with a provision that if the defendant filed security as provided by the statute, he should have a further adjournment. He filed the security, but neglected to appear at the adjourned day to procure the further adjournment, and judgment was rendered against him on that day. This was held to be a regular judgment. *Muber v. Held*, 3 Abb. 110. The application for an adjournment may be made by the plaintiff in person, or by any attorney or agent in his behalf if duly authorized for that purpose. A justice is bound to permit a duly authorized attorney or agent to make the necessary proof for an adjournment, and a refusal to do so will be an error for which a judgment will be reversed. *Seers v. Grandy*, 1 Johns. 514.

An adjournment cannot be made by a justice in the absence of both parties. In one case issue had been joined, and the cause adjourned to the 20th of May for trial. The justice then left his office, but returned in a short time, when he found a note or written consent upon his table signed by the counsel for the respective parties, authorizing an adjournment to the 18th day of May, instead of the 20th, as agreed. The justice was requested to "note the fact," and he thereupon, in the absence of the parties, adjourned the cause to the 18th of May. On that day the parties appeared, but the defendant refused to proceed with the trial on the ground that the adjournment was irregular, and

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he asked for a further adjournment, promising to waive the irregularity if the adjournment should be granted. This application was refused, and the plaintiff had a judgment which was reversed on account of the irregular adjournment in the absence of the parties, which irregularity was not waived by any act of the defendant. *Weeks v. Lyon*, 18 Barb. 530. In another case, issue was joined on the 15th day of July, and the cause adjourned by consent until the 20th day of the same month. A further adjournment by consent was made until the 15th day of October. On the 10th day of October the plaintiff's agent or attorney went before the justice, and swore that the plaintiff and one of the defendants had both authorized him to appear and adjourn the suit to some day beyond the 1st of January following. The cause was adjourned to the 9th day of January mentioned, when the plaintiff appeared, but the defendants did not appear, and a judgment was obtained by the plaintiff, which was reversed on account of the irregular adjournment. *Deland v. Richardson*, 4 Denio, 95.

In another case, the parties appeared on the return day, at the place mentioned in the process, but the justice did not appear. The justice sent a note, which was not signed, to the person at whose house the process was returnable, adjourning the cause to a subsequent day. On that day the justice and the plaintiff appeared, but the defendant did not, and the plaintiff obtained a judgment which was reversed because of the irregular adjournment. *Wiest v. Critsinger*, 4 Johns. 117. These cases show with what strictness the courts enforce the rule that the justice and the parties, or at least the justice and the plaintiff, must be present in court before a regular and valid adjournment can be made.

The general rule is that an irregular or an illegal adjournment is a discontinuance of the action. The cases relating to this point are very numerous, and some of them will be noticed hereafter, by way of illustrating what constitutes such irregularity. It is proper in this place to correct an erroneous statement frequently made, that an irregular adjournment will render void any judgment which may be subsequently rendered against the party objecting, or non-appearing. This statement is not correct, for the judgment in such cases is merely erroneous, and, therefore, reversible upon an appeal, but it is not void, nor can it be impeached in any manner except by an appeal. *Horton v. Auchmoody*, 7 Wend. 200; *Hard v. Shipman*, 6 Barb. 621; *Humphrey v. Persons*, 23 id. 314; *Stanton v. Schell*, 3 Sandf. 323; *D'Ivernois v. Leavitt*, 8 Abb. 60.

The principle is this, when the justice has once acquired jurisdiction

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of the subject-matter and of the person, he is authorized to proceed with the action, and, though subsequent errors committed by him may render his judgment erroneous, and therefore reversible on an appeal, yet no such judgment will be held to be utterly void. *Ib.* And the justice and the constable who enforce such erroneous judgment will be protected from an action for any acts done before a reversal of the judgment. *Ib.* As illustrative of judgments which are erroneous, but not void, it has been held that a second adjournment in favor of a plaintiff is erroneous. *Horton v. Auchmoody*, 7 Wend. 200; *Proudfit v. Henman*, 8 Johns. 391; *Payne v. Wheeler*, 15 id. 492; *Dunham v. Heyden*, 7 id. 381.

So of a second adjournment by a justice on his own motion, when objection was made. *Gamage v. Law*, 2 Johns. 192; *Kilmore v. Sudam*, 7 id. 529. So where a justice held open a cause for a long time after the trial of the action had been commenced. *Green v. Angel*, 13 Johns. 469; *Story v. Bishop*, 4 E. D. Smith, 423; *Aberhall v. Roach*, 11 How. 95; S. C., 3 E. D. Smith, 345; *Redfield v. Florence*, 2 id. 339. So an adjournment in favor of a defendant, without proof or security, when that course is objected to by the plaintiff, is erroneous. *Peck v. Andrews*, 32 Barb. 445. So an adjournment by the justice in the absence of the parties is erroneous, notwithstanding the parties agreed to such an adjournment in the absence of the justice, provided the parties do not both appear at the subsequent trial. *Kimball v. Mack*, 10 Wend. 497; *Weeks v. Lyon*, 18 Barb. 530; *Deland v. Richardson*, 4 Denio, 95; *Wiest v. Critsinger*, 4 Johns. 117. So where the plaintiff does not appear on the return day, or an adjourned day, the cause cannot be adjourned, but must be dismissed. *Bailey v. Delaplaine*, 1 Sandf. 11; *Norris v. Bleakley*, 3 Abb. 107; S. C., 1 Hilt. 90; *Sprague v. Shed*, 9 Johns. 140; *Green v. Angel*, 13 id. 469. So, although a justice may adjourn a cause when a defendant does not appear on the return day of process, yet he cannot hold the cause open indefinitely. He should adjourn to a day certain, and if he does not, but holds the cause open indefinitely for four days, and then renders judgment against a defendant in his absence, the judgment will be erroneous. *Wilcox v. Clement*, 4 Denio, 160. So, when a commission is issued by a justice for the purpose of taking the evidence of an absent witness, the cause ought to be adjourned to a day certain, and it is irregular to hold open the cause indefinitely for the return day of such commission. *Allen v. Edwards*, 3 Hill, 499.

It does not follow as of course, however, that every erroneous ad-

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journalment will be sufficient cause for a reversal of the judgment. Every person may renounce any benefit which the law has conferred upon him. *Buel v. Trustees of Lockport*, 3 N. Y. 197; *Baker v. Braman*, 6 Hill, 47; *Conkling v. King*, 10 N. Y. 446; Broom's Leg. Max. 444, 547. And, therefore, if the party who might have alleged error in the proceedings chooses to appear voluntarily in the action at a subsequent trial thereof, and to proceed therein without objection, such acts will be a waiver of the irregularity, and the judgment will be regular and valid. See the foregoing cases. But a defendant may appear and offer to proceed with the cause conditionally, but not otherwise, and in that case the condition must be complied with, or there will be no waiver of the previous irregularity. *Weeks v. Lyon*, 18 Barb. 530. The party who procures an irregular adjournment cannot allege that as a ground of error, because no one is permitted to take advantage of his own wrongful acts. *Peck v. McAlpine*, 3 Caines, 166.

So where an adjournment was irregularly granted, but the defendant subsequently confessed judgment, this was held to be a waiver of the error. *Hill v. Downer*, 11 Johns. 461. There may be a waiver of any irregularity which may occur in the proceedings in an action. And this waiver may be express or implied, or it may result from the acts of the parties. And if it is a general rule that a voluntary appearance and participation in the proceedings in an action without objection, after an irregularity committed, will be a waiver of the error and will render the subsequent judgment valid. And it will not make any difference in what manner the party was induced to proceed in the action, if there was no fraud in procuring his attendance, and if he appeared and proceeded in the action voluntarily. And, therefore, the appearance will be regular and the waiver complete, whether such party appeared at the request of the opposite party, or on that of the justice, or voluntarily on his own motion.

PART VI.

EVIDENCE.

CHAPTER I.

GENERAL PRINCIPLES.

SECTION 1. Preliminary view. That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of evidence. When such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

But the parties to an action are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might frequently be brought forward, which would lead rather to error than to truth, the attention of the court or jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, the law has provided certain rules for limiting and regulating the admissibility of evidence. Some of these rules are statutory enactments, but the great majority of them are judicial decisions, which are founded upon convenience and the promotion of justice.

When evidence is offered by either party, on the trial of a cause, it is the province of the justice to decide as to its admissibility, and with this question a jury have nothing whatever to do. It is their duty to weigh and pass upon such evidence as shall be submitted to them, under the decision of the court.

For the finding of a verdict, in every issue, it is essential, in the first place, to know what facts, when proved, will satisfy the issue in point of law; and secondly, to inquire whether such facts have been proved. There are cases in which both questions are submitted to the jury on

the trial of actions in justices' courts. But when the question submitted to them is merely a question of fact, and the court decides the questions of law, the office of the jury is then confined to the questions of fact, and their duty is to ascertain the existence of facts, by means of the judgment which they form of the credibility of witnesses, and by the inferences which they make from the circumstances submitted to their consideration. In relation to proofs, the law provides that the jury shall not be misled or deceived by irrelevant or illegal evidence, by providing rules for its exclusion ; and having done this, the rest is left to the conscience and discretion of the jury. And so strongly is this rule enforced, that it is the settled practice of the courts not to interfere with the finding of a jury upon a question of fact, unless the verdict is manifestly a perverse one, or is the result of fraud or misconduct of some kind, or is clearly contrary to the evidence.

The means which the law employs for investigating a past transaction are those which are resorted to by mankind for similar, but extrajudicial purposes. It rarely if ever happens that a jury, or other tribunal, whose business it is to decide upon a matter of fact, can do so by means of actual personal observation. It is obvious that when inquiry is to be made into the circumstances of a past transaction, before a jury, information must be derived, for the most part, from the same source, and must be judged of and estimated, to a great extent, by the same rules that would be resorted to and applied by an individual whose business or whose interest it was, in the course of human events, to institute such an inquiry. When knowledge cannot be acquired, by means of actual and personal observation, there are but two modes by which the existence of a by-gone fact can be ascertained.

1. By information derived, either immediately or mediately, from those who had actual knowledge of the fact ; or,

2. By means of inferences or conclusions drawn from other facts connected with the principal fact, which can be sufficiently established.

In the first case, the inference is founded on a principle of faith in human veracity, sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and those which are unknown. In each case, the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ. All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had, actual knowledge of the fact, may not improperly be termed *direct* evidence ;

whilst that which is derived merely from collateral circumstances may be termed *indirect* or inferential evidence. It is obvious that the *means* of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.

Evidence may be conveniently divided into two classes: 1st. *Direct*, which consists in the testimony, whether *immediately* or *mediately*, derived from those who had actual knowledge of the principal or disputed fact; or 2d. *Indirect*, or inferential evidence, where an inference is made as to the truth of the disputed fact, not by means of the actual knowledge which any witness had of the fact, but from collateral facts ascertained by competent means.

Direct or testimonial evidence, again, is either *immediate*, that is where a witness states his own actual knowledge of the fact, or *mediate*, where the information is communicated, not immediately by the party who had actual knowledge of the fact, but from him through the intermediate testimony of one or more witnesses.

Competent evidence is such evidence as the law adjudges to be admissible when offered by either party. *Incompetent* evidence is such as is rejected by the law as inadmissible. Competency may relate to the person of the witness offered, or it may relate to the character of the evidence itself. Some persons are by law incompetent to be sworn, and, therefore, they cannot give competent evidence. Again, the law in some cases excludes certain kinds of evidence, and requires some particular character of evidence to render it either admissible or available, as in the case of the statute of frauds, which requires certain agreements to be in writing. Where that statute requires a written agreement, proof of a parol agreement would be incompetent evidence.

So when a contract is reduced to writing, the writing itself is the *competent* evidence of its contents, while parol evidence thereof would be incompetent evidence.

Credible evidence is such evidence as is worthy of belief. In determining what credit is due to a witness, or to particular kinds of evidence, much is left to the discretion of a jury, who must decide that question upon all the circumstances before them.

A witness may be *competent*, and therefore admissible as a witness, while his statements may be utterly unworthy of credit on account of his character. In such a case his evidence is competent, but it is not credible.

Matters judicially noticed, without proof.

Evidence is *relevant* when it bears upon any of the issues to be tried, or when it bears upon any question which is to be determined upon the evidence. Evidence is *irrelevant* when it does not bear upon any such issue or question. Evidence may be relevant and, therefore, admissible, and yet it may be of very little value or importance to the cause.

Cumulative evidence is such as augments or increases in quantity and kind. If six witnesses have sworn in a similar manner in relation to a particular transaction, it would be cumulative evidence to call several others to the same point.

Conclusive evidence is such as does not admit of explanation or contradiction. It is evidence, which, of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. A record, unless impeached for fraud, is an instance of conclusive evidence.

Satisfactory evidence is that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. If evidence is admissible, its sufficiency is always a question for the jury, or a justice when he sits in their place.

§ 2. **Matters judicially noticed, without proof.** There are some things of which every court takes judicial notice without evidence to prove their existence or their extent or validity. Courts are bound to take notice of the existence of all general statutes, *Browne v. Scofield*, 8 Barb. 239; *Methodist Church v. Pickett*, 19 N. Y. 482; *People v. Herkimer*, 4 Cow. 345; and of the rules of the common law, and the decisions of the superior courts, without any proof whatever upon the subject.

Courts also take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto*, by their own government, and of the local divisions of their country into states, provinces, counties, cities, towns, local parishes and the like, so far as the political government is concerned or affected; *People v. Breese*, 7 Cow. 429; *Chapman v. Wilber*, 6 Hill, 475; *Bronson v. Gleason*, 7 Barb. 472; *Hinckley v. Beckwith*, 23 Wis. 328; and of the relative positions of such local divisions, but not of their precise boundaries, further than may be described in public statutes. But courts do not take judicial notice that particular places are, or are not, within particular counties. *Brunt v. Thompson*, 2 Ad. & El. (N. S.) 789.

The courts will take judicial notice of the government surveys of land; *Gardner v. Eberhart*, 82 Ill. 316; *Buchanan v. Whitam*, 36 Ind. 257; *Murphy v. Hendricks*, 57 id. 593; and also of blocks and lots in towns and cities. *Gardner v. Eberhart*, 82 Ill. 316. But the

Matters judicially noticed, without proof.

courts will not take judicial notice of the names of the townships composing a county, where townships are formed by a board of commissioners, and are not created, bounded and named by the legislature. *Bragg v. Rush County*, 34 Ind. 406.

The courts will also take judicial notice of the incorporation of a city or town under a special act; *Hard v. City of Decorah*, 43 Iowa, 313; *Village of Winooski v. Gokey*, 49 Vt. 282; of the charter of a village corporation; *Village of Winooski v. Gokey*, 49 Vt. 282; or of a city; *Stier v. City of Oskaloosa*, 41 Iowa, 353; but not of the incorporation of a city or village under a general act; *Hard v. City of Decorah*, 43 Iowa, 313; nor of the width of the streets or sidewalks of a city, nor of the ordinances of the corporation establishing and defining the same, or prescribing and regulating their limits and extent. *Porter v. Waring*, 69 N. Y. 250. A city court may, however, take judicial notice of city ordinances without further proof. *State v. Lieber*, 11 Iowa, 407.

Courts take judicial notice of acts incorporating cities where the act itself declares that it is a public act; *Bowie v. City of Kansas*, 51 Mo. 454; also of an act relating to the powers of a single municipal corporation, though not in terms declared to be public. *Fauntleroy v. Hannibal*, 1 Dillon, 118. And if the act incorporating a city declares that it is a public act, a supplement to the act will follow the original for the purpose of judicial recognition. *Hawthorne v. Hoboken*, 3 Vroom (N. J.), 172.

The courts will also recognize judicially who are public officers, or officers of the court; *Dyer v. Last*, 51 Ill. 179; such as attorneys; *People v. Nevins*, 1 Hill, 154; or sheriffs, or county or town clerks, or county judges and other public officers, who are elected or appointed, and act under a general statute or law; *Thielman v. Burg*, 73 Ill. 293; and also of the genuineness of their official signatures, and of those of their lawfully constituted deputies. *Himmelmann v. Hoadley*, 44 Cal. 213. But they will not take judicial notice of the signatures of attorneys when the signatures are not part of professional acts, done in the performance of professional duties, as attorneys. *Masterson v. Le Clair*, 4 Minn. 163. And see *Alderson v. Bell*, 9 Cal. 315. The court will also take judicial notice of the fact that a county judge is *ex officio* surrogate of his county, and that the county has not sufficient population to entitle it to a surrogate as an officer acting in that capacity only; *Farley v. McConnell*, 7 Lans. 428; that a certain person is governor of the State, and of the genuineness of his official signature; *Wells v. Jackson, etc., Co.*, 47 N. H. 235; also who are the justices of

Matters judicially noticed, without proof.

the peace of the county in which the court is held where the question of their official character is not directly in issue. *Graham v. Anderson*, 42 Ill. 514.

Courts will also take judicial notice of the various courts established by law, and of the judges presiding over them; *Matter of Hackley*, 21 How. 103; and of the commencement and duration of the terms of the courts. *Rodgers v. State*, 50 Ala. 102; *Pugh v. State*, 2 Head (Tenn.), 227; *Spencer v. Curtis*, 57 Ind. 221; *Dorman v. State*, 56 id. 454; *Davidson v. Peticolos*, 34 Texas, 27. A court will also take judicial notice of its own records; *Robinson v. Brown*, 82 Ill. 279; and of all prior proceedings in cases pending before them. *State v. Bowen*, 16 Kans. 475. But the court will not take judicial notice of the record of another case in the same court, unless it is brought to the attention of the court by being made a part of the record of the case under consideration; *National Bank of Monticello v. Bryant*, 13 Bush (Ky.), 419; much less of another case in a different court. *People v. De La Guerra*, 24 Cal. 73. Nor that the case before the court had some connection with a case formerly decided by it. *Banks v. Burnam*, 61 Mo. 76. State courts do not take judicial notice of proceedings in the Federal courts. *Haber v. Klunberg*, 3 Mo. App. 342.

Judicial notice is also taken of the common and ordinary modes of transacting commercial business; *Bronson v. Wiman*, 10 Barb. 406; S. C., 8 N. Y. 182; of the way in which banks and like public institutions do business; *Agawam Bank v. Strever*, 18 id. 502; of the way that the great railways of the land are managed in the practical running of them; *Slater v. Jewett*, 85 id. 61, 68; of the different classes of notes and bills in circulation at a particular time; *Hart v. State*, 55 Ind. 599; *Lumpkin v. Merrill*, 46 Texas, 51; that gold coin is not used as money in the business of the country, but has become an article of commerce; *United States v. American Gold Coin*, 1 Woolw. 217; that contracts were made in certain Southern States during the rebellion in reference to Confederate currency; *Byford v. Tucker*, 44 Ala. 89; but not of the rules of a board of brokers, unless they are rules or usages of trade and commerce, which would be recognized without their adoption by any particular board or association. *Goldsmith v. Sawyer*, 46 Cal. 209. The courts also take notice of the prominent geographical facts and features of the country; *Mossman v. Forrest*, 27 Ind. 233; that certain rivers are public highways; *Brown v. Scofield*, 8 Barb. 239; *Neaderhouser v. State*, 28 Ind. 257. But our courts do not take judicial notice of foreign laws,

Matters judicially noticed, without proof.

which must be proved like other facts; *Thompson v. Ketcham*, 8 Johns. 189; *Francis v. Ocean Ins. Co.*, 6 Cow. 404, 429; *Lincoln v. Battelle*, 6 Wend. 475; *Dollfus v. Frosch*, 1 Denio, 367; *Monroe v. Douglass*, 5 N. Y. 447; nor do they take judicial notice of the laws of other States, if they differ from the common law. *Hosford v. Nichols*, 1 Paige, 220; *Holmes v. Broughton*, 10 Wend. 75; *Condit v. Blackwell*, 4 Green (N. J.), 193; *Simms v. Southern Ex. Co.*, 38 Ga. 129; *Hoyt v. McNeil*, 13 Minn. 390; *Mobile, etc., R. R. Co. v. Whitney*, 39 Ala. 468; *Shed v. Augustine*, 14 Kans. 282; *Henry v. Root*, 33 N. Y. 526; *Seymour v. Sturgess*, 26 id. 134.

They will, however, take judicial notice of the acts of Congress—*Bayly's Adm'r v. Chubb*, 16 Gratt. (Va.) 284; *Gooding v. Morgan*, 70 Ill. 275; *Mims v. Swartz*, 37 Texas, 13; *Morris v. Davidson*, 47 Ga. 361; *Kessel v. Albetis*, 56 Barb. 362; and of the Constitution of a sister State so far as the jurisdiction of its courts is shown. *Dodge v. Coffin*, 15 Kan. 277; but the courts will not take judicial notice of the journals of the legislature; *Grob v. Oushman*, 45 Ill. 119; nor of the regulations of the canal commissioners; *Palmer v. Aldridge*, 16 Barb. 131; nor of the by-laws of corporate bodies; *Harker v. Mayor, etc.*, 17 Wend. 199; nor of matters which happen to be known to the presiding judge. *Wheeler v. Webster*, 1 E. D. Smith, 1; *Wilkie v. Bolster*, 3 id. 327. But the court may notice the ordinary duration of human life as a scientific fact. *Johnston v. Hudson River R. R.*, 6 Duer, 634. So courts will of themselves notice the meaning of English words, terms of art, legal weights and measures, money, and the ordinary admeasurement of time.

They may take judicial notice that lager beer is a malt liquor. *Adler v. State*, 55 Ala. 16; *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158; that whisky is an intoxicating liquor; *Schlicht v. State*, 56 Ind. 173; *Commonwealth v. Peckham*, 2 Gray, 514; *Egan v. State*, 53 Ind. 162; *Klare v. State*, 43 id. 483. But not that malt liquors are intoxicating. *Shaw v. State*, 56 id. 188; *Commonwealth v. Peckham*, 2 Gray, 514; *Klare v. State*, 43 Ind. 483; nor that wine is intoxicating. *Ib.*

Courts also take judicial notice of matters of public history; *Douthitt v. Stinson*, 63 Mo. 268; *Ashley v. Martin*, 50 Ala. 537; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; and of science and art. Thus, they will judicially notice the art of photography, the mechanical and chemical processes employed, the scientific principles on which they are based, and their results.

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Luke v. Calhoun Co., 52 Ala. 115. See *Cowley v. People*, 83 N. Y. 464, 477.

The court will also take judicial notice of the recurrence of the day on which a general election is held in its own State. *Ellis v. Reddin*, 12 Kans. 306. But not of the time of holding an election in a sister State.

And generally the courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. *People v. Snyder*, 41 N. Y. 397; *Smith v. N. Y. Central R. R. Co.*, 43 Barb. 225; *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174.

§ 3. **Competency of witness.** The common law formerly excluded many persons from being witnesses who are now rendered competent by statute. The changes which have been made in this State, by statute, in relation to evidence, incline to the side of extending the competency of witnesses, leaving their credibility to the jury, or to the court. The practical effect of this is to permit many witnesses to be sworn now who were formerly excluded, and then allowing a jury to pass upon their credibility and giving their evidence such weight as they may deem proper. But it does not follow that a jury should give every witness equal credit, although the statute has rendered them equally competent to be sworn and testify. There is no part of a juror's duty which is more important than that in relation to the estimate which is to be placed upon the credibility of witnesses and the value which should be given to their evidence. The law does not permit any witness to testify unless it is under the obligation of an oath in some form. And for this reason all persons who are incapable of comprehending the nature and obligation of an oath cannot be admitted as a witness. The defect may be permanent or it may be temporary, but while the incapacity exists the witness is incompetent.

Idiots, lunatics or intoxicated persons are not competent, if their condition is such that they do not comprehend the nature of an oath. *Livingston v. Kiersted*, 10 Johns. 362; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865. An inquisition of lunacy found against a person is *prima facie* evidence of his incompetency, unless overcome by evidence of sanity. *Hoyt v. Ade*, 3 Lans. 173.

A justice ought not to permit a witness, who is in a state of gross intoxication, to be either sworn or examined; and in such a case, the justice is to decide the matter on his own view of the witness and his condition. *Hartford v. Palmer*, 16 Johns. 143. In the case just cited, the justice had refused to swear such a witness, and his decision

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was affirmed by the Supreme Court, who said, in relation to the capacity of such a witness: "This principle, necessarily, excludes persons from testifying, who are besotted with intoxication at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have a memory of events, of which they may have had knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts. A present and existing intoxication, to a considerable degree, utterly disqualifies the person so affected, to narrate facts and events in a way at all to be relied on. It would, we think, be profaning the sanctity of an oath to tender it to a man who had no present sense of the obligations it imposed. Indeed, it would be a scandal to the administration of justice to allow, for a moment, the rights of individuals to be jeopardized by the testimony of any man laboring under the beastly sin of drunkenness. * * * * We cannot withhold our approbation of the firmness the magistrate has evinced on this occasion, in refusing to administer an oath to a witness thus circumstanced."

Deaf and dumb persons are sometimes said to be presumed incompetent, and that the burden of showing them competent devolves upon the person who offers them as witnesses. A deaf and dumb witness may be examined by means of signs made with the fingers, yet it is a better mode to let him write his answers, if he is capable of doing so. *Morrison v. Lennard*, 3 Carr. & Payne, 127. So, the witness may be examined by a sworn interpreter, if that course is advisable.

There is no precise age at which children are competent or incompetent. The question of competency is to be determined not by any precise age, but by apparent capacity. *Brown v. State*, 2 Texas App. 115; *State v. Richie*, 28 La. Ann. 327; *Draper v. Draper*, 68 Ill. 17; *Flanagin v. State*, 25 Ark. 92. Children of seven, eight or nine years of age are frequently sworn; and there is so wide a difference in the capacity of children, that many of them are more intelligent at nine years of age than others are at ten or twelve. Children of fourteen are presumed to be competent, and those who are younger than that will be sworn, if they are really competent.

Under the age of fourteen a child will not be presumed to have sufficient understanding to be a witness. *State v. Richie*, 28 La. Ann. 327. But investigation may disclose a sufficient understanding. A child produced as a witness, who understands that he is brought into court to tell the truth; that it is wrong to tell a lie; and that he will be punished if he tells a lie, has sufficient understanding of the obligation of an oath to be competent. *State v. Levy*, 23 Minn. 104. Thus

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where a child nine years of age testified that she understood the nature of an oath, and that if she did not swear the truth she would get into hell-fire, she was held to be competent under the most rigid rule. *Draper v. Draper*, 68 Ill. 17. Even where a child testifies that she does not know what God and the laws of the country would do to her if she swore falsely, but that she will tell the truth, she is not thereby disqualified from testifying. *Davidson v. State*, 39 Texas, 129. And where a child eight years of age testified that she did not know what the Bible was, but believed that she must tell the truth on the stand or be punished hereafter, she was permitted to testify. *Commonwealth v. Carey*, 2 Brewst. (Penn.) 404. And see *Vincent v. State*, 3 Heisk. (Tenn.) 120; *Logston v. State*, id. 414.

When a child is intelligent, the court will permit him to be sworn as a witness, leaving the value of his evidence to the jury. When a child under fourteen years of age is offered as a witness, the justice should examine him, so as to ascertain whether he is competent, provided such a request is made by the opposite party. *People v. McNair*, 21 Wend. 608. If the child is naturally intelligent, but does not fully understand the nature of an oath, the justice may instruct him, by informing him of the moral obligations and of the legal consequences of false swearing. This may be done at the trial, before swearing the witness. Vol. 1, p. 131, § 850.

The admission or rejection of the person as a witness after such examination must depend upon the sound discretion of the court. *State v. Richie*, 28 La. Ann. 327. If the court examines a child to test its competency as a witness and finds it incompetent, it must be a very flagrant case of error to authorize an appellate court to reverse the judgment. *Peterson v. State*, 47 Ga. 524.

The Code provides that "a person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action, or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination upon which he must answer any question, relevant to that inquiry; and the party cross-examining him is not concluded by his answers to such a question." Vol. 1, p. 129, § 832. See *People v. McGloin*, 28 Hun, 150.

Under the former law, few rules exercised a more extensive influence in excluding witnesses than the one disqualifying a witness having an interest in the event of the suit. The old rule, however, no longer exists.

The Code declares "except as otherwise specially prescribed in this

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title, a person shall not be excluded or excused from being a witness by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed or defended." Vol. 1, p. 128, § 828. This provision is a substantial re-enactment of the rule of evidence laid down in section 398 of the old Code. Under that section it was held that a witness could not be excluded for interest in any court and before any person acting judicially except as qualified by the next section relating to evidence of personal transactions or communications with deceased persons. *Tilton v. Ormsby*, 10 Hun, 7. The text of the latter section will be found in a preceding volume. See vol. 1, p. 128, § 829. A careful reading of that section will show that a party in interest, etc., is not incompetent as a witness unless he is called:

First. To testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest; and

Second. Unless the testimony is offered against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise; and

Third. Unless the testimony to be given concerns a personal transaction or communication between the witness and the deceased person or lunatic; nor will it exclude him in any event where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. See *Sweet v. Low*, 28 Hun, 432.

Taking up the subdivisions of the foregoing analysis in their order, we start first with the proposition that section 829 of the Code prevents a person, from whom a party to the action or proceeding derives his title or interest, from being a witness, only when called "in his own behalf or interest, or in behalf of the party succeeding to his title or interest." *Nearpass v. Gilman*, 16 Hun, 121; *Allis v. Stafford*, 14 id. 418; *Church v. Howard*, 17 id. 5; *Carpenter v. Soule*, 88 N. Y. 251. And see *Richardson v. Warner*, 13 Hun, 13, 17.

Thus, where an action is brought by the administrators of a deceased person against the maker of a note held by the deceased at the time of his death, a person who transferred the note to the plaintiffs' intestate by indorsement, but who has never been charged as indorser, is a competent witness for the defendant to prove declarations made by the

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deceased that the note in suit had been paid. *Nearpass v. Gilman*, 16 Hun, 121. So a person who signed the notes for the defendant as his agent is a competent witness for the defendant in such action to prove payments made by him to the deceased in his life-time. *Nearpass v. Gilman*, 16 Hun, 121. So where the payee of a promissory note is dead, and an action has been brought thereon, in justice court, by his successor in interest against the maker and his surety, and a judgment recovered against both, from which the surety alone has appealed, the maker of the note is a competent witness for the surety on the new trial in the County Court to show a valid agreement entered into between the witness and the payee in his life-time, extending the time of payment of the note without the consent of the surety. *Allis v. Stafford*, 14 Hun, 418. This is upon the ground that the maker of the note, not being a party to the appeal, would not be a witness in his "own behalf;" and his liability to his surety or to the plaintiff being in no way affected by the result of the appeal his testimony would not be in his "own interest," and therefore he would not be rendered incompetent by section 829 of the Code.

Where a child has been emancipated by her parents and after such emancipation has rendered services for a person, since deceased, the father is a competent witness, in an action brought by the daughter to recover the value of such services, to testify as to conversations and transactions had with such person in regard to the subject-matter of the suit. *Shirley v. Bennett*, 6 Lans. 515.

But where a bond and mortgage has been executed by a husband and wife, upon lands belonging to the wife, and has subsequently been assigned to a third party, and both the mortgagee and his assignee are dead, the husband is not a competent witness, in an action brought upon the bond and mortgage by the executor of the deceased assignee, to prove usury in the loan by the deceased mortgagee, where the complaint demands judgment against the husband for the deficiency. *Whitehead v. Smith*, 14 Hun, 531.

It is sometimes difficult to determine whether the party offered as a witness is interested in the event of the action within the meaning of the statute. The true test of the interest of the witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent. *Hobart v. Hobart*, 62 N. Y. 80; *Tuttle v. Turner*, 28 Texas, 759.

It is next important to consider who are meant by persons deriving

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their title or interest from, through or under a deceased person or lunatic by assignment or otherwise. A maker of a note or the acceptor of a bill, negotiating his own paper, or procuring it to be discounted, is not an assignor of a note or bill. It is an original contract with the party taking the bill or note and not the assignment of the obligation of third parties. *Comstock v. Hier*, 73 N. Y. 269. Thus if A. makes a promissory note payable to the order of B., and B. indorses it and A. then negotiates it with C., A. is not the assignor of C. But if A. makes a promissory note payable to the order of, and indorsed by B., and this is subsequently indorsed by C., and by him transferred to D., D. is the assignee of C., and B. is a person "from, through or under" whom D. derives his title. *Richards v. Warner*, 13 Hun, 13.

We are next led to consider the subject-matter to which the prohibition of the statute extends. The prohibition of the Code relates only to a personal transaction or communication between the witness and the deceased person or lunatic, and does not preclude the witness, although also a party, from testifying to the statements of a person, since deceased, made to a third person in the hearing of the witness, *Cary v. White*, 59 N. Y. 336; *Lobdell v. Lobdell*, 36 id. 327; *Simmons v. Sisson*, 26 id. 264; *Holcomb v. Holcomb*, 20 Hun, 156; *Marsh v. Gilbert*, 2 Redf. 465; *Badger v. Badger*, 88 N. Y. 546. unless the conversation overheard by the witness was between the deceased and an agent of the witness who was at the time acting for the witness and in his interest. In that case the witness would be incompetent, as in legal effect it would be a conversation between the witness and the deceased. *Head v. Teeter*, 10 Hun, 548. Nor does the fact that a party participated in the conversation between the deceased and a third party render him incompetent, so long as what is proposed to be proved by him is limited to what is neither a personal conversation nor a communication between the witness and the deceased. *Cary v. White*, 59 N. Y. 336.

But while a party is not incompetent to testify to an independent conversation between the deceased and a third person, yet if he participated in the conversation and it related to a transaction between him and the deceased, he is incompetent. *Kraushaar v. Meyer*, 72 N. Y. 602; *Brague v. Lord*, 67 id. 495. See *Smith v. Ulman*, 26 Hun, 386; *Holcomb v. Holcomb*, 20 id. 156, 159.

In an action against the surviving partner of a firm, based upon a contract made with the firm, the plaintiff is a competent witness to testify to a personal transaction had with the deceased partner, if the defendant was present at the time of the occurrence. *Kale v. Elliott*,

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18 Hun, 198. So in an action on a joint and several promissory note made by two persons, one of whom is dead, the plaintiff is competent to testify to transactions and conversations between himself and the deceased maker. The defendant is not the "survivor" of the deceased maker within the meaning of the statute. *Sprague v. Swift*, 28 Hun, 49.

The word "transaction," as used in the statute, does not embrace all the occurrences which go to make up a cause of action, but only such as must have been communicated to the deceased to give them effect. *Franklin v. Pinkney*, 18 Abb. 186. It was not the intention of the Code, that, in actions against the representatives of a deceased person, the evidence of the living party should be excluded, as to an occurrence at which the deceased need not have been present, or as to a fact he need not have known, to make evidence of it admissible. *Ib.*

And there is no reason for construing the word "personal" as there used, as meaning "private." There is nothing in the section which makes the admissibility of the evidence depend on the fact that at the time when it is offered there is some one living who can contradict it. *Hatch v. Peugnet*, 64 Barb. 189. But the fact that another person is competent to speak concerning the same matter goes far to take the case out of the substantial reason of the statute. *Cary v. White*, 59 N. Y. 336.

The fact that the maker and indorser of a promissory note have put in separate answers when sued together by the executor of the deceased holder does not entitle one to call the other as a witness to any transaction had with the decedent. *Alexander v. Dutcher*, 70 N. Y. 385.

Where an action is brought on a promissory note given to the plaintiff's intestate and the defense is that the note was assigned to the defendant's wife, the defendant may testify that he saw the note in his wife's possession. This does not amount to a transaction with the intestate. *Smith v. Sergeant*, 67 Barb. 243.

A fact that a party cannot prove directly by his testimony cannot be established inferentially by the same means. *Johnson v. Spies*, 5 Hun, 468; *Jacques v. Elmore*, *id.* 675.

Thus in an action upon a note brought by the personal representatives of a deceased payee the maker is incompetent to prove by direct testimony that he received the note from the payee, though he produce it on the trial canceled; and he is equally incompetent to prove it indirectly, by stating in substance that he received it from no one else, though he says it in an indirect manner. *Grey v. Grey*, 47 N. Y. 552. So in an action against an executor, the plaintiff cannot be permitted

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to testify, as a witness in his own behalf, as to what passed between him and the deceased in her life-time, nor to testify that certain conversations did not occur between him and the deceased. *Clarke v. Smith*, 46 Barb. 30. In such a case it does not make any difference whether the object of the testimony is to prove an affirmative or a negative, for in either case it is incompetent. *Ib.*

Any proof, by a person incompetent to testify directly to a personal transaction or communication with a deceased person, leading to the inference that no such personal transaction or communication took place, is equally as inadmissible as evidence that one did take place. *Haughey v. Wright*, 12 Hun, 179; *Howell v. Van Siclen*, 6 id. 115; *Dyer v. Dyer*, 48 Barb. 190; *Church v. Howard*, 17 Hun, 9; *Hill v. Heermans*, id. 470; *Mulqueen v. Druffy*, 6 id. 299. But while a party is prohibited from testifying that any particular communication or transaction did or did not take place personally between him and the deceased, he is not precluded from testifying to extraneous facts which tend to show that a witness who has testified to such transaction has testified falsely, or that it is impossible that his statement can be true, as for example, that such witness was never present at the place specified when any conversation or transaction occurred between the party and the deceased, and that the interviews did not occur at the place named by the witness, or that the party or the witness were at some other place at the time of the alleged interview or transaction. *Pinney v. Orth*, 88 N. Y. 447.

As the rule excluding the testimony of a party on account of interest often operates to defeat a meritorious action or to exclude a just defense, counsel often strenuously insist that a particular question put to an interested witness does not tend to prove a personal transaction or communication with the deceased and is, therefore, not within the prohibition of the statute. One test to apply to determine the admissibility of the evidence is, does the testimony offered tend to prove what the transaction was? If it does, the evidence is inadmissible. *Stanley v. Whitney*, 47 Barb. 586. See *Wadsworth v. Heermans*, 85 N. Y. 639; affirming S. C., 22 Hun, 455; *Van Gelder v. Van Gelder*, 81 N. Y. 625; *Holcomb v. Holcomb*, 20 Hun, 159. Where the defense to an action brought by the personal representatives of a deceased person to recover the property of the intestate is that the property mentioned in the complaint was given to the defendants by the intestate in his life time, a defendant who claims to be entitled to share in the proceeds of the property in question is incompetent to testify whether or not he was present when the property was handed

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by the deceased to the co-defendant. *Waver v. Waver*, 15 Hun, 277. So, in an action for services rendered and materials furnished to defendant's testator, the plaintiff cannot testify to the accuracy in gross of a bill of particulars made after the testator's death, containing a statement of the contract price of the services rendered and goods sold and then read it in evidence; nor can he testify that he worked upon the premises owned by the testator, nor give the number of days he so worked, nor the value of his services. *Fisher v. Verplanck*, 17 Hun, 150. In some cases the intent with which an act was done becomes a part of the transaction; and a witness may be incompetent to speak of the intent with which he acted as well as of the act itself. Thus where an action is brought to recover a sum of money alleged to be due from the defendant for money received by the defendant for the use and benefit of the plaintiff, and the defendant has died and his administratrix been substituted in his stead, the plaintiff is not a competent witness in his own behalf to testify whether or not he put any property in the hands of the intestate for the purpose of defrauding his creditors, or with that intent. *Tooley v. Bacon*, 8 Hun, 176. In the case cited the court said: "The intent with which the transfers were made is a mere mental operation and cannot strictly be called a personal transaction or communication between the intestate and the witness. But when the intent with which an act is done becomes the subject of legal inquiry, it is then, it seems to me, to be treated as a part of the act, and a party to the transaction cannot testify as to the intention with which it was done in an action between him and the representatives of the other party to such transaction. The reasons which induced the legislature to exclude the evidence of a party to a transaction when the other party to it is dead apply in all their force to evidence of the intention with which an act is done, as proof of the act itself."

But where the executor, survivor, committee or person deriving his title or interest from, through or under a deceased person or lunatic is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication, the prohibition does not apply to counter declarations offered by the adverse party. *Potts v. Mayer*, 86 N. Y. 302; *Markell v. Benson*, 55 How. 360; *Smith v. Christopher*, 3 Hun, 585; *Cole v. Denue*, id. 610; *Goodwin v. Hirsch*, 5 J. & Sp. 503. Where a plaintiff, suing as an executor, proves by a third person a conversion between his testator and the defendant, the defendant may testify in his own behalf that no such conversion ever took place.

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Gorham v. Price, 25 Hun, 11. And where the personal representatives of the deceased have given evidence which *concerns* the transaction between the deceased and the defendant, the latter may then give evidence in his own behalf *concerning* the same transaction. *Sweet v. Low*, 28 Hun, 432.

Where a party has died since the trial of an action or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of section 829 of the Code of Civil Procedure, taken or read in evidence on the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony, or any question put to him. Vol. 1, p. 128, § 830.

Under the existing laws the rule is that a party is competent as a witness. His exclusion is to be made out by the party alleging his incompetency as to any particular matter. *Cary v. White*, 59 N. Y. 336.

But the change in the law in relation to the *competency* of the witness does not in any manner affect the principle as to his *credibility*. The change which was made by the legislature in this respect was founded upon the assumption that a jury, or a justice sitting in their place, would prove entirely competent to carefully weigh the evidence of an interested witness, and then give it due credit and nothing more. An interested witness may be strictly honest, and may not swerve in the slightest degree from the truth, but the experience of the past has conclusively shown that there are many persons whose statements as a witness should be received with great caution if they are interested in the result of the action. This is evident from the fact that the old law excluded them altogether.

Husbands and wives were not formerly permitted to be witnesses for or against each other. They were not excluded on the ground of interest, but from a principle of public policy. *Hasbrouck v. Vandervoort*, 9 N. Y. 153; S. C., 4 Sandf. 596; *Erwin v. Smaller*, 2 id. 340; *Pillow v. Bushnell*, 5 Barb. 156.

Neither could a husband or wife be examined as a witness, either for or against each other, except in cases where they were parties to the action. *Rogers v. Rogers*, 1 Daly, 194; *Moffatt v. Moffatt*, 10 Bosw. 468; *Carpenter v. White*, 46 Barb. 291.

But when a wife would not be a competent witness if the husband were sued alone, merely making her a party to the action would not render her competent. *Macondray v. Wardle*, 26 Barb. 612; *Pillow*

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v. *Bushnell*, 5 id. 156. But when a husband and wife were properly joined as co-plaintiffs, or as co-defendants, each was competent as a witness in his own behalf, or for each other. *March v. Potter*, 30 Barb. 506; *Shoemaker v. McKee*, 19 How. 86; *Schaffner v. Reuter*, 37 Barb. 44; *Hooper v. Hooper*, 43 id. 292. When a husband or wife is incompetent as a witness, the declarations or admissions of either of them are inadmissible as evidence against the other. *Lay Grae v. Peterson*, 2 Sandf. 338.

But sweeping changes have been made by the legislature, not only as to the property rights of husbands and wives, but also as to their competency as witnesses for or against each other. As a rule no person can now be excluded or excused from being a witness because he or she is the husband or wife of a party to an action or special proceeding, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed or defended. Vol. 1, p. 128, § 828. But the Code also provides that "a husband or wife shall not be compelled, or without the consent of the other, if living, allowed to disclose a confidential communication made by one to the other during the marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy, except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and husband." Vol. 1, p. 128, § 831.

By the Laws of 1867 it was provided that "in any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding.

"Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for, or on account of, criminal conversation.

"No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." Laws of 1867, chap. 887.

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In an action between a husband and wife either is a competent witness against the other under the provisions of the act of 1867, save in the cases excepted therein. *Southwick v. Southwick*, 49 N. Y. 510; *Minier v. Minier*, 4 Lans. 425. And under the new Code a husband or wife may be witnesses the one against the other in any civil action save as limited by sections 829 and 831 of that act. See *People v. Crandon*, 17 Hun, 490, 493; Code, § 828.

The tendency and effect of legislation has been to abrogate the common-law distinction growing out of the marital relation in respect to the competency of witnesses. Where the husband or wife are parties to or interested in an action they may be examined in the same manner and subject to the same rules of examination as any other witness, except that they shall not be required to disclose any confidential communication made to each other during marriage. *Wehrkamp v. Willett*, 1 Keyes, 250.

The amendment of the Code in 1879 repealing section 830, which prohibited the husband or wife from testifying to personal communications or transactions with a person since deceased or with a lunatic in cases where the other would be incompetent under section 829, is significant of the intent of the legislature to place a husband or wife upon the same footing as any other witness so far as competency is concerned, save as to confidential communications made after marriage, and as to actions or proceedings based upon an allegation of adultery, or for criminal conversation.

A kept mistress of a party was always a competent witness and might be called although she had passed by the name of the party and appeared to the world as his wife. *Batthews v. Galindo*, 4 Bing. 610; *State v. Brown*, 28 La. Ann. 669.

An attorney or counselor is a competent witness in favor of the party in whose behalf he is acting. *Robinson v. Dauchy*, 3 Barb. 21; *Rea v. Trotter*, 26 Gratt. (Va.) 585; *Follansbee v. Walker*, 72 Penn. St. 228; *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Straton v. Henderson*, 26 Ill. 68; *Little v. McKeon*, 1 Sandf. 607. But in the case just cited the court used the following language as to the propriety of such a practice: "As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counselors, of standing and character, will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients soon become marked both by their

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associates and the courts, and forfeit in character more than will ever be compensated to them by success in such clients' controversies." Id. 609.

But an attorney or counselor at law is not allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment. Vol. 1, p. 129, § 835. This was the rule at common law. *Berd v. Lovelace*, Cary, 88; *Austin v. Vesey*, id. 89; *Kilway v. Kilway*, id. 126; *Waldron v. Ward*, Stiles, 449; *Duffin v. Smith*, Peake's N. P. C. 103; *Whiting v. Barney*, 30 N. Y. 330; *Coventry v. Tannahill*, 1 Hill, 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 533.

A justice is a competent witness to prove and explain entries upon his docket, and to identify the cause and the parties. *Haven v. Green*, 26 Ill. 252. The mode of proving the judicial acts of a justice will be noticed hereafter.

A juror is always a competent witness for either party. *State v. McDonald*, 73 N. C. 346; *Cramer v. City of Burlington*, 42 Iowa, 315; *Howser v. Commonwealth*, 51 Penn. St. 332; *Commonwealth v. Hill*, 11 Cush. 137. And a sheriff is not disqualified as a witness by reason of having summoned the jury who are to pass upon the evidence he may give. *Crowe v. Peters*, 63 Mo. 429. But while a juror may give evidence to show the identity of the subject-matter in different actions he will not be allowed to contradict the record. *Stapleton v. King*, 40 Iowa, 278.

An arbitrator is a competent witness to show that no final award was made, and that though he signed it, yet on afterward discovering a mistake therein he never delivered it. *Shulte v. Hennessy*, 40 Iowa, 352. So an arbitrator is a competent witness to prove that matters were included in the award which were not contained in the submission, where there is no pretense that the arbitrators acted in bad faith. *Briggs v. Smith*, 20 Barb. 409. But he is not a competent witness to prove his own misconduct. *Claycomb v. Butler*, 36 Ill. 100. Or that he made a mistake in the award. *Doke v. James*, 4 N. Y. 568; *Briggs v. Smith*, 20 Barb. 409.

No person is rendered incompetent as a witness on account of his opinions on matters of religious belief. N. Y. State Const. of 1846, art. 1, § 3. But notwithstanding the Constitution makes all persons *competent* witnesses, whether they are believers in a Supreme Being, or are atheists or infidels, yet a party against whom a witness is called may interrogate him on his cross-examination as to his opinions on

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matters of religious belief, and may show by him, if he can, that he does not believe in the existence of a God who will punish false swearing. *Stanbro v. Hopkins*, 28 Barb. 265. And if he entertains such a belief the jury may take that fact into account in estimating the credit which should be given to the witness. *Ib.*

Objections to the competency of a witness ought to be taken before he is sworn in chief, especially if the ground of objection is known at that time. In such a case, if no objection is taken before the examination of the witness, his evidence will be considered as admitted by consent.

There are several statutes which render persons competent witnesses in cases where they would be rejected by the common law. But most of these statutes related to cases in which the person was incompetent by reason of his interest in the event of the action. And the Code has rendered those special statutes useless, since no person can now be excluded on the ground of interest. There are some statutes, however, which are still important, because they change the common-law rules of evidence in an important point of view. At common law no person could be compelled to give evidence against himself in either a civil or a criminal action. But, by several statutes, a witness may be compelled to testify as a witness in actions in which the recovery is in the nature of a penalty. Thus, where the defense of usury is interposed, the lender of the money may be compelled to testify as to the usury. 3 R. S. 74, § 11, 5th ed.; Laws 1837, chap. 430, § 2. As the law now stands there are few instances in which a witness is incompetent. But the change in the law in that respect does not in any manner interfere with those rules which relate to the *credibility* of witnesses. The mere fact that the field of competency has been so greatly extended ought to excite a proper caution on the part of jurors in relation to the credit of persons thus rendered competent to be sworn. And in most cases the jury will be likely to form a correct estimate of the characters, motives and reliability of the persons who are called as witnesses.

There are cases in which parties may properly testify as to matters which, from their nature, render direct evidence in contradiction impossible, as for example, the intent with which an act was done, where intent is material to the issue. Because a competent witness has testified to his intent, and he has not been directly impeached or contradicted, his testimony cannot be taken as conclusive. In fact it is a general rule that where a witness is interested in the question, although he is not directly impeached, and his testimony is uncontradicted, his

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credibility is a question for the jury, and the court is not warranted in directing a verdict upon his testimony alone. *Gildersleeve v. Landon*, 73 N. Y. 609. See *Kavanagh v. Wilson*, 70 id. 177; *Elwood v. The Western Union Telegraph Co.*, 45 id. 549.

§ 4. **Admissions.** In all litigations the law regards the deliberate admissions of a party to the action. The value and the importance of an admission, however, is much influenced by the circumstances under which it was made.

Where the parties mutually agree upon a statement of facts and submit the legal questions arising thereon to the court for adjudication, the admissions will be conclusive for that purpose. So, facts admitted by the pleadings are to be taken as true. A fact thus admitted need not be proved; *Walrod v. Bennett*, 6 Barb. 145; and no evidence is admissible to contradict an admission thus made upon the record. *Crosbie v. Leary*, 6 Bosw. 313; *Walrod v. Bennett*, 6 Barb. 145; *Bridge v. Payson*, 5 Sandf. 210; *Robbins v. Codman*, 4 E. D. Smith, 315; *Van Dyke v. Maguire*, 57 N. Y. 429. "That what the parties have agreed to in their pleading shall be admitted though the jury find otherwise," is an ancient rule, not to be departed from, except in cases where an amendment has been ordered. *Van Dyke v. Maguire*, 57 N. Y. 429.

An illustration or two will be sufficient to show when a fact is conclusively admitted by the pleadings. Suppose an action to be brought upon a promissory note, which is set out in the complaint with the necessary allegations, showing a right of action against the defendant, and that the only defense interposed is payment, or a set-off. In such a case the making of the note for value is conclusively admitted. It need not be proved, and no evidence in contradiction of such facts is admissible. *Gregory v. Trainor*, 4 E. D. Smith, 58.

Again, suppose that a demurrer is interposed to a complaint or an answer, upon the ground that the facts stated do not state a cause of action or a ground of defense. In such a case the demurrer admits the truth of all the material allegations which are well pleaded. *Darling v. Brewster*, 55 N. Y. 667; *Cutter v. Wright*, 22 id. 472. An admission made in the pleadings need not be an express one. Where no denial is interposed, but an affirmative defense is set up, the truth of the facts alleged in the complaint will be admitted. *Gregory v. Trainor*, 4 E. D. Smith, 58. So, where a denial is partial, the facts not denied will stand admitted. *Fairchild v. Rushmore*, 8 Bosw. 698. Where a party to an action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to

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give them in evidence, and it matters not whether the admissions were in writing, or by parol, nor when, nor to whom they were made. They are received in evidence because of the great probability that a party would not admit or state any thing against himself or his own interest unless it were true. This rule applies to a pleading of a party, though in another action and with other parties if it be shown that the admissions were inserted in the pleading with his knowledge and sanction, or by his direction. *Cook v. Barr*, 44 N. Y. 156.

An admission in an answer of the execution of a deed extends to the signing, sealing and delivery. *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Robert v. Good*, 36 id. 408.

Where an admission in the pleading of the adverse party is alone relied upon to establish a fact, any statements made in connection with the admission of another fact, which would nullify the effect of the admission, must also be held as established; the whole of the statement must be taken and construed together. *Gildersleeve v. Landon*, 73 N. Y. 609. This rule will not, however, prevent the party claiming the benefit of the admission from disproving the fact so alleged in connection with it. So far as the statement is not disproved it is effectual; so far as it is shown to be untrue it is of no avail. *Ib.*

An admission of a legal conclusion is not binding on the court. *Cutting v. Lincoln*, 9 Abb. (N. S.) 436.

There is another class of admissions which it is important to notice. If all the facts in the case are put in issue by the pleadings, the law will require each party to establish his side of the case by sufficient proofs. This, however, is not always done by calling witnesses. It sometimes happens that each party is willing to concede or admit the truth of many of the facts of the case, for the purpose of expediting the trial, or for some other object. If these facts are voluntarily and deliberately stated and admitted in open court, for the purposes of the trial, they are not only competent, but conclusive evidence of the truth of the facts so admitted. The same rule applies where a single fact is admitted by either party. And it is well settled that when a fact is assumed upon trial, a party cannot on review claim to the contrary, having acquiesced in respect to the assumption made at the trial. *Hill v. Heermans*, 17 Hun, 470; *Paige v. Fazackerly*, 36 Barb. 393; *Smith v. Hill*, 22 id. 656. And when an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney, or as a matter of proof on the hearing, it cannot be retracted on a subsequent trial unless by leave of the court. *Owen v.*

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Cawley, 36 N. Y. 600; *Holley v. Young*, 68 Me. 215; S. C., 28 Am. Rep. 40; *Wetherell v. Bird*, 7 Carr. & P. 6.

A return by a justice on appeal will always be evidence of the admissions of the parties on the hearing before him. *Rawson v. Adams*, 17 Johns. 130.

It is a general rule that the admissions of a party to the action are evidence against him. The exceptions to the rule will be hereafter noticed. The statements which a party has made under oath as a witness are competent evidence against him as an admission. *Tooker v. Gormer*, 2 Hilt. 71; *Pickard v. Collins*, 23 Barb. 444. Such evidence may be given, for the purpose of showing that the party swore on a former trial to statements which he contradicts on a subsequent trial. *Pickard v. Collins*, 23 Barb. 444. And the evidence given on the former trial may be proved by any person who heard it, though the party himself cannot be compelled to state what he swore on the former trial, since it might aid in a prosecution against him for perjury. *Ib.* What a person has voluntarily sworn to as a witness is evidence against him, even though the questions answered were improper, and he might have refused to answer them. *Smith v. Beadnell*, 1 Camp. N. P. 30. But if a party declines to answer such a question, and he is compelled to answer it by the court, the answer so given cannot be subsequently given in evidence against him in another action as an admission. *Regina v. Garbett*, 2 Car. & Kir. N. P. 474.

There are some cases in which a party is bound by the statements of a third person. Where a party is applied to for information in relation to an uncertain or a disputed matter, and he refers the applicant to a third person, the answers of such third person will be competent evidence against the party making such reference. *William v. Innes*, 1 Camp. N. P. 364, 366, note; *Hood v. Reeves*, 3 Carr. & Payne, 532; *Bedell v. Commercial Mutual Ins. Co.*, 3 Bosw. 147; *Wehlev. Spelman*, 1 Hun, 634. But such declarations are not evidence unless they are strictly within the subject-matter in relation to which the reference is made. *Duval v. Covenhoven*, 4 Wend. 561.

The admissions of a wife are not evidence against her husband merely by reason of the marriage relation. But she may act as his agent, and her admissions will then be admissible in the same manner as the admissions of any other agent. Whether she is authorized to act as his agent, and what the extent of the agency may be, are questions of fact to be settled by evidence. An express agency is not frequently created, but is established from the circumstances attending the transaction. In an action by the husband for injury by negligence, the declarations of

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his wife that the defendant was free from negligence cannot be treated as an admission of the fact by him. *Stillwell v. N. Y. Central R. R. Co.*, 34 N. Y. 29.

So declarations and admissions made by the husband are not evidence against his wife merely by reason of the marriage relation. Where a married woman claims the ownership of household furniture, which has been levied on under an attachment against her husband, and in an action against the sheriff for the conversion of the furniture, gives evidence in support of her title that the purchase-money of the property levied on was paid in part by her husband out of the proceeds of other household furniture formerly owned by her and sold by her husband to one B., evidence of conversations had between a third person and the husband as to the sale to B., and who it was for, is not competent against the wife, not being part of the *res gestæ*. *De Wolf v. Williams*, 69 N. Y. 621.

The husband is not, by virtue of the marital relation, the agent of his wife so that his representations concerning her claims to lands will operate as an estoppel against her; and, therefore, evidence of statements made by the husband concerning his wife's claims to lands is incompetent in the absence of evidence that he spoke by her authority. *Towles v. Fisher*, 77 N. C. 437.

Upon the same principle, if the husband purchases lumber on credit, and erects a house on lands of his wife, without her authority to make the purchase, and without her knowledge that credit was given, no agency can be inferred from the marital relation alone. *Price v. Seydell*, 46 Iowa, 696. See *Ferguson v. Spear*, 65 Me. 277; *Ainsley v. Mead*, 3 Lans. 116. But where business is carried on exclusively by the husband in his wife's name and as her agent, the statements and conduct of the husband in the course of the business will bind her. *Le-land v. Colver*, 34 Mich. 418; *Wicks v. Hatch*, 6 J. & Sp. 95.

Where a husband permits his wife to act as his agent in any particular business, he adopts her acts and admissions in reference to such business, and he is bound by them. *Riley v. Suydam*, 4 Barb. 222; *Hopkins v. Mollinieux*, 4 Wend. 465. But where the agency of the wife extends only to the performance of certain specific acts of a general transaction, her admissions in respect to other matters connected with the general transaction are not evidence against her husband. *Goodrich v. Tracy*, 43 Vt. 314.

The wife of a toll-gatherer for a plankroad will be deemed his agent in his absence; and if she takes too much toll, he will be liable to the penalty imposed by statute. *Marselis v. Seaman*, 21 Barb. 319. If

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a wife executes a mortgage upon the personal property of her husband, and in his presence, if he makes no objection, he will be as effectually bound by her acts as though done by himself. *Edgerton v. Thomas*, 9 N. Y. 40.

If a wife acts as agent for her husband in managing his farm, renting lands, purchasing tools, stock, etc., and she purchases such property and gives her own note, it will be a question of fact for a jury whether the husband is not liable as principal. *Gates v. Brower*, 9 N. Y. 205. And see *Plimmer v. Sells*, 3 Nev. & Man. 422.

Where goods were sold to a wife who then resided at some distance from her husband, who occasionally visited her, he was held to be bound by a letter of hers promising payment, so as to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. N. P. 304; *Palethorp v. Furnish*, 2 Esp. N. P. 511, note.

So, where a wife served in her husband's shop, and carried on the business of it in his absence, her admissions, which were made on an application for payment for goods before delivered at the shop, were held receivable in evidence against her husband. *Clifford v. Burton*, 1 Bing. 199; *Petty v. Anderson*, 3 id. 170. And see *Cotes v. Davis*, 1 Camp. N. P. 485.

The plaintiff's wife loaned money to the defendant, and in an action by the husband to recover the amount, the wife's admissions to third persons that the money had been repaid was held competent evidence. *McLean v. Jagger*, 13 How. 494.

A wife loaned money for her husband upon an agreement which was alleged to be usurious, because, by the terms of the loan, a cow was to be taken by the borrower at a price above its real value. To prove the value of the cow, and that it was less than thirty dollars, the declarations of the wife were offered, although they were not made until sometime after the loan was effected; these declarations were held inadmissible. *Ripley v. Mason*, Hill & Denio, 66.

In an action against a husband for damages because his dog had bitten a child, the declarations of the defendant's wife, as to the manner in which the injury occurred, and as to the character of the dog, are not admissible evidence against the husband. *Logue v. Link*, 4 E. D. Smith, 63.

An admission made by an attorney or counselor on a trial is evidence against the party represented by him, if it is done for the purpose of obviating the necessity of proving some fact on the trial, or for convenience as to some matter of practice. *Chambers v. Mason*, 5 J. Scott (N. S.), 59; *Haller v. Worman*, 9 id. 892. But, if the client is not

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present at the trial, the admission cannot be used in any other action than the one in which it was made. And see *Colledge v. Horn*, 3 Bing. 119. An admission by an attorney, to bind his client, must be intended and understood to be an admission. It must be within the scope of the attorney's authority in the proceedings in which he is engaged. Beyond this his agency does not extend; and any statement made by counsel in summing up a case which was outside of the case and of no importance to the issue then being tried, cannot be given in evidence on another trial, especially if it does not appear that his client was present and heard the statement made. *Adee v. Howe*, 15 Hun, 20. See *Weisbrod v. Chicago, etc., R. R. Co.*, 20 Wis. 419.

The declarations, representations or admissions of an agent, which are made while acting within the scope of his authority, and in the discharge of his duties as agent, are admissible as evidence against his principal. *Hunter v. Hudson River Iron and Machine Co.*, 20 Barb. 494; *Kasson v. Mills*, 8 How. 377; *Milburn v. Belloni*, 34 Barb. 607; *Nelson v. Cowing*, 6 Hill, 336; *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Peck v. Ritchey*, 66 Mo. 114; *Mix v. Osby*, 62 Ill. 193; *Howe Machine Co. v. Snow*, 32 Iowa, 433; *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339; *Thomas v. Sternheimer*, 29 Md. 268; *Beardslee v. Steinmesch*, 38 Mo. 168; *Cliquot's Champagne*, 3 Wall. (U. S.) 114.

As a general rule, whenever what an agent did is admissible in evidence, it is competent to prove what he said about the act while doing it. *Tuttle v. Turner*, 28 Texas, 759.

Such admissions or declarations of an agent are received in evidence against the principal, not as admissions or declarations merely, but as a part of the transaction. *Thalhimer v. Brinckerhoff*, 4 Wend. 394; *Hynds v. Hays*, 25 Ind. 31; *Gutchess v. Gutchess*, 66 Barb. 483. They must be a part of the *res gestæ*. *Lowry v. Harris*, 12 Minn. 255; *Converse v. Blumrich*, 14 Mich. 109.

All declarations or admissions which are not made within the scope of the agent's authority, nor while in the transaction of the business of the agency, are inadmissible; and this is especially true, when the admission is made after the termination of the agency, or after the transaction by the agent is closed. *Fogg v. Child*, 13 Barb. 246; *Isles v. Tucker*, 5 Duer, 393; *Budlong v. Van Nostrand*, 24 Barb. 25; *Webb v. Alexander*, 7 Wend. 281; *Rowell v. Klein*, 44 Ind. 290; *White v. Miller*, 71 N. Y. 118; *Bowen v. National Bank of Newport*, 11 Hun, 226; *First National Bank v. Ocean National Bank*, 60 N. Y. 278; *Whiteside v. Margarel*, 51 Ill. 507. The general rule is that what one

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person says out of court is not admissible to charge or bind another. The exception is in cases of agency ; and in cases of agency, the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent at the time the declarations were made was engaged in executing the authority conferred upon him, and that the declarations related to and were connected with the business then depending, so that they constituted a part of the *res gestæ*. This rule is applicable in all cases whether the agent is general or special, or whether the principal is a corporation or a private person. *White v. Miller*, 71 N. Y. 118 ; *Hydorn v. Cushman*, 16 Hun, 107 ; *Bowen v. National Bank of Newport*, 11 id. 226 ; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153 ; *Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264.

Thus in an action upon a policy of life insurance the casual statement of an agent, when not in the performance of any duty for his principal, that proof of loss mailed to the company had been received is not competent evidence against the company. *Dean v. Aetna Life Ins. Co.*, 62 N. Y. 642. Before the declarations of an agent are admissible, his agency must be established. *Perkins v. Stebbins*, 29 Barb. 523 ; *Francis v. Edwards*, 77 N. C. 271 ; *Breckenridge v. McAfee*, 54 Ind. 141 ; *Grandy v. Ferebee*, 68 N. C. 356 ; *Rosenstock v. Tormey*, 32 Md. 169 ; *Farmer v. Lewis*, 1 Bush (Ky.), 66. And this cannot be done by the agent's own assertions. *Hatch v. Squires*, 11 Mich. 185 ; *Seneerbox v. McGrade*, 6 Minn. 494. Nor can the agency be proved by general reputation. *Perkins v. Stebbins*, 29 Barb. 523. And declarations of an alleged agent, made without the knowledge of the supposed principal, are no evidence of the agency. *Davis v. Henderson*, 20 Wis. 520. Declarations of a member of a firm that one of the partners therein is a member of another firm, are inadmissible to prove that fact. *Jones v. O'Farrel*, 1 Nev. 354.

Agency may be shown by the acts of the agent as such, and that they were recognized by his principal. *Woodwell v. Brown*, 44 Penn. St. 121. Or evidence may be given of his original authority. *Woodbury v. Larned*, 5 Minn. 339. The plaintiff having made a proposition to the defendant, to do certain work upon a building which the latter was erecting, the defendant told him to go and see B., who was the contractor, about it. He did so, and B. employed him to do the work. There was some evidence to show that B. was the defendant's agent, and it was held that proof of declarations made by B., in making the contract with the plaintiff, were admissible in evidence against the defendant,

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on the ground that they were the declarations of an agent, relating to the subject-matter of his agency. *Fleming v. Smith*, 44 Barb. 554.

But the declarations or admissions of a stevedore, although made while employed by the owner to stow a cargo, are not admissible in evidence against the owner, in relation to the stowage of the cargo. *Mallory v. Perkins*, 9 Bosw. 572.

A deputy sheriff is regarded as the agent of the sheriff. His declarations, made within the scope of his authority, and while the process is in his hands and in the due course of execution, bind his principal, because the admissions are then a part of the *res gestæ*. *Stewart v. Wells*, 6 Barb. 79; *Mott v. Kip*, 10 Johns. 478. But the statements of a deputy which are not made in the performance of an official act are not admissible evidence against the sheriff. *Barker v. Binninger*, 14 N. Y. 271.

In an action against a ship-owner as a carrier, for an injury to goods which happened while on board his vessel and in course of transportation, the declarations of the master of the vessel as to the cause and manner of the injury are admissible evidence against the carrier, if such declarations were made before the master had discharged his duty by delivering the goods according to the bill of lading. *Price v. Powell*, 3 N. Y. 322.

Declarations or admissions of an agent as to past transactions are never admissible as against his principal. *Griffin v. Montgomery, etc., R. R. Co.*, 26 Ga. 111; *Lime Rock Bank v. Hewett*, 52 Me. 531. Admissions made after his authority has terminated are not evidence against his principal. *Vail v. Judson*, 4 E. D. Smith, 165; *Raiford v. French*, 11 Rich. L. (S. C.) 367; *Janeway v. Skerritt*, 1 Vroom (N. J.), 97. But statements of a general freight agent of a railway company in regard to goods delivered to him for transportation, although made eight months after such delivery, are admissible against the company, if at that time the duty of the railroad to deliver the goods still existed. *Burnside v. Grand Trunk R. R. Co.*, 47 N. H. 554.

Though the admissions of a party to the record are generally receivable in evidence against the person who made them, yet, where there are several parties on the same side, the admissions of one party are not admitted to affect the others, who may happen to be joined with him, unless there is some joint interest or privity in design between them. *Lewis v. Woodworth*, 2 N. Y. 512.

The declarations of one of several persons who were joint and several makers of a promissory note have been admitted against all the parties,

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for the purpose of repelling the defense of usury, when such declarations were made after the making of the note. *Barrick v. Austin*, 21 Barb. 241. And in an action upon a lost note, after proof that the makers had it in their possession for a common purpose, the court permitted the plaintiff to give in evidence the declaration of one of the makers that he had lost the note, as evidence of its loss. *Ellenwood v. Fults*, 63 Barb. 321. But one of several joint and several makers of a note cannot bind the others by making payments upon it before an action is barred by the statute of limitations. *Shoemaker v. Benedict*, 11 N. Y. 176; *Smith v. Ryan*, 66 id. 352; *Harper v. Fairley*, 53 id. 442; *Barger v. Durvin*, 22 Barb. 68. The rule is the same where the payment or new promise is made after the statute has attached.

Van Keuren v. Parmelee, 2 N. Y. 523. The admissions of one of several joint debtors is clearly evidence as against the party who makes them. As a general rule, the admission of one defendant will not affect another co-defendant, if the action is for a tort. *De Benedetti v. Mauchin*, 1 Hilt. 213; *Stoddard v. Holmes*, 1 Cow. 245. But such declaration is competent evidence against the person who made it. *Ib.*

Partners have a joint interest, and there are many cases in which an admission by one partner is evidence against all the members of the firm. But, before an admission can be received in evidence in such a case, the existence of the partnership must be established. The admissions or declarations of a person may be given in evidence against him, to show that he is a partner in a firm. But the declarations of one person that another person is a partner are not legal evidence as to the latter; they are evidence against those only who make them. *Kirby v. Hewitt*, 26 Barb. 607; *Davidson v. Hutchins*, 1 Hilt. 123; *McPherson v. Rathbone*, 7 Wend. 216; *Whitney v. Ferris*, 10 Johns. 66; *Hoppock v. Moses*, 43 How. 201; *Henry v. Willard*, 73 N. C. 35; *Ruhe v. Burnell*, 121 Mass. 450; *Cross v. Langley*, 50 Ala. 8; *Convers v. Shambaugh*, 4 Neb. 376; *Smith v. Hulett*, 65 Ill. 495; *Johnson v. Gallivan*, 52 N. H. 143; *Currier v. Silloway*, 1 Allen (Mass.), 19. When a partnership is established, the acts and admissions of either of the partners as to the partnership business are evidence against all, if such admissions are made during the existence of the partnership. *Walden v. Sherburne*, 15 Johns. 409; *Webster v. Stearns*, 44 N. H. 498; *Fogerty v. Jordan*, 2 Rob. 319; *Van Keuren v. Parmelee*, 2 N. Y. 523; *Folk v. Willson*, 21 Md. 538; *Rich v. Flanders*, 39 N. H. 304.

But after a dissolution of the partnership, neither partner can make an admission which is binding upon his former partner. *Baker v.*

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Stackpoole, 9 Cow. 420 ; *Bank of Vergennes v. Cameron*, 7 Barb. 144 ; *Nichols v. White*, 85 N. Y. 531 ; *Winslow v. Newlan*, 45 Ill. 145 ; *Hogg v. Orgill*, 34 Penn. St. 344 ; *Flowers v. Helm*, 29 Mo. 324 ; *American Iron Mountain Co. v. Evans*, 27 id. 552 ; *Miller v. Neimerick*, 19 Ill. 172. In such a case, one partner cannot give a note, in the name of the firm, for a partnership debt, which will be binding on the other partners. *Mitchell v. Ostrom*, 2 Hill, 520 ; *Lusk v. Smith*, 8 Barb. 570 ; *Whitworth v. Ballard*, 56 Ind. 279 ; *Meyer v. Atkins*, 29 La. Ann. 586 ; *Vaccaro v. Toof*, 9 Heisk. (Tenn.) 194 ; *Curry v. White*, 51 Cal. 530 ; *Brown v. Broach*, 52 Miss. 536 ; *Smith v. Sheldon*, 35 Mich. 42 ; *McCowin v. Cubbison*, 72 Penn. St. 358. Nor can one partner, in such a case, give a note in renewal of one made by the firm during its existence. *National Bank v. Norton*, 1 Hill, 572. Nor prevent the running of the statute of limitations by part payment of a firm debt. *Graham v. Selover*, 59 Barb. 313 ; *Van Keuren v. Parmlee*, 2 N. Y. 524 *Pennoyer v. David*, 8 Mich. 407 ; *Tate v. Clements*, 16 Fla. 339 ; S. C., 26 Am. Rep. 709 ; *Mayberry v. Willoughby*, 5 Neb. 368 ; S. C., 25 Am. Rep. 491. Though one partner cannot bind his copartner by a note, after the dissolution of the partnership, yet he may liquidate a previous account. By doing so, he does not create a debt ; that was previously in existence. *McPherson v. Rathbone*, 11 Wend. 96, 99 ; *Murray v. Mumford*, 6 Cow. 441.

The acts and delarations of one of several owners of a water power in the presence and hearing of the others, as to their relative rights, is competent evidence as against one claiming under either. *Crippen v. Morss*, 49 N. Y. 63.

It is a general rule, founded upon principles of justice, in regard to the relation of principal and surety, that the surety ought not to be affected by an admission made by his principal ; although he may be affected by declarations or statements made by the principal, when they are connected with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business. *Dunn v. Slee*, Holt, 399, 401. Thus, where a person had become surety, by a bond, for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. *Smith v. Whittingham*, 6 Carr. & Payne, 78. So, in an action upon a guaranty to pay for goods sold and delivered to a third person, what such third person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guaranty. *Evans v. Beattie*, 5 Esp. N. P. 26.

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The rule seems to be that a surety is bound only for the actual conduct of his principal, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, when it can be had, excluding all declarations of the principal made subsequent to the act to which they relate. The declarations of the principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestæ*, are competent evidence against the surety. *Hatch v. Elkins*, 65 N. Y. 489; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *United States v. Cutter*, 2 Curtis, 617; *Casky v. Haviland*, 13 Ala. 314. But his declarations subsequently made are not competent evidence against the surety. *Hatch v. Elkins*, 65 N. Y. 489; *Hotchkiss v. Lyon*, 2 Blackf. 222; *Bacon v. Chesney*, 1 Stark. 192; *Tenth National Bank v. Darragh*, 1 Hun, 111; *Horn v. Perry*, 14 id. 409; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475.

But in an action upon the bond of a public officer, his official reports, through mere admissions of the principal, are admissible as evidence, but are not conclusive as against his sureties. *Bissell v. Saxton*, 66 N. Y. 55; *Supervisors of Tompkins County v. Bristol*, 15 Hun, 116.

Where certain persons as principals and others as sureties have bound themselves for the payment of any deficiency remaining after the assets of a co-partnership had been applied to the payment of the firm debts, the admissions of the principals as to the amount of such deficiency made in the absence of the sureties are not evidence as against them. *Horn v. Perry*, 14 Hun, 409.

Entries made by a deceased person, in the course of duty, or by which he has charged himself with the receipt of money, being admissible as against all the world, are, of course, evidence against a person who has become his surety that he would keep his accounts faithfully. *Goss v. Watlington*, 3 Brod. & Bing. 132; *Whitnash v. George*, 8 Barn. & Cress. 556; *Middleton v. Melton*, 10 id. 317. But, where one is a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, he is at common law, no more affected by its event, if against him, than a mere stranger. *Thomas v. Hubbell*, 15 N. Y. 405; *Jackson v. Griswold*, 4 Hill, 522.

It has been held, in some cases, that where a surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract; and that, if the contract is by parol, subsequent declarations of the principal are admissible in evidence against the surety, though they are not conclusive. And, where a

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husband and wife agreed, by articles, to live separate, and C., as trustee and surety for the wife, covenanted to pay the husband a sum of money, upon his delivering to the wife a carriage and horses for her separate use, it was held, in an action by the husband for the money, that the wife's admissions of the receipt by her of the carriage and horses were admissible. *Fenner v. Lewis*, 10 Johns. 38. So, where A. guaranteed the performance of any contract that B. might make with C., the declarations and admissions of B. were held admissible against A., to prove the contract. *Meade v. McDowell*, 5 Binn. 195.

The admissions or declarations of persons who formerly owned personal property or choses in action are frequently offered in evidence. When personal property has been sold the admissions or declarations of the former owner are not admissible against his vendee, as to the title to the property sold. *Worrall v. Parmelee*, 1 N. Y. 519.

And the rule is the same, although such declarations were made before the sale of the property. *Hurd v. West*, 7 Cow. 752; *Whitaker v. Brown*, 8 Wend. 490.

In an action for the breach of warranty made on the sale of a horse, the defendant offered to prove what a former owner of the horse said of him to the plaintiff, some months before the latter purchased him of the defendant; but it was held that such evidence was inadmissible. *Brisbane v. Parsons*, 33 N. Y. 332. In such a case, it is no defense to show that the defendant made the warranty in good faith, and under misinformation as to the character of the horse; and the real question to be tried relates to the condition of the horse at the time of the warranty. *Ib.*

The declarations of the parties to a chattel mortgage are not admissible as evidence to sustain the mortgage, as against a judgment creditor. *Carpenter v. Simmons*, 28 How. 13. Nor are the declarations of the mortgagor, made after filing the mortgage, evidence against the mortgagee. *Walker v. Henry*, 85 N. Y. 130. In an action between the vendee and the creditor of the vendor to determine the title of the property purchased, the declarations of the vendor, after regaining, and while in possession of the chattels, are not competent against the vendee. *Tilson v. Terwilliger*, 56 N. Y. 273.

The declarations made by the payee of a negotiable promissory note, while he owns and holds it, are not admissible in evidence against one to whom it is subsequently transferred for value, even though the transfer is made after maturity, *Paige v. Cagwin*, 7 Hill, 361; *Whitaker v. Brown*, 8 Wend. 490; *Smith v. Schauck*, 18 Barb. 344, and though it was taken with notice of the illegality of the consideration. *Osborn v.*

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Robbins, 7 Lans. 44. The rule is the same, although the payee is dead at the time his declarations are offered in evidence. *Beach v. Wise*, 1 Hill, 612. See *Dodge v. Freedman's Savings, etc., Co.*, 93 U. S. 379.

So the declarations which are made by the owner of a chose in action are not admissible to affect the rights of one who derives title from him. *Stark v. Boswell*, 6 Hill, 405.

The cause of *Paige v. Cagwin*, above cited, is a leading case in this State on the subject of the admissibility of declarations made by the former owner of personal property, while he was the party in interest, against one deriving title from him. This case has been frequently followed in our courts, and is regarded as establishing the general rule that the declarations of the vendor of chattels or the assignor of a chose in action, made before he parted with his interest therein, are inadmissible against his vendee or assignee. *Jermain v. Denniston*, 6 N. Y. 276; *Booth v. Swezey*, 8 id. 276; *Tousley v. Barry*, 16 id. 497; *Edington v. Mutual Life Ins. Co.*, 67 id. 185; *Tabor v. Van Tassell*, 86 id. 642.

In an action by the indorsee against the maker of a note, which was alleged to have been sold under a usurious contract, the declarations of the payee who transferred the note are not admissible in evidence to show the usurious transfer, notwithstanding the payee was dead at the time of offering such evidence. *Kent v. Walton*, 7 Wend. 256.

A note belonged to a bank until the time of its failure, and after that time it was transferred to the plaintiff, but in what manner and for what consideration did not appear at the trial. An action was brought against the maker and the indorser by such plaintiff, and the defendants offered to show, by entries in the bank-book, that the note was paid, and this was held to be admissible in evidence as against such plaintiff. *Jermain v. Denniston*, 6 N. Y. 276.

But the qualification found in *Paige v. Cagwin*, that the vendee or assignee must be a purchaser for value, in order to make the declaration inadmissible, is an essential part of the rule. *Von Sachs v. Krietz*, 72 N. Y. 548. And it has been directly held that the declarations of a prior holder of a promissory note transferred after maturity are admissible against his indorsee, where the latter is not a holder for value. *Brisbane v. Pratt*, 4 Denio, 63. See *Von Sachs v. Krietz*, 72 N. Y. 548, 554; *Green v. Given*, 33 id. 343, 369; *James v. Chalmers*, 6 id. 209, 215.

When a party against whom the declarations are offered claims as privy by representation through the person making them, or is identified in interest with him, the declarations are clearly admissible. The

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declarations of an intestate, or of a testator, touching the title to personal property, or establishing a defense to a claim asserted by the executor or administrator, or a demand against the estate he represents, are constantly received upon this ground. *Brown v. Mailler*, 12 N. Y. 118; *Smith v. Smith*, 7 C. & P. 401; *Woodruff v. Cook*, 25 Barb. 505; *Von Sachs v. Kreitz*, 72 N. Y. 548, 555.

The position of an assignee in bankruptcy, in respect to the estate of the bankrupt, is in many respects analogous to that of executor or administrator in respect to the estate of the decedent. He holds the assigned estate in trust for the bankrupt and his creditors. He is not a purchaser for value, and in asserting a claim held by the bankrupt, he stands upon his right and title, and not upon any new and independent right or equity. This relation between a bankrupt and his assignee creates an identity of interests between them which makes the declarations of the bankrupt, made before bankruptcy, admissible in evidence against his assignee, to establish or support a claim against the estate of the bankrupt. *Von Sachs v. Kreitz*, 72 N. Y. 548.

The declarations or admissions which may have been made by the assignees of goods, at a time subsequent to the making of the assignment, and after they have parted with the possession of the assigned property, are not competent evidence in favor of parties, who are sued by the assignees, for taking and selling the goods under and by virtue of a judgment and execution against the assignees. *Peck v. Crouse*, 46 Barb. 151; *Burnham v. Brennan*, 74 N. Y. 597.

The declarations of an assignor, who has made an assignment for the benefit of his creditors, are not admissible for the purpose of impeaching the assignment for fraud, nor, to furnish evidence of his own or the trustee's fraudulent intent in making or receiving such assignment, when the declarations are made out of court after the execution and delivery of the assignment, and the entry of the trustees upon the performance of the trust by taking possession of the assigned property, *Cuyler v. McCartney*, 40 N. Y. 221; *Weinrich v. Porter*, 47 Mo. 293; *Coyne v. Weaver*, 84 N. Y. 386; *Ogden v. Peters*, 15 Barb. 560; *Hanna v. Curtis*, 1 Barb. Ch. 263, nor when previously made, *Jones v. Methodist Church*, 21 Barb. 161; *Cuyler v. McCartney*, 33 id. 165; *Booth v. Sweezey*, 4 Seld. 276, 278; *Truax v. Slater*, 86 N. Y. 630, provided the declarations are no part of the *res gestæ*. Ib. But if the assignor remains continuously in possession of the assigned property, his declarations as to the object of making the assignment, while so in possession, are receivable in evidence as against the assignor and his creditors who claim under the assignment. *Adams v. David-*

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son, 10 N. Y. 309. See *Bullis v. Montgomery*, 50 id. 352, 359; *Cuyler v. McCartney*, 40 id. 221, 235; *Coyne v. Weaver*, 84 id. 386, 393. While the assignor continues in possession of the assigned property, his acts and declarations while in actual possession may be given in evidence as part of the *res gestæ*. *Newlin v. Lyon*, 49 N. Y. 661; *Magee v. Raignel*, 64 Penn. St. 110.

But declarations as to the ownership of a note, made before maturity, to an indorser by one employed to sell the note, are not admissible to affect the title of the purchaser; *Wilson v. Bowden*, 113 Mass. 422; nor are they admissible to affect the title of his principal. *Pier v. Duff*, 63 Penn. St. 59.

The intent of parties to a sale of goods, to defraud the creditors of the vendor, cannot be proved by the declarations of the vendor made after the transaction. *Hutchins v. Castle*, 48 Cal. 152; *Weinrich v. Porter*, 47 Mo. 293; *Miner v. Phillips*, 42 Ill. 123; *Jones v. Morse*, 36 Cal. 205; *Shaw v. Robertson*, 12 Minn. 445. The declarations of a donor made subsequent to the gift, are inadmissible to impeach the title of the donee. *Bunker v. Green*, 48 Ill. 243; *Cornett v. Fain*, 33 Ga. 219.

A plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum tendered. *Roosevelt v. N. Y. & Harlem R. R. Co.*, 45 Barb. 554; S. C., 30 How. 226; *Woodward v. Cutler*, 33 Vt. 49.

An offer made by a party, whether verbal or in writing, and expressly stated to be made without prejudice, to pay money by way of compromise, and with a view to buy peace, is not evidence of a debt or of a legal liability, by way of admission. *Cory v. Bretton*, 4 Carr. & Payne, 462; *Healy v. Thatcher*, 8 id. 388. So where what is said is spoken with a view of effecting a compromise and for no other purpose, it will not be admissible as evidence, though there is no express declaration that what is said is to be without prejudice; if that was the intention of the party, it is sufficient. *Jardine v. Sheridan*, 2 Car. & Kir. N. P. 24. The ground of rejecting such evidence is, that confidential overtures ought to be protected; and that the law favors settlements and compromises instead of litigation. An offer of compromise is a mere proposition to give or accept something for the purpose of an amicable adjustment of the difficulties in question, and so long as the offer is unaccepted, it is but a mere proposition, and the law excludes all such propositions as evidence. *Daniels v. Woonsocket*, 11 R. I. 4; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Barker v. Bushnell*, 75 Ill. 220; *State Bank v. Dutton*, 11 Wis. 371; *Payne v. Forty-second*

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St., etc., R. R. Co., 8 J. & Sp. 8; *Gay v. Bates*, 99 Mass. 263; *Pike v. Doyle*, 19 La. Ann. 362.

A common case is where a plaintiff claims a certain sum, as, for instance, \$100, and the defendant offers to pay \$25, for the purpose of settling the claim; this offer neither admits nor ascertains the debt, but is a mere proposition to give a certain sum to be rid of trouble and expense of an action, and, therefore, the offer is not evidence. See *Reynolds v. Manning*, 15 Md. 510.

It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made *because it is a fact*, the evidence to prove it is competent, whatever motive may have prompted to the declaration.

The illustration already given shows this sufficiently. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Marvin v. Richmond*, 3 Denio, 58; *Murray v. Coster*, 4 Cow. 635, opinion; *Waldridge v. Kennison*, 1 Esp. N. P. 143; *Turner v. Railton*, 2 id. 474; *Doon v. Ravey*, 49 Vt. 293; *Plummer v. Caurrier*, 52 N. H. 287; *Bartlett v. Tarbox*, 1 Abb. App. Dec. 120; *Eastman v. Amoskeag, etc., Co.*, 44 N. H. 143; *Perkins v. Concord R. R.*, 44 id. 223.

An offer to compromise on conditions is no admission. *Read v. McLemore*, 34 Miss. 110. But an offer to pay a debt in goods instead of money is not an offer to compromise. *Ferry v. Taylor*, 33 Md. 323.

Where a letter has been written "without prejudice," the answer to it, though not guarded in the same manner, will not be admitted. *Paddock v. Forrester*, 3 Scott N. R. 734. So if a letter is written "without prejudice," no part of it can be given in evidence. *Healey v. Thatcher*, 8 Carr. & Payne, 388. An admission must be voluntary to be admissible, and where an answer was given by a person as a witness under an order or decision of the court requiring him to answer a question, although objected to by the witness, his answer so given was held to be inadmissible as evidence against him of an admission. *Regina v. Garbett*, 2 Car. & Kir. N. P. 474.

Admissions are sometimes implied from the assumed language, character or conduct of a party. In such cases the existence and truth of the fact to be proved is sometimes assumed in the expressions which are given in evidence. The expressions in such cases are received as

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an admission of the fact, though they were used for some other purpose and though the admission is only implied; and, as an admission, they are allowed to supersede the necessity of producing more explicit evidence. An agent is employed to sell goods, and pays over the proceeds to his employer, and a demand is made by the latter for the money arising upon the sale of certain property, a declaration by the agent, in answer to such demand, that he had paid over all the money, is an implied admission of the sale and dispenses with proof of that fact.

So, when a demand is made for property, if there is a refusal which is put upon a specific ground, it is an implied admission that such ground is the true one. *Tuttle v. Gladding*, 2 E. D. Smith, 157; *Winter v. Coit*, 3 Seld. 288; *Livingston v. Stoessel*, 3 Bosw. 19; *Dunlap v. Hunting*, 2 Denio, 643; *Weeks v. Goode*, 6 J. Scott (N. S.), 367. And such admission is so far conclusive that the party must maintain the claim then made or fail in his defense, if sued for the refusal to make the delivery claimed. *Ib.* The entry of a charge to a particular person in a book of account, or the making out of a bill of parcels in his name is an admission that they were furnished on his credit. *Storr v. Scott*, 6 Carr. & Payne, 241. See *Cowdin v. Gottgetreu*, 55 N. Y. 650; *Anderson v. Hyman*, 1 H. Black. 120; *Watson v. Wharam*, 2 Term R. 80; *Conolly v. Kettlewell*, 1 Gill (Md.), 260. The fact that a certain person is charged on the plaintiff's books with goods is not conclusive evidence that the credit was given to him. *Swift v. Pierce*, 13 Allen, 136. When goods are sold to an agent the legal presumption is that the credit is given to the principal, and entries on the books of the vendor charging the goods to the agent, though of much weight on the question, are not conclusive evidence that the credit was given exclusively to him. *Meeker v. Claghorn*, 44 N. Y. 352; *Foster v. Persch*, 68 id. 400.

In some cases it is allowable to give evidence by written or verbal statements made, or of acts done by others, and then show how the party who heard or read the statements or saw the acts done was affected by them, for the purpose of using his conduct, expressions or demeanor as evidence against him, by way of admission. The evidence in such cases is altogether presumptive in its quality and character.

There are many instances in which it is a person's duty to speak out upon a subject if he desires to preserve his rights.

If a person offers to sell the personal property of A., in his presence and hearing, the latter is bound to disclose his ownership, or the purchaser will get a good title. So, where an account is made out and presented to an individual, it is his duty to dispute or deny it, if

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false, or to point out the inaccuracies, if any exist. As a general rule, where an account, showing a balance, is duly rendered, the person to whom it is rendered is bound, within a reasonable time, to examine it, and object, if he disputes its accuracy. An omission to do so will be an implied admission of its correctness. *Lockwood v. Thorne*, 11 N. Y. 170, reversing same case in 12 Barb. 487; *Beers v. Reynolds*, id. 288; S. C., 11 N. Y. 97. The omission to object does not render the admission conclusive; it merely raises a presumption that it is correct, which may be rebutted by evidence showing circumstances that tend to a contrary inference. *Lockwood v. Thorne*, 18 N. Y. 285, reversing same case in 24 Barb. 391. And see *Williams v. Glenny*, 16 N. Y. 389.

Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated. A party is not to be affected by statements made in his presence, under circumstances which do not properly allow a reply. In legal investigations, there is a regularity of proceeding which does not permit a party to interpose a denial how and when he pleases, as he would in a common conversation. And, in such cases, the same inferences are not to be drawn from his silence or his conduct, as would otherwise be done. *Melen v. Andrews*, 1 Mood. & Malk. 336; *Rex v. Appleby*, 3 Stark. 33; *Brogles v. State*, 47 Ind. 251; *Wilkins v. Stidzer*, 22 Cal. 231. But, if the party does answer or make a reply, that may be given in evidence as an admission. *Jones v. Morrell*, 1 Car. & Kir. 266. So, a statement which is made in the plaintiff's hearing, although not in his presence, is admissible in evidence, if it is otherwise receivable. *Neile v. Jakle*, 2 Car. & Kir. 709. The general rule that a declaration is good only as against the person making it is subject to various limitations; and a statement made by a person in the presence of his associates and acquiesced in by them, is admissible against them. *Lathrop v. Bramhall*, 3 Hun, 394.

If a party, to whom a note bearing his name is shown with a request to pay it, is silent, his silence is competent evidence that his signature

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is genuine, or if not genuine, of his assent to be bound by it. *Corser v. Paul*, 41 N. H. 24. A refusal to pay a bill because another person should pay part is admissible as an admission of the authority of the agent who accepted it. *May v. Hewitt*, 33 Ala. 161.

A distinction is made between declarations made by a party and those made by a stranger. An omission to reply to the latter is not an implied admission of the truth of the statement, since the refusal to reply may be on account of the impertinence of the person who made it, and who is rebuked by silence. *Child v. Grace*, 2 Carr. & Payne, 193. If a reply is made, that may be given in evidence. *Ib.*

There may also be special circumstances calling for silence on the part of the person to whom the conversation is addressed which will prevent such silence from being construed as admissions of the truth of statements made by the stranger. *Slattery v. People*, 76 Ill. 217.

A statement made in the presence of a party to the action becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such statements are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement shall have made to it. If he is silent when he ought to have denied, the presumption of acquiescence arises. *Gibney v. Marchay*, 34 N. Y. 301, 305.

But such an acquiescence is worth very little, indeed, where the party hearing it has no means of personally knowing the truth or falsehood of the statement. *Hayslep v. Gymer*, 1 Ad. & El. 162, 165.

The declarations of a party are not evidence in his own favor; *State v. Tatro*, 50 Vt. 483; *Baird v. Fletcher*, *id.* 603; *Finch v. Phillips*, 41 Wis. 387; unless the adverse party, by giving in evidence a part of his statements, or facts raising some presumption from his apparent silence, has made the declarations admissible as a part of the conversation, or as a reply to the circumstances out of which such presumption arises. *Crosbie v. Leary*, 6 Bosw. 313.

A defendant who puts in evidence a correspondence, consisting of several letters between himself and the plaintiff, has a right to give in evidence a letter written by him to the plaintiff, in reply to the plaintiff's last letter, which bore date on the day before the defendant's letter. *Roe v. Day*, 7 Carr. & Payne, 705. The rule that a person is presumed to admit facts stated in a conversation with him, and not denied, does not extend to facts stated by letter. The fact that a person receives a letter, and does not, in replying, deny an allegation made therein, is not an admission by him of such fact. *Waring v. United States Telegraph Co.*, 4 Daly, 233; S. C., 44 How. 69.

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Said Lord TENTERDEN, "what is said to a man to his face he is in some degree called upon to contradict, if he does not acquiesce in it; but the answering of a letter is quite different, and it is too much to say that a man, by not answering a letter, at all events admits the truth of the statements that letter contains." *Fairlie v. Denton*, 3 Carr. & Payne, 103; *Doe v. Frankis*, 11 Ad. & El. 795. But see *Fenn v. Weston*, 31 Vt. 345.

Great care should be exercised in receiving and acting upon admissions which are implied from a supposed acquiescence in the statements of other persons; and they ought never to be received at all, unless the evidence is of direct declarations of that kind which naturally call for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in. See *Waring v. United States Telegraph Co.*, 4 Daly, 233; *State v. Hamilton*, 55 Mo. 520.

Evidence that a person for whom work is being done by contract did not dissent to certain deviations from the contract when his attention was called thereto is competent as tending to show assent. *Bailey v. Woods*, 17 N. H. 365.

With respect to verbal admissions, it may be observed that they ought to be received and acted upon as evidence with great caution. It may be a correct principle, that the statement of a person to the prejudice of his own interest is so far entitled to consideration as to be admissible in evidence against him. Still, the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may have been misinformed, or may not have correctly expressed his meaning, or he may have spoken lightly and without consideration; even his meaning, if correctly expressed, may have been misunderstood, or a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement; and, where a witness is corrupt, a slight change in the language may make a material difference between the admission really made, and that stated by the witness. *Law v. Merrills*, 6 Wend. 277; 1 Phil. Ev. 479, 4th Am. ed.; *Garrison v. Akin*, 2 Barb. 25, 27; *Chicago, etc., R. R. Co. v. Button*, 68 Ill. 409.

Drunkenness of a person at the time he made the declarations offered in evidence as admissions may be taken into account, according to its degree. *State v. Bryan*, 74 N. C. 351. But there is no rule that admissions by a party are weak evidence, and it is error to so instruct a jury. It is for the jury to weigh this kind of evidence, and to give to it such consideration as it demands. *Manro v. Platt*, 62 Ill. 450. If the testimony as to the admissions of the parties is conflicting, the

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acts of the parties, if clearly shown, should have controlling weight. *Russell v. Miller*, 26 Mich. 1.

It is an elementary principle that the admissions and confessions of parties are admissible in evidence when pertinent to the issue to be tried. They are not by any means conclusive, and not necessarily even *prima facie* evidence of the facts to which they relate. They may be controlled and overborne by evidence of a higher character and more commanding weight; but when they relate to a matter material to the issue, they should be received, and the effect to be given to them is wholly with the jury. If it appears from the declarations themselves, or from evidence *aliunde*, that the party had no personal knowledge of the facts as to which the admission is made, then but little importance is to be attached to them. *Stephens v. Vroman*, 18 Barb. 250, 257.

An admission made by a party upon the assumption or hypothesis that certain information given him is true will be admissible against him in connection with proof of the truth of his information. *Chapman v. Chicago, etc., R. R. Co.*, 26 Wis. 295. But in every case to render a confession of an adverse party admissible as evidence, it must be of some fact material to the issue; for if the circumstance admitted be of such a character that it would have no just bearing on the case, if otherwise proved, it must not be received because its existence is established out of the mouth of the party against whom it is offered, *Stephens v. Vroman*, 16 N. Y. 381.

There is no limitation upon the right of a party to introduce evidence to contradict the truth of his own admissions, where such admissions were retrospective, and not operating by way of an estoppel. *Carland v. Day*, 4 E. D. Smith, 251; *Ellis v. Willard*, 9 N. Y. 529; *Young v. Bushnell*, 8 Bosw. 1; *Young v. Foote*, 43 Ill. 33.

Where an admission is voluntarily and deliberately made, and it is satisfactorily proved, it may be strong evidence against the party making it. *Saveland v. Green*, 40 Wis. 431.

On the subject of admissions, it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together. This is necessary, in order to enable the court and jury to judge of the true extent of the admission, which, when taken entire, will often have a different import from that which a partial account might convey. *Thompson v. Austen*, 2 Dowl. & Ryl. 358; *Kammell v. Bassett*, 24 Ark. 499; *Barnes v. Allen*, 1 Abb. App. Dec. 111; *Searles v. Thompson*, 18 Minn. 316; *People v. Murphy*, 39 Cal. 52; *Barry v. Davis*, 33 Mich. 515.

Where, taking the admission together, the branch making against

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the party is completely avoided, qualified or explained away by another branch, and there is nothing beside, either intrinsic or extrinsic, in the latter branch to render it questionable, the first is neutralized; and the whole admission is considered as not weighing any thing against the party. In such cases, if there is no other evidence in the case, the plaintiff is not entitled to recover, and if he does, the judgment will be reversed, as in a case in which the plaintiff said: "I have bought the goods, but I have paid for them." *Smith v. Jones*, 15 Johns. 229. So where the defendant said: "I have received a dollar from the plaintiff, but it was my due." *Carver v. Tracy*, 3 Johns. 427. So where the defendant admitted that the plaintiff had attended her as a physician, but she also alleged that she had not employed him, and that she was under the age of twenty-one years. *Wailing v. Toll*, 9 Johns. 141. And so of a case in which the defendant admitted that he shot the plaintiff's dog, but alleged that it was done because he attacked him in the highway in the night-time." *Credit v. Brown*, 10 Johns. 265. So of an admission that goods were purchased, but alleging that they were purchased on time which had not expired at the time of bringing the action. *Perego v. Purdy*, 1 Hilt. 269. So where a party admitted that he had given a note for a stove, but he alleged that the stove was warranted, and that the warranty was broken because the stove was not good, but had broken. *Kelsey v. Bush*, 2 Hill, 440.

In the cases just cited, the plaintiffs relied on the admissions of the defendant to make a case; but the entire admission was held insufficient to authorize a recovery, and the judgments were all reversed. If, however, there are any other facts in the case which destroy the effect of that part of the admission which discharges the party, there may be a recovery.

If that part of the admission discharging the party is improbable, or it is discredited by the other evidence in the case the jury may disregard the excuse, and the plaintiff may recover. *Barnes v. Allen*, 30 Barb. 663; *Bearss v. Copley*, 10 N. Y. 93. And see *Nesbit v. Stringer*, 2 Duer, 26; *Dorlon v. Douglass*, 6 Barb. 451.

When one party to an action calls the opposite party as a witness, and proves facts by him which favor the party calling him, the witness may also give evidence which goes to discharge the liability so created; but the jury are at liberty to judge of the value which is to be placed upon the matter in excuse. *Roberts v. Gee*, 15 Barb. 449; *Brown v. State*, 2 Texas App. 139.

The rule which requires that the whole of an admission may be given

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in evidence is not an unlimited one, as to the facts which may then be called for. If an admission is called for and proved against a party, he is entitled to ask for all that was said at the same time, or on the same occasion in relation to the admission called for, or the same subject of inquiry. But the rule is not extended so far as to permit a party to call for all that was said in the same conversation, if a part of it related to another and a distinct matter from that inquired about by the party calling for such admission. *Garey v. Nicholson*, 24 Wend. 350; *Dorlon v. Douglass*, 6 Barb. 451; *Rouse v. Whited*, 25 id. 279; 27 N. Y. 170; *Prince v. Samo*, 7 Ad. & Ell. 627; *Greaton v. Smith*, 1 Daly, 380; *Downs v. New York Central R. R. Co.*, 47 N. Y. 83; *Miller v. Wildcat, etc., Co.*, 52 Ind. 51.

The object of permitting the entire admission to be given is to enable the party against whom a part of it is given to have the whole of it shown so as to explain, qualify or discharge any liability which would appear to exist from a partial statement of the matter. If the other parts of the conversation relate to a different and distinct subject-matter, it would not serve the purpose of an explanation, qualification or discharge, and the reason of the rule which allows the whole admission ceases, so far as it relates to the matter foreign to the admission called for.

Where the liability of a defendant is sought to be proved by his verbal declarations or admissions to a witness, in several different interviews, all the conversations between him and the witness, bearing upon the subject of inquiry, must be submitted to the consideration of the jury. *Nesbit v. Stringer*, 2 Duer, 26. So, in an action against the defendant for the recovery of the rent of premises occupied by a third person, where evidence has been given of a conversation, on a specified day, between the landlord and the defendant, tending to establish a hiring of the premises by the defendant, and an agreement that such third person might occupy them, and that the defendant would pay the rent, it will be error to exclude evidence of other cotemporaneous conversations between the landlord and the defendant, upon the same subject. *Halsey v. Jarvis*, 7 Bosw. 461. Such evidence cannot properly be excluded merely because the conversations and verbal agreement offered to be proved were not had and made on the precise day on which it is stated that the conversation already stated was had. *Ib.* So, if part of a pleading is read as an admission, the whole pleading must be taken together, the same as any other admission. *Gildersleeve v. Mahony*, 5 Duer, 383; *Gildersleeve v. Landon*, 73 N. Y. 609. Where the

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plaintiff proves a demand of the defendant and his refusal to pay over money in his hands, the defendant has a right to show by the same witness what reasons were assigned for the refusal. *Bennett v. Burch*, 1 Denio, 141. In such a case the reasons for the refusal are an essential part of the admission. But the rule is otherwise when a long series of facts is sought to be made evidence in this manner, on the ground that they are an answer to the demand. *Walrod v. Ball*, 9 Barb. 271. If any part of the reasons are admissible, the offer to prove them should be limited to such of them as are admissible. *Ib.*

A party cannot give his own declarations in evidence, in his own favor, by calling for the entire conversation which occurred at a given time, merely because the other side has inquired as to a part of the conversation; the examination must be confined to the matters inquired about by the other side, and not extended to different statements, though made at the same time, and in the same conversation. *Lynch v. McBeth*, 7 How. 113; *Downs v. New York Central R. R. Co.*, 47 N. Y. 831.

An admission must be so specific and clear as to leave no room for doubt as to the identity of the matter referred to. And where the evidence to prove the making of a promissory note, purporting to be signed by the defendant, and payable to the bearer, was that the plaintiff's agent called on the defendant with the alleged note in his pocket, but which he did not exhibit, and told him he had a note for that amount against him, of which he wanted the payment for the plaintiff; and the defendant said he had given such a note, and would pay it if the plaintiff would make a small deduction, and indulge him as to time, it was held that the note produced on the trial was not identified with that to which the admission referred, and that the proof was insufficient. *Palmer v. Manning*, 4 Denio, 131; *Shaver v. Ehle*, 16 Johns. 201. In another case of an action by the indorsee against the maker of a promissory note, the plaintiff proved that the indorsement of the payee was genuine, and that a copy of the note had been shown to the defendant, who admitted that he had signed such a note, and this was held sufficient proof of the identity of the note and of the maker's signature. *Pentz v. Winterbottom*, 5 Denio, 51.

A party to a cause, who is proved to have made admissions, may defeat their effect, by showing that they were made under a mistake of law, provided the other party has not been induced to change his condition in consequence. *Newton v. Liddiard*, 12 Ad. & Ell. (N. S.) 925; *Newton v. Belcher*, *id.* 921; *Heane v. Rogers*, 9 Barn. & Cres. 377.

The subject of admissions at the trial has been already noticed. *Ante*,

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396. There is another class of judicial admissions which arise from the acts of the party. Payment of money into court by the defendant operates as an admission for several purposes. It admits that the amount paid into court is due to the plaintiff; *Logue v. Gillick*, 1 E. D. Smith, 398; *Seaton v. Benedict*, 5 Bing. 28; that it is for the cause of action stated in the complaint; *Bennett v. Francis*, 2 Bos. & Pul. 550; that the plaintiff is entitled to claim it in the character in which he sues; *Lipscombe v. Holmes*, 2 Camp. 441; that the contract set forth is correctly described, and was duly executed; *Gutteridge v. Smith*, 2 H. Bla. 374; *Randall v. Lynch*, 2 Camp. 352, 357; that the instrument sued on was properly stamped; *Israel v. Benjamin*, 3 Camp. 40; that the contract has been broken in the manner and to the extent alleged in the complaint; *Dyer v. Ashton*, 1 Barn. & Cres. 3; and where goods are sold by sample, it admits that the goods delivered agreed with the sample. *Leggett v. Cooper*, 2 Stark. 103.

The general rule is, that the payment of money into court admits every fact which it would be necessary for the plaintiff to prove, to entitle him to recover the amount so paid in. *Dyer v. Ashton*, 1 Barn. & Cress. 3. But it does not admit any thing beyond that.

In all actions for a tort, whether in trespass, trover, replevin, or in other actions, it is a general rule that the admissions of one defendant are not admissible against his co-defendant, even when the wrongful act was committed by them jointly. *De Benedetti v. Mauchin*, 1 Hilt. 213; *Daniels v. Potter*, 4 Carr. & Payne, 262; S. C., 1 Mood. & Malk. 502. The only exception to the rule is, where it is shown that there was a conspiracy or a concerted plan to commit the wrongful act; and where that is shown by evidence independent of the admissions of one defendant against his co-defendant, the declarations of either defendant, which are made with reference to the common plan, and in pursuance of it, are admissible as evidence against all. *Ib.*; *People v. Paris*, 4 Denio, 153; *Lee v. Bennett*, How. App. Cases, 187; *Newlin v. Lyon*, 49 N. Y. 661; *Dewey v. Moyer*, 72 id. 70; *Cruyler v. McCartney*, 40 id. 221; *Taylor v. State*, 3 Texas App. 169; *Smith v. State*, 52 Ala. 407; *Philpot v. Taylor*, 75 Ill. 309; *Kelley v. People*, 55 N. Y. 565; *Jacobs v. Shorey*, 48 N. H. 100. But such admissions are evidence against the party making them, and may be admitted in evidence against him, although he may be sued jointly with other defendants. *De Benedetti v. Mauchin*, 1 Hilt. 213. But even when a common plan or a conspiracy is shown to have been made by several defendants, the admissions of one defendant will not be evidence against the others, if made after the completion of the act, or in reference to a matter

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which is not a part of the common plan. *Lynes v. State*, 36 Miss. 617; *State v. Ross*, 29 Mo. 32; *Clinton v. Estes*, 20 Ark. 216; *State v. Thibreau*, 30 Vt. 100; *State v. Jackson*, 29 La. Ann. 354; *Reid v. Louisiana State Lottery Co.*, 29 id. 388; *United States v. McKee*, 3 Dill. 546; *Foster v. Thrasher*, 45 Ga. 517; *State v. Pike*, 51 N. H. 105; *State v. Larkin*, 49 id. 39. They must be part of the *res gestæ*, to render them admissible against all of the defendants. *Id.*; *Patton v. Ohio*, 6 Ohio (N. S.), 467; *State v. Duncan*, 64 Mo. 262; *Dart v. Walker*, 3 Daly, 138. A conspiracy cannot be proved against three by evidence that one admitted it. *Cuyler v. McCartney*, 40 N. Y. 221. The conspiracy must be shown by them by evidence other than the declarations sought to be used as evidence, before the declarations of one conspirator can be used to affect another. *Caraskadan v. Williams*, 7 W. Va. 1; *Garrard v. State*, 50 Miss. 147.

In case of conspiracy, where the combination is proved, the acts and declarations of the conspirators are not received as evidence of the conspiracy but to show what was done, the means employed, the particular design in respect to the parties to be affected or wronged, and generally, those details, which, assuming the combination and the illegal purpose, unfold its extent, scope and influence either upon the public or the individual who suffers from the wrong, or to show the execution of the illegal design. *Cuyler v. McCartney*, 40 N. Y. 221. Thus, after it is shown to the satisfaction of the court that an assignment was entered into by the assignor and assignee with the common purpose of defrauding the creditors of the assignor, his acts and declarations after the assignment are competent evidence against the parties thereto, not to show the formation of the common purpose, but to prove its execution, extent and effect. *Newlin v. Lyon*, 49 N. Y. 661.

There are many cases in which declarations, when standing alone, are inadmissible as evidence, though they become admissible because they accompany some act, or are a part of some transaction, and are, therefore, admissible in explanation of it. The general rule is, that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction. *Moore v. Meacham*, 10 N. Y. 207, 210. Declarations, made right at the conclusion of a transaction, but not afterward, are admissible as a part of the *res gestæ*, as much so as though made during the progress of it. *Kimball v. Huntington*, 10 Wend. 677. When it is material to show for what purpose a note was sent to a bank, a letter, accompanying the note, explaining that object,

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is admissible, as a part of the *res gestæ*. *Bank of Monroe v. Culver*, 2 Hill, 531.

The declarations of an agent, while acting within the scope of his authority, and in the discharge of his duty, in making a contract or doing some other act, are evidence against his principal, because part of the *res gestæ*. *Budlong v. Van Nostrand*, 24 Barb. 25; *Thallheimer v. Brinckerhoff*, 6 Cow. 90; 4 Wend. 394; *ante*, 400. If made after that time, they are not competent evidence. *Ib*.

In an action for a breach of promise of marriage, evidence of the plaintiff's declarations, accompanying her preparations for the wedding, are admissible for the purpose of showing her assent, after the promise of the defendant is shown by other evidence. *Wilcox v. Green*, 23 Barb. 639; *Werely v. Persons*, 28 N. Y. 344.

On a question of fraud, in relation to the sale of personal property, when the acts of the parties may be shown, the declarations which accompany those acts are equally admissible. *Crary v. Sprague*, 12 Wend. 41, 44.

When declarations are admissible as a part of the *res gestæ*, they are admissible in favor of the party making them, as much as in favor of the opposite party. The books contain a great number of cases illustrative of this rule, but the principle is one which is easy of application if it is carefully kept in mind; and the cases already cited are sufficient to show the extent and application of it.

§ 5. **Estoppel.** An estoppel is an impediment or bar, by which a man is precluded in law from alleging or denying a fact, in consequence of his own previous act, allegation or denial to the contrary. Estoppels may be created by record, by deed, or by matter *in pais*. This subject is fully discussed elsewhere. See "*Estoppel*," vol. 2, p. 934.

§ 6. **Presumptions.** The term "presumption" has been variously defined by legal writers. It is said to be "The result of a process of reasoning from one fact to another, or from one or more facts to others; an inference. A conclusion, judgment or belief, as to the truth of some proposed matter of fact arrived at and found by a process of inference from other facts." Burr. Circ. Evid. 910. An inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known. Stark. Evid. 742. A probable inference which our common sense draws from circumstances usually occurring in such cases. 1 Phil. Evid. 599, 4th Am. ed. A probable consequence drawn from facts, as to the truth of a fact alleged, but of which there is no direct

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proof. Wills' Circ. Evid. 17. An inference, affirmative or disaffirmative, of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning from some one or more matters of fact either admitted in the cause or otherwise satisfactorily established. Best on Presump. 12. It is a conclusion in favor of the existence of one fact from others in proof. *Tanner v. Hughes*, 53 Penn. St. 289. In the course of legal investigations there are two kinds of presumption which require attention; one is a presumption of fact, the other a presumption of law.

Presumptions of fact are questions for a jury, or the justice in their place, for determining the existence of certain disputed facts, upon the evidence introduced in the case. Presumptions of law are merely the application of legal rules to ascertained facts.

To determine whether a presumption is one of law, or one of fact, it is merely necessary to ascertain what kind of inference is to be drawn, whether it is one of fact or one of law. If upon certain evidence given it is important to ascertain the existence of some other fact, or the truth or falsity of some allegation of fact, the presumption is one of fact. If, on the contrary, no inference of additional facts is necessary in order to make a decision, then the presumption is one of law. See *Justice v. Lang*, 52 N. Y. 323, 327.

A few illustrations are all that will be given of the numerous cases upon the subject. And first as to presumption of law.

General sanity is presumed, because that is ordinarily the condition of the mind. *Gardner v. Gardner*, 22 Wend. 526; *Brown v. Torrey*, 24 Barb. 583; *Walter v. People*, 32 N. Y. 147; *Weed v. Mutual Benefit Life Ins. Co.*, 70 id. 566; *Anderson v. Cranmer*, 11 W. Va. 562; *State v. Smith*, 53 Mo. 267. After inquest found the presumption is changed. *Lilly v. Waggoner*, 27 Ill. 395. And see *State v. Wilmer*, 40 Wis. 304.

A person's motives are presumed to be good, and that he is honest in his transactions, in the absence of evidence showing fraud or improper motives. *Fleming v. Slocum*, 18 Johns. 403; *Lewis v. Palmer*, Hill & Denio, 68; *Bank of Silver Creek v. Talcott*, 22 Barb. 552; *Barnes v. Allen*, 1 Keyes, 390.

Thus where A., for a valuable consideration, agrees to purchase gold coin of B. at a specified price within a specified time, B. having the option to deliver the coin or not, it will be presumed that the contract was made in good faith with the intent on the part of both parties to perform it, in the absence of evidence to the contrary. *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Salomon*, 71 id. 420.

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It is a legal presumption that all conveyances are made in good faith and not fraudulently, *O'Neal v. Boone*, 82 Ill. 589, unless there is something in the character or form of the conveyance that renders it presumptively fraudulent under the statute of frauds.

A man is presumed to intend those necessary consequences which result from his voluntary or deliberate acts. *Van Pelt v. McGraw*, 4 N. Y. 110; *Filkins v. People*, 69 id. 101; *State v. Patterson*, 45 Vt. 308. And acts which are innocent and lawful, in themselves may become wrongful and fraudulent, when done without a just regard to the rights of others. The law will not presume that a person is a wrong-doer. And where a sheriff or constable levies an execution against A. on the property of B., there is no presumption that the plaintiff, in the execution, directed the levy, which can support an action against him. *Averill v. Williams*, 1 Denio, 501; S. C., 4 id. 295.

The law presumes that a public officer has properly discharged his official duties. *Hartwell v. Root*, 19 Johns. 345; *Smith v. Hall*, 22 Barb. 656; *Leland v. Cameron*, 31 N. Y. 115; *Hefner v. Heffe*, 29 La. Ann. 149; *Webber v. Webber*, 1 Metc. (Ky.) 18. And in the absence of proof to the contrary, it is presumed that an officer, in selling property under an execution, has complied with all the requirements of the statute and of the law. *Leland v. Cameron*, 31 N. Y. 115; *Wood v. Morehouse*, 45 id. 368.

If a sheriff has levied on real estate and afterward the execution is found in the clerk's office it will be presumed that the sheriff returned it there. *Conwell v. Watkins*, 71 Ill. 488. So a levy may be presumed from the fact that the execution was received, receipted for, and money paid over as made upon it. *Pain v. Tutwiler*, 27 Gratt. (Va.) 440. So when a constable has sold property under execution, and the record is silent as to whether he gave due notice of the sale or not, the court will presume that he did his duty. *Culbertson v. Milhollin*, 22 Ind. 362. So when no place of service is named in a constable's return, it will be presumed that the service was made within his precinct. *Richardson v. Smith*, 1 Allen (Mass.), 541. And where an acknowledgment is taken before an officer authorized to take acknowledgments within the limits of his jurisdiction the courts will presume that it was actually taken within such limits. *People v. Snyder*, 41 N. Y. 397.

Giving a promissory note raises a presumption that there is nothing due to the maker at that time from the person to whom the note is given. *De Freest v. Bloomingdale*, 5 Denio, 304; *Lake v. Tysen*, 6

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N. Y. 461; *Duguid v. Ogilvie*, 3 E. D. Smith, 527. This presumption may be rebutted, by showing that the note was given for a mere temporary loan, without any settlement. *Ib.*

In an action for the conversion of a promissory note, it is competent for the defendant to prove the insolvency of the maker, and thereby lessen the damages; but in the absence of any evidence of a want of ability to pay, the presumption is, that he is solvent, and able to pay the note. *Potter v. Merchants' Bank*, 28 N. Y. 642.

Where a joint and several promissory note is signed by three persons as makers, the word "surety" being added to the name of the last signer, it will be presumed that he is the surety for the other two; *Sayles v. Sims*, 73 N. Y. 551; and where a person indorses a promissory note in blank, before delivery to the payee, it will be presumed that he intended to become liable simply as second indorser and so not liable to the payee. *Coulter v. Richmond*, 59 N. Y. 478. But these presumptions are not conclusive. And where a promissory note is made by one of two members of a firm in the firm name, though not for the copartnership business, and without the knowledge and consent of the other partner, the note, in the hands of a *bona fide* holder, will be presumptive evidence that it is valid business paper, and was given for a debt due from the makers to the payee. *First National Bank of Chittenango v. Morgan*, 73 N. Y. 593.

Possession of a note by the maker raises a presumption that it has been paid. *Dougherty v. Deeney*, 41 Iowa, 19. And where a note has remained in the hands of the payee, he will be presumed to know the relation the other parties to the note sustain to each other, as for example, that some are sureties, and others makers. *Ward v. Stout*, 32 Ill. 399. Possession of personal property is *prima facie* evidence of title to it. *Fish v. Skut*, 21 Barb. 333; *Wicket v. Adirondack Co.*, 4 Sup. Ct. (T. & C.) 250; *Whiton v. Snyder*, 88 N. Y. 299.

But when the custody and possession of property is shown to be equally consistent with an outstanding title in a third person as with a title in the one having possession, the mere possession raises no presumption of ownership. *Rawley v. Brown*, 71 N. Y. 85.

Possession of land, in law, presumptively accompanies the title, and this presumption can be overcome only by showing a different possession in fact. *Frantz v. Ireland*, 66 Barb. 386.

It will be presumed in favor of the title of the finder of property, that it was abandoned by the former owner. But this presumption may be rebutted by direct proof; and the character of the property and the circumstances under which it is found may be such as to pre-

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vent any presumption of abandonment from arising in the case. *New York & Harlem R. R. Co. v. Haws*, 56 N. Y. 175.

It is a presumption of law that every species of property found in the possession of a person at the time of his death belongs to those succeeding to his estate. *Succession of Alexander*, 18 La. Ann. 337. And possession, in the absence of proof to the contrary, will be attributed to a lawful origin and will not be presumed to be wrongful. *Austin v. Bailey*, 37 Vt. 219; *McEwan v. Portland*, 1 Oregon, 300.

Prima facie, a person receiving money is entitled to it, and he does not become a debtor to the person delivering it. Some evidence in explanation of the transaction is necessary to establish a liability by the receipt of the money. *Sweet v. Barney*, 24 Barb. 533, 538; *Welch v. Seaborn*, 1 Stark. 474. But slight circumstances will make the matter a question of fact for a jury. *Bogert v. Morse*, 1 N. Y. 377; S. C., 4 Denio, 108.

Where letters are directed to a particular person on business, and answers are received in due course of mail, a fair inference arises that the answers were written by the person from whom they purport to come. *Bush v. Miller*, 13 Barb. 481; *Cunningham v. Hudson River Bank*, 21 Wend. 557, 559; *Ovenston v. Wilson*, 2 Car. & Kir. 1.

The mailing of a notice of the dissolution of a copartnership, properly directed, to a party sought to be charged with notice, raises a presumption of notice; *Austin v. Holland*, 69 N. Y. 571; for it is presumed that letters sent by post to a party are received by him in due course. *Ib.*; *Best on Presumptions*, § 403. But see *First Nat. Bank of Bellefonte v. McManigle*, 69 Penn. St. 156; *Greenfield Bank v. Crafts*, 4 Allen (Mass.), 447.

This is, however, but a presumption of fact. There is no presumption of law that a letter, mailed to a person at a place where he usually receives his letters, was received by him. *Ib.* Nor is there any presumption of law that a drop letter was deposited in the post-office on the date indicated by the post-mark. *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177.

A written instrument is presumed to have been executed and delivered at the time it bears date. *Bell v. Davis*, 8 Barb. 210; *Seymour v. Van Slyck*, 8 Wend. 403; *Cowing v. Altman*, 71 N. Y. 425; *People v. Snyder*, 41 id. 397; *Van Rensselaer v. Vickery*, 3 Lans. 57; *Hardin v. Crate*, 78 Ill. 533.

Where an agreement requiring a stamp is lost, and it was without a stamp when last seen, it will be presumed that it never was stamped,

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and secondary evidence of its contents will not be admissible. *Arbon v. Frussell*, 1 Hurlst. & Colt. 864.

The mere fact that the body of an instrument or of an indorsement is not in the handwriting of the signer raises no presumption that it was not in its present state when the signature was made. *Small v. Sloan*, 1 Bosw. 352.

The possession of an unmutilated railroad passage ticket is presumptive evidence that the holder has paid the regular price for it, and is entitled to be transported according to its terms, and that the ticket has not been used for that purpose. *Pier v. Finch*, 24 Barb. 514.

A receipt for rent arising at a subsequent period is presumptive evidence that all rent, previously accruing, had been paid. *Decker v. Livingston*, 15 Johns. 479. But proof that an employer has regular pay days, on which his workmen are accustomed to receive their wages, and that the plaintiff has been seen to receive payments on those days, is not sufficient evidence that he has been paid for work which was done since the time when it is shown that the last payment was made to him. *Irvine v. Wortendyke*, 2 E. D. Smith, 374.

The common law of a neighboring State will be presumed to be like our own, in the absence of any proof upon the subject. *Robinson v. Dauchy*, 3 Barb. 20; *Holmes v. Broughton*, 10 Wend. 75. But there is no presumption that the common law was in force in Russia at any given time. Such a presumption is indulged by our courts only in reference to England and the States which have taken the common law from England. *Savage v. O'Neil*, 44 N. Y. 298. But whether the statute law of another State is to be presumed, in the absence of proof, to be the same as our own, *quære*. *McCulloch v. Norwood*, 58 N. Y. 562; *Harris v. White*, 81 id. 532. See *Rape v. Heaton*, 9 Wis. 328; *Hynes v. McDermott*, 82 N. Y. 41; *Paine v. Noelke*, 11 Jones & Sp. 176; *Bemis v. McKenzie*, 13 Florida, 553; *Stokes v. Macken*, 62 Barb. 145. Foreign laws must be proved, like other facts in a case. *Cole v. Stone*, Hill & Denio, 360.

In relation to presumptions of fact, there are not so many reported cases, for such questions are purely questions for a jury, and there are few cases in which their decision upon such matters is not final. This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defined, whether they are mechanical and physical, or of a purely moral nature. It is that mental operation which is exercised in the ordinary affairs of life, namely, the process of ascertaining the existence of one fact when the

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existence of another is shown, without resort to the aid of any rule of law.

There are few presumptions, then, absolutely conclusive, so as to prevent a person from rebutting them by proper evidence.

Records, deeds, and estoppels *in pais* are generally conclusive. But, as a general rule, a presumption merely stands for proof until the contrary of the presumption is shown by evidence. When the law raises a presumption from a given state of facts, that presumption will be sufficient proof, if it is not rebutted.

Occasionally, there are conflicting presumptions. When such is the case, and different inferences may be drawn from evidence or from the conduct of the parties, it is the province of the jury to draw the inferences. *Powell v. Powell*, 71 N. Y. 71.

The law presumes the continuance of life, as well as that a party is innocent of crime. In one case, a woman married a second husband within twelve months after her first husband was last heard of; and it was held that the presumption in favor of innocence should prevail, by supposing that the first husband was dead at the time of the second marriage. *Rex v. Inhab. of Twynning*, 2 Barn. & Ald. 386. See *O'Gara v. Eisenlohr*, 38 N. Y. 296. See, also, *Lockhart v. White*, 18 Texas, 102; *Klein v. Landman*, 29 Mo. 259; *Squire v. State*, 46 Ind. 459.

But where a husband married a second wife, and it was shown that the first wife had written a letter to him, which was dated twenty-five days before that time, the court held that there could be no presumption of the death of the first wife. *Rex v. Inhab. of Harborne*, 2 Ad. & El. 540.

If it is shown that certain persons were partners two or three years before the time of the trial, it will be presumed, in the absence of evidence to show a change or dissolution of the partnership, that it still continues. *Cooper v. Dedrick*, 22 Barb. 516.

Generally speaking, when a fact has been shown, its continuance will be presumed until the contrary appears. Thus when it has been established that a highway has been legally laid out its continuance as such will be presumed until the contrary appears. *Beckwith v. Whalen*, 65 N. Y. 322. So while there is no presumption that a woman is married, when the fact is proved, a state of coverture is presumed to exist until the contrary is shown. *Erskin v. Lewis*, 25 Ill. 251. So where it is shown that an act was done during minority, there will be no presumption that the party has since attained majority. *Irvine v. Irvine*, 5 Minn. 61. But where a person enters into the service of

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another without any agreement at the time as to the term or compensation, a subsequent agreement fixing the rate of compensation for a specified time does not, in the absence of other proof, raise a presumption that the employee was to receive the same compensation for services rendered after that time. *Smith v. Velie*, 60 N. Y. 106.

As a general rule, where members of a firm have access to books, and opportunity to know their contents, and how their accounts are kept, the presumption is that they do know. *Fairchild v. Fairchild*, 64 N. Y. 471.

So where a person has done work for a contractor or has furnished material for the erection or repair of a building, he will be presumed to have done so with the consent of the owner, in the absence of proof of objection on his part. *Wheeler v. Scofield*, 67 N. Y. 311.

When parties have submitted matters in controversy to arbitrators, and the terms of the submission leave it in doubt as to whether all or a part of the matters in controversy were submitted, the presumption is in favor of an intention that all matters should be decided. *Jones v. Welwood*, 71 N. Y. 208.

Where a paper has once been filed in the office of a county clerk, which it is his duty to keep on deposit in his official possession at his public office, and the paper is not found in the particular place provided for the deposit of it, the presumption is that it is lost or destroyed. *Mandeville v. Reynolds*, 68 N. Y. 528; *Rex v. Stonebridge*, 8 B. & C. 96.

Where goods are purchased on credit by a known agent for the use of the principal, the presumption is that the credit was given to the principal. *Butler v. Evening Mail Association*, 61 N. Y. 634.

When a general custom is shown to exist in a particular trade or business, parties engaged in the business are presumed to contract with reference to the custom, unless it is otherwise expressly agreed. *Dalton v. Daniels*, 2 Hilt. 472; *Barton v. McKelway*, 2 Zab. R. 165.

The subject of circumstantial evidence will receive attention in another place.

A seal upon an executory instrument is presumptive evidence of a sufficient consideration. Code of Civil Pro., § 840.

Under the statutes of this State a person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the State or elsewhere, for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. Vol. 1, p. 129, § 841.

The statute also provides that "a final judgment or decree for a sum of

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money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the State, or heretofore or hereafter rendered in a court of record within the United States, or elsewhere, is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree; or his heir or personal representative; or a person whom he otherwise represents. Such an acknowledgment must be in writing and signed by the person to be charged thereby." Vol. 1, p. 110, § 376; 2 R. S. 301, § 47.

The Revised Statutes also provide that "after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period." 2 R. S. 301, § 48.

§ 7. **Hearsay.** When a witness, in the course of stating what has come under the cognizance of his own senses, concerning a matter in dispute, states the language of others, which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called *hearsay* evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn; or, on the other hand, it may consist of a verbal or written narrative of facts, received by the witness from some other person, which he delivers at second hand to the court. This term, *hearsay* evidence, is used with reference both to that which is written and to that which is spoken. But, in its legal sense, it is confined to that kind of evidence (whether spoken or written) which does not derive its credibility solely from the credit due to the witness himself, but rests also, in part on the veracity and competency of some other person from whom the witness may have received his information. It may be here stated that the general rule is, and it is a rule of very extensive influence, that hearsay evidence is not receivable.

The most satisfactory evidence which can be afforded is the evidence of our own senses. But, in judicial investigations, the court and jury cannot have that kind of evidence, since they must decide upon the evidence adduced at the trial.

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The great bulk of the proof which is made in the trial of actions is the testimony of witnesses, orally delivered. And, as a test of truth it is found indispensable to the due administration of justice, that every living witness should be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony which is derived from the relation of third persons, even when the informant is known, cannot be subjected to this test, nor is the statement under oath, and, besides, it is frequently impossible to ascertain through whom, or how many persons, the narration has been transmitted from the original witnesses of the fact. There are several exceptions to the rule which excludes hearsay evidence. But those cases in which it is received are of that character which sufficiently guards against frauds; and, in most of them, the rejection of the evidence would work a greater mischief than could result from its reception. There are some cases in which this kind of evidence is treated as original evidence.

In cases where it is material to inquire into the demeanor, the conduct and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question are, in their nature, original evidence; for they are the thing itself which is inquired into, as far as outward behavior is important; and as evidence of existing inward sentiments, they are unlike a statement of past occurrences, for they derive their credit from being usually identified with and naturally resulting from, particular corresponding feelings. Accordingly, in actions for criminal conversation, where it is material to inquire into the terms upon which the husband and wife lived together, before the connection of the wife with the defendant, it is usual to give evidence of what the husband and wife have said to, or of each other, in order to show their mutual demeanor and conduct, and whether they were living together upon better or worse terms. *Trelawney v. Coleman*, 2 Starkie, 191; S. C., 1 Barn. & Ald. 90; *Winter v. Wroot*, 1 Mood. & Rob. 404; *Willis v. Bernard*, 8 Bing. 376; *Elsam v. Faucett*, 2 Esp. 562. So in an action for enticing away the plaintiff's wife, and for harboring her, the character and conduct of the plaintiff may be shown, and the declarations of the wife may be proved, expressive of her wishes in relation to her living with the plaintiff as his wife; and in all such cases the intent with which the defendant has acted is a material point of inquiry. *Bennett v. Smith*, 21 Barb. 439; *Schuneman v. Palmer*, 4 id. 225.

Formerly the expressions of a person afflicted with bodily pain from

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a personal injury, or from illness, relative to his health and sensations, were admissible evidence in connection with other evidence, showing his condition, such expressions being ordinarily the natural consequences and the outward indication of co-existing sufferings. *Caldwell v. Murphy*, 11 N. Y. 416; *Aveson v. Kinniard*, 6 East, 188; *Fort v. Brown*, 46 Barb. 366; *Goodwin v. Harrison*, 1 Root, 80; *Bacon v. Charlton*, 6 Cush. 581; *Brown v. New York Central R. R.* 32 N. Y. 597, 603; *Maine v. People*, 9 Hun, 113; *Matteson v. New York Central R. R.*, 35 N. Y. 487; *Werley v. Persons*, 28 id. 344. Before parties could be sworn as witnesses in their own behalf, these statements and declarations were received in evidence with considerable caution and merely as a matter of necessity. Statements and representations of a sick person, of the nature, symptoms and effects of his malady, have been received as original evidence, and especially when made to a medical attendant to enable him to administer to a patient, they have been regarded as competent evidence and entitled to weight.

There is good reason for their admission when made to the attending physician and surgeon, as upon them, in connection with the manifestations and symptoms of injury or disease, the opinion of the expert is based and the treatment governed. But in every other case the admission of testimony so exceptional must be referred to the necessities of the case and the inability of the party to give evidence of a higher and more satisfactory nature. Since the amendment of the Code allowing parties to testify in their own behalf, there is no longer a necessity for giving in evidence the declarations of a party if he is living and able to be sworn and examined as a witness; and the reason of the rule ceasing, the rule itself, adopted with a reluctance, and followed doubtingly and cautiously, should cease. *Reed v. New York Central R. R. Co.*, 45 N. Y. 574.

Verbal and written declarations are often said to be admissible as constituting a part of the *res gestæ*. As such they are most properly admissible when they accompany some act, the nature and object or motives of which are the subject of inquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords; for where words or writings accompany an act, or where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at the time of their doing a

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particular act, in the same manner as their demeanor or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intention, even if such statements would not be excluded on other grounds. In an action against the indorsers of a note, answers made by a person applied to as maker, at the place designated by the maker as his place of business, admitting himself to be the maker, are admissible as a part of the *res gestæ*, and are presumptive evidence that the person of whom the demand was made was the maker. *Hunt v. Maybee*, 7 N. Y. 266.

An officer's return to process is generally conclusive as against the officer, and he will not be permitted to question its truth. But such returns are also evidence in favor of the officers who made them. If a constable is sued in trespass, trover, or replevin for levying upon goods, his return is *prima facie* evidence of his levy upon it as an officer. *Cornell v. Cook*, 7 Cow. 310; *Earl v. Camp*, 16 Wend. 562, 569; *Spoor v. Holland*, 8 id. 445. In actions against officers, their returns, regular on their face, will generally be *prima facie* evidence for them. *Putnam v. Man*, 3 Wend. 202.

In ordinary cases hearsay evidence is excluded, even though stated under oath, and in a judicial proceeding, for the party against whom it is offered has not enjoyed the right and the advantages of cross-examination. And the evidence is rejected, although it is certain that no better evidence is to be had, and although the rejection of the evidence will be to exclude all the evidence possessed by the party offering it. *Rex v. Nuneham*, 1 East, 373; *Rex v. Frystone*, 2 id. 54. So affidavits taken *ex parte* are not admissible as evidence on the trial of an action. Vol. 1, p. 42, § 3004; *People v. Walsh*, 87 N. Y. 481; *Clute v. Fitch*, 25 Barb. 428.

Besides the cases which have been noticed, in which certain evidence was treated as original, instead of hearsay evidence, there are several important exceptions to the general rule, which will require to be observed in practice.

Exception 1st. In matters of public or general interest, hearsay evidence is sometimes admissible. And, therefore, it is received for the purpose of showing that a particular person holds a specified office, or a public employment as an officer. This evidence is usually accompanied by evidence showing that the person who claims to be such officer has performed such acts as the office or employment authorizes him to perform. In an action brought by an overseer of the poor

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to recover a penalty, the character in which he sues may be proved by reputation. *Blatchley v. Moser*, 15 Wend. 215.

So such evidence is sufficient to show that the plaintiff is trustee or collector of a school district; *Ring v. Grout*, 7 Wend. 341; *McCoy v. Curtice*, 9 id. 17; or to show that he is a constable; *Adams v. Jackson*, 2 Aik. 145; or a justice of the peace. *Snow v. Peacock*, 2 Carr. & Payne, 215; *Wilcox v. Smith*, 5 Wend. 231. So the same rule applies in actions against persons who have assumed to act as officers, as in the case of an action against one as an overseer of highways; *Dean v. Gridley*, 10 Wend. 254; though he will not be liable to an action at the suit of the commissioners of highways for the penalty given by statute for a neglect of duty as overseer, if he has omitted to file his acceptance of the office in the town clerk's office. *Bentley v. Phelps*, 27 Barb. 524. In actions against sheriffs, deputy sheriffs, constables, justices of the peace, etc., it is sufficient to prove that they have acted as such without showing their election or appointment. *Potter v. Luther*, 3 Johns. 431. So as to actions by or against attorneys or counselors. *Berryman v. Wise*, 4 Term R. 366.

But, when it is convenient, it is always best to prove all such facts by such evidence as leaves no question as to its admissibility or its sufficiency, by showing the election or appointment, etc.

Hearsay evidence is not admissible for the purpose of showing who was a freight agent of a railroad corporation at a particular time. *Spade v. Hudson River R. Co.*, 16 Barb. 383.

Nor can it be shown who were the officers of a corporation by general reputation. *Litchfield Iron Co. v. Bennett*, 7 Cow. 234.

So it is a general rule, that a paper executed by a third person cannot be admitted as evidence of the truth of the facts it recites, when his declarations, as to the same matter, would not be admissible, because they were hearsay evidence. *Garrigue v. Loeschner*, 3 Bosw. 578.

Exception 2d. In matters of pedigree, the statements of deceased persons are allowed in many cases, subject, however, to various limitations and qualifications. *Cuddy v. Brown*, 78 Ill. 415; *Ross v. Cooley*, 8 Johns. 128; *Bogert v. King*, 5 Cow. 237; *Webb v. Richardson*, 42 Vt. 465; *Eaton v. Tallmadge*, 24 Wis. 217. Such evidence, when allowed, is admitted upon the principle that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position, without any temptation to exceed or to fall short of the truth. Matters of pedigree consist of general evidence as to descent or relationship, or as to particular facts, such as marriages, births or deaths, and of the time when such events

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occurred, either absolutely, or relative to each other. Declarations of the family or kindred are admissible to show who was a member of the family or the particular relationship of the person, as son, daughter, cousin, and the like. So particular facts may be proved in the same way, as the ages of persons, the dates of marriages or births, etc. *Clark v. Owens*, 18 N. Y. 434; *Chamberlain v. Chamberlain*, 71 id. 423.

A person may testify as to his own age. His parents are not necessarily the best witnesses. *State v. Cain*, 9 W. Va. 559; *Cheever v. Congdon*, 34 Mich. 296. But the place of birth of a child cannot be shown by the declarations of a deceased parent. *Rex v. Erith*, 8 East, 539; *Regina v. Rishworth*, 2 Ad. & El. (N. S.) 476. *Town of Union v. Town of Plainfield*, 39 Conn. 563. And the testimony of a son as to representations made to him by his parent as to his place of birth are inadmissible. *McCarty v. Denning*, 4 Lans. 440. Hearsay, in regard to the place of birth of a deceased person, is clearly inadmissible unless it comes from the relatives of such person. *Tyler v. Flanders*, 57 N. H. 618; *Carter v. Montgomery*, 2 Tenn. Ch. 216.

The fact of a person's death may be shown, in the absence of better evidence, by reputation among the family and relatives of the deceased. *Clark v. Owens*, 18 N. Y. 434. But the place of a person's death cannot be proved by hearsay declarations. *McCarty v. Terry*, 7 Lans. 236.

The testimony of a widow that her husband died at a certain time but that her only knowledge of his death and burial is derived from what his relatives have stated and written to her, is competent evidence of the husband's death. *Mason v. Fuller*, 45 Vt. 29. But a newspaper notice of the death of a person in another State is no evidence of death. *Fosgate v. Herkimer Manufacturing and Hydraulic Co.*, 9 Barb. 287. Nor is a memoranda made by a third person and not in the discharge of any official duty evidence of that fact. *Ridgley v. Johnson*, 11 Barb. 527.

Entries in the family Bible or register are evidence, if made by the father or under his direction, and he is dead.

But when such entries are recent, and the father is present in court, or can be produced there, or when the entries are made by the mother, after the father's death, and she is present in court, or can be produced, such entries will be rejected. *Leggett v. Boyd*, 3 Wend. 376, 379. See *Kobbe v. Price*, 14 Hun, 55.

The declarations of deceased parents are admissible in the same manner as entries in the Bible or register.

But declarations of other persons, to be admissible, as to pedigree should be made by one who was connected with the family by consanguinity or affinity, or who derived his information from persons so connected with the family, or who has some personal knowledge of the facts of which he speaks. *Crawford v. Blackburn*, 17 Md. 49; *Carnes v. Crandall*, 10 Iowa, 377. A statement in a deposition by a witness long and intimately acquainted with a family, that certain children died at such a time ("as appears from entries in the family Bible which I believe to be true") is not subject to exception at the trial. *Secrist v. Green*, 3 Wall. (U. S.) 744.

Where a deceased physician has attended the birth of a person whose age was a subject of inquiry, and that it was shown that he was in practice for many years before such birth, and for several years afterward; that he made an entry in his register of all such cases as he attended; that in his register was an entry of the birth of this person, at a time specified in the register; that such register also contained entries of the birth of a sister and brother of such person, at a subsequent time, it was held that the register was competent evidence of the time of the birth of such person. *Arms v. Middleton*, 23 Barb. 671.

But such entries or declarations are rejected when the person who made them is alive and within reach of the process of the court, and he himself can be produced as a witness.

Exception 3d. An exception to the general rule is made in cases relating to ancient possessions; but no such questions arise in a justice's court, and the rules need not be discussed in this work.

Exception 4th. Dying declarations are sometimes received in evidence in criminal cases.

But they are not admissible on the trial of civil actions. *Wilson v. Boerem*, 15 Johns. 286; *Gray v. Goodrich*, 7 id. 95; *Jackson v. Betts*, 6 Cow. 377; S. C., 6 Wend. 173; *Spatz v. Lyons*, 55 Barb. 476.

Exception 5th. Declaration against interest by persons since deceased. It is a well-settled rule, that declarations of persons, since deceased, whether the declarations were verbal or written, are admissible in those cases in which the persons making them are presumed to be cognizant of the subject-matter of the declarations, and where their declarations apparently operate against their own interest, whether pecuniary or proprietary. It is presumed, when declarations are made under such circumstances, that they are entitled to credit, because the regard which men pay to their own interest may be safely considered as a sufficient guaranty against their prejudicing themselves by any erroneous statement; and the assumed tendency of the

declarations precludes the possibility of any fraudulent statement. Indeed, the apprehension of fraud in such cases is, in a great measure, removed, without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the life-time of the authors of them; and that it is always competent for the party against whom they are produced to point out any sinister motive for making them.

The declarations of a living person, however, are not admissible, however much they may be against his interest, unless he is a party to the action, or is the real party in interest, though not nominally so on the record. *Spargo v. Brown*, 9 Barn. & Cres. 935; *Phillips v. Cole*, 10 Ad. & El. 106; *Smith v. Whittingham*, 6 Carr. & Payne, 78. But the admissions of an assignor are not admissible, even though such assignor is dead. *Ante*, 406. The entries must be such as are really against the party making the entries, not such as are merely apparent, or they will not be admissible.

Exception 6th. Entries in the course of office or business. There is a rule which allows of written entries, made by deceased persons as evidence, even though not made against their interest, provided that, in addition to a peculiar and personal knowledge of the facts, and the absence of all interest to pervert them, the entries appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be contemporaneous with the transactions to which they relate. And, under such circumstances, it would appear that, upon general principles, there is no sound distinction between written entries and verbal declarations. The entries which are made in books of account will be noticed in a subsequent place.

The protest and certificate of a notary public are presumptive evidence of the presentment of a note and non-payment thereof, to charge an indorser, if the notary is dead, notwithstanding the fact that the indorser serves an affidavit, when sued, stating that he did not receive such notice. *McKnight v. Lewis*, 5 Barb. 681. And see vol. 1, pp. 135, 136, §§ 923, 924.

The entry of a deceased clerk in the register of a notary, made in the ordinary and usual course of business, are received in evidence to prevent a failure of justice, and because public convenience and the interest of trade and commerce demand it. *Gawtry v. Doane*, 51 N. Y. 84. So the book of a deceased messenger of a bank, not a notary, in which in the course of his duty he entered memoranda of demands and

notices to the promisors and indorsers upon notes left in the bank for collection, has been received as evidence of a demand of the maker and notice to the indorser of a note so left for collection. *Welch v. Barrett*, 15 Mass. 379. So when notaries public are authorized by statute to appoint one or more deputies to assist them in making protests and delivering notices, and are required to keep a book containing a record of the protests made by them, with mention of the notices they have given to drawers or indorsers, together with the names of the drawers or indorsers, the dates of the notices, the manner in which they were served, etc., the memorandum made by the deceased deputy notary of the facts and circumstances required by the statute is, after the proper preliminary proof has been made, competent evidence of demand and protest. *Fassin v. Hubbard*, 61 Barb. 548.

So a memorandum of a cashier is evidence when he is dead, where he was in the habit of making such entries, after giving the proper notices in the name of the notary of the bank. *Nichols v. Goldsmith*, 7 Wend. 160.

But whenever entries made in the books of third persons are offered in evidence, it must be shown that such person is dead before the entries are admissible; it is not sufficient that he is out of the jurisdiction of the court, and cannot be found on due inquiry; *Wilbur v. Selden*, 6 Cow. 162; and the entries will clearly be inadmissible when the witness is within reach of the process of the court or is present therein at the trial. *Leggett v. Boyd*, 3 Wend. 376. Entries made by the discount clerk of a bank can only be proved by the clerk if alive and within the State. *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *White v. Ambler*, 8 id. 170.

The principle of the rule which receives such entries is limited to those cases only in which the entry was made in the ordinary and regular course of business. And it does not extend to entries which, though made in the course of business, include independent matters, which are not necessary to the performance of the duty by the person who makes the entry. In this respect, the entries now under consideration differ materially from those which have been made against the interest of the party making them, which, it has been seen, are admissible, not only as evidence of the facts which are directly against the interest of the declarant, but also of other independent facts contained in the same entry; and immediately connected with the other facts. The entries must be made, too, in the "usual course of business," by which is meant that the entries are not admissible if made out of the usual course of business.

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The entries must also be made contemporaneously with the occurrence of the events recorded, though this is not the rule as to entries which are made against the interest of the party making them. Verbal declarations are not admissible unless they are shown to be part of the *res gestæ*.

An indorsement which is made by the obligee of a bond, or the payee of a note, for the purpose of avoiding the defense of the statute of limitations, is not admissible as evidence, unless it is shown that the indorsement was made at a time when it was against the interest of the party making it, though if that is shown the evidence is admissible. *Roseboom v. Billington*, 17 Johns. 182; *Read v. Hurd*, 7 Wend. 408.

It should be remembered that hearsay evidence becomes no stronger by being the subject of an entry in an account book. *Churchman v. Lewis*, 34 N. Y. 444.

Exception 7th. Evidence of a deceased witness. Where a witness has been sworn and examined by the parties upon the trial of an action, and the witness subsequently dies, his evidence is admissible in a subsequent action between the same parties, when the point in issue is the same as that in the former trial. *Osborn v. Bell*, 5 Denio, 370; *State v. Johnson*, 12 Nev. 121; *Jaccard v. Anderson*, 37 Mo. 91. So the testimony of a party who has died since a former trial may be given in evidence upon a new trial. Vol. 1, p. 128, § 830. This kind of evidence, classed among the exceptions to the rule respecting hearsay evidence, is of a different character from any which has been before mentioned, for not only is it free from the objection of being extrajudicial, or of being without oath, but the party also who is to be affected by it had the power of cross-examining the witness, under the same circumstances as on the subsequent trial.

The proof of what the deceased witness swore may be made by any person who heard his testimony, even though he took no minutes of the evidence. *Grimm v. Hamel*, 2 Hilt. 434; *Hutchings v. Corgan*, 59 Ill. 70. An attorney or counselor, or other person, who took minutes upon a former trial, and testifies to their accuracy, may state on a subsequent trial what a deceased witness swore to on a former trial, although such attorney, etc., cannot testify from his mere recollection without a reference to his minutes. *Van Buren v. Cockburn*, 14 Barb. 118; *Huff v. Bennett*, 6 N. Y. 337; *Martin v. Cope*, 3 Abb. Ct. App. 182; *Crawford v. Loper*, 25 Barb. 449. It is sufficient, if upon such examination of his minutes, he can then swear from recollection what the evidence was given by the deceased witness. *Ib.*

And where a witness has no recollection of what a deceased witness

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swore, even after looking over his minutes, his minutes are then competent evidence to prove such facts, provided the witness swears that he took down the evidence of the former witness, in the capacity of counsel or attorney, and that he has no doubt of the correctness of his minutes. *Halsey v. Sinsebaugh*, 15 N. Y. 485. To make the minutes evidence, when the person who took them does not recollect the evidence, it is not necessary to prove that the precise words of the former witness were taken down. It is sufficient if it appears that the person who took the evidence down in writing intended to take down the precise language of the witness, but could not swear that he gave the precise words, nor that he had taken down every word, though he intended to take down all that was material. *Clark v. Vorce*, 15 Wend. 193; *Crawford v. Loper*, 25 Barb. 449; *Yale v. Comstock*, 112 Mass. 267. See *Haddow v. Lundy*, 59 N. Y. 320. But the person called to give the testimony of a deceased witness upon a former trial must be able to state the substance of all the testimony given by the deceased. *Buie v. Carver*, 73 N. C. 264; *Tibbitts v. Flanders*, 18 N. H. 284; *Harrison v. Charlton*, 42 Iowa, 573. And all of such testimony must be given. *Woods v. Keys*, 14 Allen (Mass.), 236.

The minutes of a former trial, kept by an attorney, since deceased, cannot be received in evidence, although it is shown that the attorney kept minutes during the whole trial, and that the minutes, according to the recollection of a witness present, appear to be the minutes of the entire trial. *Crouch v. Parker*, 56 N. Y. 597. The minutes of a person who took down the evidence of a former witness are not evidence of what was testified to, if he cannot swear that he took down the evidence accurately or fully, even though he cannot state the evidence from recollection, after refreshing his memory from such minutes. *Huff v. Bennett*, 6 N. Y. 337. Before the minutes of a person are evidence in such a case, it must appear that after refreshing his recollection, he cannot swear to the evidence given by the deceased witness; such minutes are merely auxiliary, and are never admissible when the person who made them recollects the facts stated in them, whether his recollection is independent of them, or whether it is refreshed by them so as to revive his recollection. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134, 140.

It is not necessary to prove the precise words used by a deceased witness. Such a thing is utterly impracticable, and is no more required than it would be to give the manner and tones of voice of such witness. If the substance is fully given, it is all that can be required. *Chaffe v. Cox*, 1 Hilt. 79; *Clark v. Vorce*, 15 Wend. 193; S. C.,

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19 id. 232, 233; 1 Phil. Ev. 399, note, 4th Am. ed; *Gannon v. Stevens*, 13 Kans. 447; *Martin v. Cope*, 3 Abb. App. Dec. 182; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Thurmond v. Trammall*, 28 Texas, 371; *Horne v. Williams*, 23 Ind. 37; *Trammall v. Hemp-hill*, 27 Ga. 525.

Before evidence is admissible, for the purpose of showing what a witness testified to on a former trial, it must be shown that he is dead. *Powell v. Waters*, 17 Johns. 176; *Wilber v. Selden*, 6 Cow. 162. *State v. Staples*, 47 N. H. 113. The fact that the witness has forgotten the facts to which he had formerly testified does not render evidence of his former testimony competent. *Robinson v. Gilman*, 43 N. H. 295.

So the pendency of the former trial must be shown, unless the proof is expressly waived, or no objection is taken on that ground, which would be an implied waiver. *Beals v. Guernsey*, 8 Johns. 446; *White v. Kibling*, 11 id. 128. See *Charlesworth v. Tinker*, 18 Wis. 633. And it must be also shown that the evidence was given in a case in which the parties to the suit in which it is offered, or their privies, were parties. *Poorman v. Miller*, 44 Cal. 269; *Lane v. Brainerd*, 30 Conn. 565. The testimony of a deceased witness may be given in evidence in a subsequent suit between the same parties or their privies, provided the point in issue be the same. But if there are new parties in the same suit, not in privity with any of the first, and who had no opportunity to cross-examine the witness, the evidence will not be admissible. *Orr v. Hadley*, 36 N. H. 575.

Exception 8th. Admission of parties. This matter has been fully discussed already. *Ante*, 395.

§ 8. **Best evidence.** The law excludes such evidence of facts as from the nature of the thing supposes still better evidence behind in the party's possession or power. The rule has been expressed in various forms, by different authors. One declares that it requires "the best evidence of which the case in its nature is susceptible." 1 Greenl. Ev., § 82. Another, that it requires "the best attainable evidence." Stark. 641. Others, that it requires the highest evidence of which the nature of the thing is capable. The precise import of the rule cannot be fully and clearly comprehended, without reference to its application in various instances.

The principle of the rule under consideration is founded on the presumption that there is something in the better evidence that is withheld, which would make against the party resorting to inferior evidence. Although in some instances this presumption may not be very strong,

yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a court or jury the kind of evidence which is least calculated to perplex or mislead them.

The present rule is satisfied by the production of the best *attainable* evidence. In requiring the best evidence applicable to each particular fact, it meant that no evidence of a nature merely substitutionary shall be received where the primary evidence is producible. By substitutionary evidence is meant such evidence as implies the existence of primary or more original information.

If a party offers a copy of a deed, bill of exchange, promissory note, or written contract, when he ought to produce the original, and is able to do so, a presumption arises that there is something in the original instrument which would make against such party; and, therefore, the copy, in such a case, is not competent evidence. The rule is general in its application, and, therefore, it would not be sufficient to rebut this presumption, in any particular case, by showing that the copy is correct for the purpose of admitting such substitutionary evidence. The reason why the best evidence is required is, to prevent frauds, by keeping back the best evidence; and, when the reason of the rule fails, the rule itself ceases. If the original paper is shown to be in the hands of the opposite party, who refuses to produce it, after receiving a proper notice for that purpose; or, if it is shown that the original has been lost or destroyed, without any default on his part, no presumption of fraud can be made, and a copy of the instrument will then be admitted, because a copy is the best evidence which can then be adduced.

The rule does not relate to the measure or quantity of the evidence offered, but to its *quality*, when compared with some other evidence of superior degree. It is not necessary, in point of law, to give the fullest proof that every case may admit of. If there are several eye-witnesses to a particular fact, it may be proved by the testimony of one or more of them, without calling the others.

The cases in which secondary evidence is excluded, and the best evidence required, is, where oral evidence is offered in the place of written instruments. These instruments may be reduced to three classes: 1st. Those instruments which the law requires to be in writing; 2d. Those contracts which the parties have put into writing; and 3d. All other writings, the existence of which is disputed, and which are material to the issue.

In the first place, oral evidence cannot be substituted for any instrument which the law requires to be in writing; such as records, public documents, official examinations, deeds of conveyance of lands, wills,

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other than nuncupative, promises to pay the debt of another, or to answer for his default, etc., and other writings required by the statute of frauds. Neither can other written evidence be substituted in the place of a record of testimony and proceedings had before a court and which the law requires the court to keep, unless some statute authorizes the substitution of a copy in place of the original. Thus when a statute requires that evidence taken before a surrogate in certain cases shall be reduced to writing and entered in a proper book to be provided and preserved as part of the books of his office, but does not declare that the book in which the entry is made shall be evidence, the minutes of the testimony taken before the surrogate are the best evidence of what was sworn to before him, and the entry of such testimony in the proper book, being but a copy of his minutes, is but secondary evidence. And even if the statute made the book in which such minutes are transcribed, competent evidence of the facts therein contained, the original minutes would still be higher evidence. *Haddow v. Lundy*, 59 N. Y. 320.

Where the law declares that an agreement is not valid unless in writing, an oral contract is void, and cannot be enforced. But if the agreement has been properly executed, and is then accidentally lost or destroyed, it will be valid, and its existence may be proved, like any other lost paper, etc. So, where the certificate of incorporation of a corporate company has been duly executed and filed, but it could not be found on due search in the proper office, where it was filed, it was held competent to show, by other evidence, that, in truth, a copy was filed; and a sworn copy of the original was held competent evidence. *New York Car Oil Co. v. Richmond*, 6 Bosw. 213. So, where an action is brought on a judgment and the judgment-roll has been duly filed in the office of the county clerk, but cannot be found in the particular place provided for its deposit, it is presumed to be lost or destroyed and secondary evidence may be given of its contents. *Mandeville v. Reynolds*, 68 N. Y. 528.

Even the admissions of a party will not be competent to prove the contents of a record, or of an instrument which the law requires to be in writing, unless it is in those cases in which the admission is made in open court, at the trial, for the purpose of obviating the production of written evidence. *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 486; *Jenner v. Joliffe*, 6 Johns. 9; *Hasbrouck v. Baker*, 10 id. 248. The general rule is, that the oral admissions of a party, made out of court, are evidence against him in those cases only in which an oral

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contract would be binding or in which the transaction may legally rest in parol evidence. *Ib.*

And, where an action of trespass was brought against a defendant, on the ground that he had directed another person to take the plaintiff's property, and it appeared that the only direction which he had given was contained in a military warrant, which he had signed as president of a court-martial, it was held that the plaintiff was bound to produce the warrant, and could not prove the direction by oral evidence. *Stebbins v. Cooper*, 4 Denio, 191.

In the second place, oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the cases of negotiable securities; and, in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository, and the appropriate evidence of their agreement. The written contract is not a collateral matter, but is of the very essence of the transaction.

In an action against a constable, for selling property which the plaintiff claimed to own, by virtue of a bill of sale, it was held that the bill of sale must be produced, and that parol evidence of its contents was not admissible. *Dunn v. Hewitt*, 2 Denio, 637. And this was held, notwithstanding the fact that it first appeared on cross-examination of the witness proving the sale, that it was reduced to writing. *Ib.* In such a case the justice is bound to strike out the parol evidence, if a motion is made for that purpose, by the party against whom it has been introduced. *Ib.*

So an agreement for the renting of certain rooms was reduced to writing, and this was held to exclude evidence of prior oral negotiations as to the terms of the letting. *Townsend v. Fisher*, 2 Hilt. 47. And see *Niles v. Culver*, 8 Barb. 205; *Van Brunt v. Day*, 17 Hun, 166. The rule which excludes such evidence applies not only to prior and contemporaneous oral declarations, but with equal force to subsequent declarations. *Mott v. Richtmyer*, 57 N. Y. 49. The object of putting agreements into writing is to exclude, as said by Lord COKE, a resort to "the uncertain testimony of slippery memory." If the writing is a mere receipt for the price of property sold, and not a bill of sale, then parol evidence of prior negotiations is admissible. *Filkins v. Whyland*, 24 N. Y. 338; *Silliman v. Tuttle*, 45 Barb. 171. See *Ryan v. Ward*, 48 N. Y. 204; *Foster v. Newbrough*, 58 id. 481; *Smith v. Holland*, 61 id. 635. Parol evidence of payment may be

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given, although a receipt for the money paid was given at the time of payment. *Wolf v. Foster*, 13 Kans. 116.

The general rule is applicable to contracts of all kinds, whether relating to the sale or leasing of real estate, the sale or exchange of personal property, or for the rendering of personal services, and the like, where it is essential that the original instrument should be produced. But there are cases in which this is not necessary. And in an action for a wrongful trespass by a stranger, upon premises held by the plaintiff as a tenant, the plaintiff need not produce his lease. Evidence of possession on his part, under a claim of right by a written instrument, is entirely sufficient, as against a wrong-doer. *Walker v. Wilson*, 8 Bosw. 586.

And where a paper is intended by the parties to it as a mere memorandum, and not as a contract, parol evidence may be given to show the actual terms of the contract. *Cassidy v. Begoden*, 6 J. & Sp. 180; *Foot v. Bentley*, 44 N. Y. 166.

A copy of a telegram is not the best evidence, and therefore the original must be produced in evidence or its absence accounted for. *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 682.

When it becomes necessary to prove the contents of letters which have passed between parties, the originals must be produced, or the party desiring to give proof of their contents must lay the foundation for secondary evidence in the ordinary and usual way. Letter-press copies are in no sense original papers, and cannot be admitted in evidence without the proper preliminary proof. *Foot v. Bentley*, 44 N. Y. 166; *Marsh v. Hand*, 35 Md. 123. When this proof has been given these copies become evidence.

A sworn copy of a letter-press copy of a lost letter is competent as evidence of the contents of the letter without producing the letter-press copy. *Robertson v. Lynch*, 18 Johns. 451; *Goodrich v. Weston*, 102 Mass. 362; 3 Am. Rep. 469. This is upon the ground that there are no grades of secondary evidence. Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original. If the first copy be lost or in the hands of the opposite party, so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character. The admission of a transcript from the record of a deed or other private writing, for the record of which provision is made by law, is not an exception to but only a modification of the same rule. But when the source of original evidence is exhausted and resort

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is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the fact that a less satisfactory form of proof is offered while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. *Ib.* See, also, *Stetson v. Gulliver*, 2 Cush. 494; *Winn v. Patterson*, 6 Pet. 663; *Brown v. Woodman*, 6 C. & P. 206; *Doe v. Ross*, 7 M. & W. 102. So when secondary evidence is admissible, parol evidence of the contents of a document may be given although there is a copy of the document in existence. *Doe v. Ross*, 7 M. & W. 102, 107; *Best on Evidence*, § 87. But this rule is not universally recognized; and it has in many instances been held that the general rule applies also to secondary evidence, so that a copy of a copy is not evidence, although a copy of the original paper might be, in some cases. See *Orman v. Riley*, 15 Cal. 48; *Reeve v. Long*, Holt, 286; *Leibman v. Pooley*, 1 Stark. 167; *Everingham v. Roundell*, 2 Moo. & R. 138; *Coman v. State*, 4 Blackf. 241.

When a way bill is a copy of a copy, oral evidence of the weight of the goods described in such bill is admissible. *Young v. Mertens*, 27 Md. 114. Where it was important to show that a bill of items had been rendered to the defendant, and also what the items were, the plaintiff offered a copy of his books, from which the bill rendered had been copied; this evidence was objected to, and it was held that the books themselves were the best evidence, and that a copy of the books was not admissible evidence. *Reddington v. Gilman*, 1 Bosw. 235, 242. So, parol proof may be given of a lost paper, by giving a copy of it in evidence; but if a copy is made, and the original is lost, the copyist must be produced to prove the copy, if possible, and mere evidence of his handwriting in making the copy is not sufficient. *Brewster v. Countryman*, 12 Wend. 446.

A copy of a memorandum cannot be read as evidence of the contents of it. *McCormick v. Pennsylvania Cent. R. R. Co.*, 49 N. Y. 303, 315; *Marclay v. Schultz*, 29 id. 346. But a witness may use a copy of an entry made by himself or any other person for the purpose of refreshing his recollection, if, on reading it, he can testify that he then recollects the fact to which the entry relates. *McCormick v. Pennsylvania Cent. R. R. Co.*, 49 N. Y. 303, 315; *Marclay v. Schultz*, 29 id. 346, 351.

When it appears that a transfer of an account sued upon is in writing,

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the writing must be produced as the best evidence. *Gilmore v. Bangs*, 55 Ga. 403. And when the interest which the party in possession has in personal property, as whether one-half or the whole, is of the essence of the suit, and absolutely necessary to fix the amount of the recovery, and it appears that he purchased from another and holds title under a written instrument showing the quantity of his interest, the bill of sale is the best evidence and parol evidence, of his title is inadmissible. *Epping v. Mockler*, 55 Ga. 376. Where a contract of sale is in writing the written instrument is the best evidence of the terms of the contract. *Baldwin v. McKay*, 41 Miss. 358.

Where an instrument is partly printed and partly written, and there is a contradiction between the written and printed portions, the written parts will prevail over the printed. *Woodruff v. Commercial Ins. Co.*, 2 Hilt. 122, 125; *Weisser v. Maitland*, 3 Sandf. 318, 322.

The admission of oral evidence to prove the contents of a paper without objection, does not prevent the party against whom it is offered from objecting to its sufficiency; *Hopper v. Taylor*, 4 E. D. Smith, 486; *Southwick v. Hayden*, 7 Cow. 334; nor from moving to strike it out at the close of the trial, before the summing up the cause, *Dunn v. Hewitt*, 2 Denio, 637; *Heely v. Barnes*, 4 id. 73; though it has been held, that, when improper evidence is deliberately admitted, without objection, which bears upon the issues on a trial, the court has no right to strike it out, even on motion. *Hall v. Earnest*, 36 Barb. 585. If, however, the evidence has been received upon some condition, mistake or contingency, a motion may be made to strike it out. *Ib.*

In the third place, oral evidence cannot be substituted for any writing, the existence of which is disputed, if its production is material either to the issue between the parties, or as to the credit of witnesses, and it is not merely a memorandum of some other fact.

By applying the rule in such cases, the court acquires a knowledge of the whole contents of the instrument, which may have a different effect from the statement of a part. Thus it is not allowed, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and having asked him if he wrote that letter, because, if it were otherwise, the cross-examining counsel might put the court in possession of a part only of the contents of a paper, when a knowledge of the whole was essential to a right judgment in the cause. If the witness acknowledges the writing

of the letter, yet he cannot be questioned as to its contents, but the letter itself must be read. *The Queen's Case*, 2 Brod. & Bing. 287. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited, but if he denies that he wrote such part, he cannot be examined as to the contents of the letter. *Ib.*

There are several exceptions to the rule which requires the best evidence.

Exception 1st. Where it is necessary to prove the contents of any record, or of proceedings in a court of justice, or in public books or registers, it is sufficient, in general, to produce an examined copy. This is on a principle of general convenience, and because it is apparent, that if the contents were misrepresented, there would be obvious means of exposing the fraud or error. The manner of proving records will be explained hereafter.

Exception 2d. It is not, in general, necessary to prove the appointment of public officers, by producing record evidence of their election or appointment, for this would be attended with general inconvenience; and a strong presumption arises from the exercise of a public office, that the election or appointment is valid. In the case of sheriffs, deputy sheriffs, constables, justices of the peace, and the like, it is sufficient to prove that they acted in that character, without producing written evidence of an election or appointment. *Ante*, 432.

An affidavit which purports to be sworn to before a proper officer is *prima facie* sufficient, and as to third persons conclusive.

Exception 3d. Where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced; *Wabash, etc., Canal v. Reinhart*, 22 Ind. 463; *Brown v. National Bank of Newport*, 11 Hun, 226; as where the writing is a mere proposal, which has not been acted upon; or where a written memorandum was made of the terms of the contract, which was read in the presence of the parties, but never signed, or proposed to be signed; or where, during an employment under a written contract, a separate verbal order is given, and the like cases. So if a written communication is *accompanied* by a verbal one, to the same effect, the latter may be received as independent evidence, though not for the purpose of proving the contents of the writing, nor as a substitute for it. So a payment of money may be proved by oral evidence, although a written receipt was taken; *Wolf v. Foster*, 13 Kans. 116; so an oral demand of goods may be proved, although a written demand was made at the same time.

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Where it is important to show that there was a consideration for the sale of chattels, the answer of a witness on the trial that such consideration was a sum of money and "one hundred acres of land," is not liable to the objection that it gives the contents of a deed of land which is not produced on the trial. *Reynolds v. Kelly*, 1 Daly, 283.

A ticket issued to a passenger for his passage from New York to San Francisco does not preclude the passenger from showing by parol testimony a contract for such transportation, independent of that expressed in such ticket. *Van Buskirk v. Roberts*, 31 N. Y. 661. Passage tickets are regarded as vouchers or tokens rather than contracts. *Quinby v. Vanderbilt*, 17 N. Y. 306.

Where the purpose for which a writing was executed is not inconsistent with its terms, it may properly be proved by parol. *Hutchins v. Hebbard*, 34 N. Y. 24. Where the principal contract is oral, and a written instrument is executed and delivered in part performance thereof, and as a mere incident of it, the written instrument does not merge the oral one, and the latter may be established by oral evidence. *Ib.*

Exception 4th. Proceedings before justices of the peace, in the trial of actions before them, may be proved without the production of their dockets, provided the statutory requirements are observed.

The Code provides that the docket-book of a justice of the peace, within the State, or a transcript thereof certified by him, is evidence before him of any matter required by law to be entered by him therein. Vol. 1, p. 139, § 938.

Before the justice himself, his own docket is evidence, without any proof of its authenticity, or of the official character of the justice. *Smith v. Frost*, 5 Hill, 431; *Groff v. Griswold*, 1 Denio, 432. So a transcript of his docket, or of other proceedings before himself, is equally evidence before himself, without any other proof of authenticity.

When the action is tried before some justice other than the one who rendered the judgment, or is tried in some other court, the docket may be proved by a transcript of it, duly certified by the clerk of the county in which such justice resides. The Code provides as follows: "A transcript from the docket-book of a justice of the peace within the State, subscribed by him, and authenticated by a certificate of the clerk of the county in which the justice resides, under his hand and official seal, to the effect that the person subscribing the transcript was, at the date of the judgment therein mentioned, a justice of the peace of that county, and that the clerk is acquainted with his handwriting, and verily

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believes that the signature to the transcript is genuine, is evidence of any matter stated in the transcript which is required by law to be entered by the justice in his docket-book. Vol. 1, p. 139, § 939.

The form of a transcript and certificate will be given in a subsequent place.

The object in permitting proof to be made of the docket by a certified transcript was to save justices from the inconvenience of attending in person, as witnesses, to prove their dockets in those cases in which that became important. *Heermans v. Williams*, 11 Wend. 636. The statute must be substantially complied with, or the transcript will not be competent evidence. To authenticate the fact, that the justice was such at the time of the rendition of the judgment, the county clerk's certificate is the only competent evidence where a transcript of the docket is used. And where a judgment is a necessary part of a defense, the judgment cannot be proved by the production of a sworn copy of the docket, even if it is proved by the justice who rendered it to be a true copy. In such cases the docket is the best evidence, and must be produced, unless the justice is dead or absent. *Pratt v. Peckham*, 25 Barb. 195; *Pollock v. Hoag*, 4 E. D. Smith, 473. And see *McCarty v. Sherman*, 3 Johns. 429. But see *Wilkinson v. Vorce*, 41 Barb. 370.

"The proceedings in an action brought, or a special proceeding instituted before a justice of the peace within the State, may also be proved by the oath of the justice. In case of his death or absence, they may be proved by the original minutes of the proceedings kept by him pursuant to law, accompanied with proof of his handwriting; or by a copy of the minutes sworn to by a competent witness, as having been compared with the original entries, with proof that those entries were in the handwriting of the justice." Vol. 1, p. 139, § 940.

If the justice neglects to keep a docket, or keeps a docket which does not conform to the statutory requirement, proceedings before him may still be proved by the justice himself. *Baker v. Brintnall*, 52 Barb. 188.

The docket of a justice may be proved by producing it, and proving by the justice that it is his docket, if the proceeding which requires it is had before some other justice or court. *Booner v. Laine*, 10 Wend. 536.

The pleadings may be produced and proved by a justice without producing his docket or a transcript of it, when it is not material to prove any thing more than the contents of the pleadings. *Brotherton v. Wright*, 15 Wend. 237. And so, too, the proceedings in an action may

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be proved without a copy of the judgment, certified by the county clerk. And where a judgment has been rendered by a justice of the peace, upon process served by a person deputized by such justice to serve it, it was held that a copy of the judgment and of the proceedings taken for the recovery thereof was competent and legal evidence of such proceedings for the appointment of such person to serve the process, and of the rendition of the judgment, when the question arose in a collateral action, provided the copy of the judgment and proceedings was signed with the official signature of the justice; and it was also proved by a witness that the paper was a correct copy of the justice's proceedings and judgment. *Wilkinson v. Vorce*, 41 Barb. 370. The same case also holds that such proof is sufficient evidence of the judgment itself, in a collateral action. But see the cases above cited.

The docket is conclusive evidence between the parties to the action; but it is not evidence at all in some cases. If a constable sues to recover his fees for serving the summons in the action, the docket is no evidence to prove what constable served the summons, nor the amount of his fees. *Reynolds v. Brown*, 15 Barb. 24. And see *Cornell v. Moulton*, 3 Denio, 12; *Wardwell v. Patrick*, 1 Bosw. 406; *McGraw v. Walker*, 2 Hilt. 404. If the docket is lost, provision is made for proving its contents. Vol. 1, p. 87, § 3155.

The statute requires certain proceedings to be entered in the docket of a justice. Vol. 1, p. 84, § 3140. It also authorizes him to enter such other proceedings as he may think proper, if they are such as took place before him in the action. Vol. 1, p. 85, § 3140. This evidently relates to some proceeding in the cause by the parties, by way of practice on the trial or preceding it, or as to some agreement made by the parties on the trial. If the parties agree before the justice, on the trial, that the plaintiff may withdraw his action at any time within four days after it is submitted to the justice, this is a valid agreement; and if it is entered in the justice's docket, that will be competent proof of the fact, and will not be liable to contradiction by parol evidence. *Smith v. Compton*, 20 Barb. 262.

Parol evidence is not admissible to contradict a justice's docket. *Ib.*; *Hard v. Shipman*, 6 Barb. 621; *Niles v. Totman*, 3 id. 594; *McLean v. Hugarin*, 13 Johns. 184; *Royce v. Burt*, 42 Barb. 339, 655. Though there is an exception to this rule, and that is when it is offered to be shown that the justice had no jurisdiction to render the alleged judgment. *Ante*, 28, *Jurisdiction*.

The justice may properly enter into his docket a statement of what matters were actually tried, and also what matters were withdrawn

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from the consideration of the jury or of the justice, if he deems it proper or material to do so, and they will then become a part of the docket.

If the justice does not make any such entry, the facts may be proved by any person who knows them from being present at the trial, acting as counsel, or even though he was a mere spectator. *Phillips v. Berick*, 16 Johns. 136; *Snider v. Croy*, 2 id. 227; *Wilder v. Case*, 16 Wend. 583.

The minutes of the justice, or those of the attorneys or counsel who tried the cause, are no higher evidence than their oral testimony. The manner of proving the evidence of a former witness has been already explained; and the same rules apply to the proof of other facts which transpired at the trial. *Ante*, 397, 438.

Where a transcript of the docket is wanted as evidence, before some court or justice other than the one who rendered it, an application should be made to the justice who rendered it, for a certified copy of it. Such justice should then make a literal copy of the entire judgment, as it is entered in his docket, and of all the other matters which he has entered therein, as a part of the proceedings in the action. This transcript should then be certified by the justice.

But, before the transcript, so made, can be read in evidence, a certificate must be procured from the county clerk of the county in which the justice resided at the time of the rendition of the judgment. Vol. 1, p. 139, § 3939; *Maynard v. Thompson*, 8 Wend. 393. This certificate should be attached to the transcript.

This seal of the clerk must be the seal of the county clerk's office, but it need not be impressed upon wax or wafer, or any similar substance, it will be sufficient if impressed directly upon the paper, as a part of the certificate. A transcript thus certified by the county clerk, under his hand and official seal, proves itself, and is admissible upon its production as evidence.

The Code provides that "A transcript from the docket-book of a justice of the peace within an adjoining State, of a judgment rendered by him; a transcript of his minutes of the proceedings in the cause, previous to the judgment; or of an execution issued thereon; or of the return of an execution, when subscribed by the justice, and authenticated as prescribed in the next section, is presumptive evidence of his jurisdiction in the cause, and of the matters shown by the transcript." Vol. 1, p. 141, § 948.

"Such transcript must be authenticated by a certificate of the justice, annexed thereto, to the effect that it is in all respects correct, and that

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he had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county, in which the justice resided at the time of rendering the judgment, under the hand and seal of the Court of Common Pleas, or other County Court of the county to the effect that the person subscribing the certificate attached to the transcript was, at the date of the judgment, a justice of the peace of that county; and that the signature thereto is in his own handwriting." Vol. 1, p. 141, § 949.

"The judgment and other proceedings, and the justice's authority to render the judgment, may also be proved by the production of the docket, or of a copy of the judgment or other proceedings; and the oral testimony of the justice to the truth and correctness thereof, and to his authority to render the judgment. Vol. 1, p. 141, § 950.

There are numerous papers and documents which may be proved by certified copies; but those will be noticed in a subsequent place.

Exception 5th. Producing papers, etc., on notice. When a paper is in the hands of the opposite party, and it is important to show its contents on the trial of an action, a notice should be given to that party to produce it; and if he refuses to do so, after the service of a regular and proper notice on him for that purpose, parol evidence may be given of the contents of such paper.

If an important paper is in the hands of the opposite party, it is a general rule that a notice to produce the paper must be given before parol evidence can be given of its contents. There are, however, exceptions to this rule. If the pleadings give a party notice to be prepared to produce a particular paper or instrument at the trial, if necessary to contradict the evidence of his opponent, no notice to produce the paper or instrument is necessary. *Hammond v. Hopping*, 13 Wend. 505; *Hardin v. Kretsinger*, 17 Johns. 293; *Edwards v. Bonneau*, 1 Sandf. 610; *Hays v. Riddle*, id. 248; *Rose v. Lewis*, 10 Mich. 483. So the rule is the same when the paper to be proved is a duplicate original; or where the instrument is itself a notice, such as a notice to quit, or notice of the dishonor of a bill or note.

When it is shown that an instrument is wrongfully destroyed by the party who made it, and who wrongfully obtained possession of it, parol evidence may be given of its contents, without any notice to produce it at the trial. *Scott v. Pentz*, 5 Sandf. 572. So if a party is deprived of the possession of written instruments belonging to him by the fraud of the adverse party, parol evidence of their contents is admissible. *Grimes v. Kimball*, 3 Allen (Mass.), 518.

When it is shown that a paper is lost, without the fault of the party

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losing it, he may give parol evidence of its contents. *Livingston v. Rogers*, 1 Caines' Cases, xxvii; *Read v. Brookman*, 3 Term R. 151; *New York Car Oil Co. v. Richmond*, 6 Bosw. 213.

The mere fact that a party has voluntarily destroyed a paper will not preclude him from giving secondary evidence of its contents if the circumstances of its destruction are consistent with an honest purpose. *Rudolph v. Lane*, 57 Ind. 115. But before he can offer secondary evidence of its contents he must repel every inference of fraudulent design in its destruction. *Blake v. Fash*, 44 Ill. 302; *Joannes v. Bennett*, 5 Allen (Mass.), 169. See *Bagley v. McMickle*, 9 Cal. 430.

It is not necessary to allege in the pleadings that a paper is lost to enable a party to give parol evidence of its contents. *Supervisors of Livingston v. White*, 30 Barb. 72.

In an action against a county treasurer and the sureties in his bond, it was proved that a bond was executed; that it was delivered to the county treasurer by the witness, as he believed, though he was not positive of the fact; and it was also proved by the county clerk that he had searched for the bond on several occasions, and could not find it in his office; and that he did not recollect of having seen it in his office at all. This was held to be sufficient to admit parol evidence of its contents. *Ib.*

So where proof was made that a search had been made in the county clerk's office for an appeal bond, which had been delivered there by a justice of the peace, and that it could not be found in the place where such bonds were usually kept; and it was also shown that the justice also searched among all his papers and could not find it, this was held to be sufficient proof of loss to admit parol evidence of the contents of the bond. *Teall v. Van Wyck*, 10 Barb. 376. A clerk's certificate would be competent evidence of such search, though the proof might be made by any other person who had made such search. *Ib.* See *Mandeville v. Reynolds*, 68 N. Y. 528; vol. 1, p. 135, § 921.

The mere fact that a written instrument is without the State will not authorize parol proof of its contents. There must be preliminary proof of some reasonable effort to procure the original. *Shaw v. Mason*, 10 Kans. 184; *Wood v. Cullen*, 13 Minn. 394; *Carland v. Cunningham*, 37 Penn. St. 228.

But when it is shown that a paper is in the possession of a party out of the State, and that the person who has it in possession refuses peremptorily to produce it, after all legal means for that purpose have been resorted to, and it is not shown that the laws of the State where he is will compel him to produce it, although he is examined as a wit-

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ness on a commission, this is sufficient to authorize parol evidence of its contents. *Forrest v. Forrest*, 6 Duer, 103, 137.

Parol evidence may be given of the contents of a letter, after it is proved to be in the hands of the defendant, and that he has refused to produce it, after the service of a proper notice on him for that purpose. *Sheldon v. Wood*, 2 Bosw. 269. So, when a paper was made out in duplicate, and it is shown that one of the originals is lost and the other is in the possession of a party on trial for an offense, a copy of the paper may be given in evidence, as there is no power in the court to compel the accused to produce the paper as evidence against • • himself. *State v. Gurnee*, 14 Kans. 111.

In an action by a principal against his agent, for not paying over moneys, parol evidence cannot be given of the contents of a letter sent by the plaintiff to the defendant, demanding payment, without first proving that due notice had been given to produce the letter at the trial. *Weeks v. Lyon*, 18 Barb. 530.

It has been held that a party is not required to produce papers at the trial, unless previous notice has been given requiring their production; and the fact that he has the papers in court does not operate to dispense with the notice, unless the nature of the case apprises him that they will be necessary on the trial. *Grimm v. Hamel*, 2 Hilt. 434. The object of the notice is not only to obtain the papers or lay the foundation of secondary evidence of their contents, but also to give the party notified an opportunity to procure testimony to support or impeach them, or to show that no such papers as those called for ever existed. *Ib.*; *Rogers v. Van Hoesen*, 12 Johns. 221; *Gorham v. Gale*, 7 Cow. 739; 3 Greenleaf's Ev., § 561, note 2, and cases. But when a witness, who is intrusted with a written instrument executed by the parties to the action, admits in court that it is then in his possession, he must produce it; and he cannot excuse himself from producing it on the ground that he has not been served with a subpoena *duces tecum*, or a notice to produce it. *Boynton v. Boynton*, 16 Abb. 87. And when a party requires its production, it is the duty of the court to require such production, for the purpose of determining its materiality as evidence; and a refusal, by the justice, to comply with such request will be error, even though it may not then appear that the paper is material evidence. *Ib.*

The general rules of practice requiring a written notice to produce papers has reference to the preliminary preparations for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress, from day to day;

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and where, at a previous hearing before a referee, the plaintiff had given the defendant verbal notice to produce certain bills and receipts, or that parol evidence of their contents would be given, this was held to be sufficient notice. *Kerr v. McGuire*, 28 How. 28; S. C., 28 N.Y. 446.

The notice, when given, ought to be served personally, whether it is made on the party or his attorney. *Rathbun v. Acker*, 18 Barb. 393.

This notice ought to be served by making a copy of it, and delivering it personally to the defendant a reasonable time before the trial, so that he may have time to search for it if necessary, or so that he may have a reasonable opportunity to obtain his witnesses to testify in relation to the paper when produced.

It is best to serve a written notice, so as to avoid any question as to the sufficiency of the notice, either in form or in substance; for if the notice is a written one, there can be no dispute as to what the notice really was, but merely as to its effect, or as to the time of its service.

The notice ought to describe the paper required in the most particular manner that can be reasonably done, so that the party who is required to produce it may have full information of the paper which he is required to produce. In most cases such a description can be given as will leave no room for doubt as to the paper desired, or for any reasonable excuse for saying that the notice was not sufficiently specific.

The reference to a paper may be to its date, the names of the parties to it, the nature of the paper, the object for which it was made, the person who witnessed it, or the person for whose benefit it was executed.

The proof of the service of the notice should be made orally on oath before the justice who tries the cause, and not by affidavit, so that the party may be cross-examined. *Villard v. Germer*, 1 Sandf. 50. If a party insists that the notice was not served in time, he ought to refuse to produce the paper, and then object to parol evidence of its contents; for if he produces the paper he will waive the objection as to the sufficiency of the notice. *Ib.*

The service of a notice on a party requiring him to produce a paper does not compel him to produce it, like the service of a subpoena *duces tecum*; the only effect of the notice is to permit the introduction of parol evidence as to the contents of the paper in cases in which due notice has been given to produce it, and a refusal to do so. *Edmonstone v. Hartshorn*, 19 N. Y. 9.

If the paper is not in the possession of the party served, nor under his control, the service of the notice will not authorize the introduction of parol evidence of its contents; as in the case of the service of a notice

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on the plaintiff to produce a letter which was written to his assignor, which was held insufficient. *Chaffee v. Cox*, 1 Hilt. 79. The assignor ought to be subpoenaed to produce the paper, in such a case. *Ib.* If he has lost or destroyed it, then parol evidence may be given of its contents. *Ib.*

Two letters were written, one immediately after the other, and were signed by the same person, contained the same words, and addressed to the same person; one was sent to the person addressed, the other retained by the writer; it was held that each was an original or duplicate, and that the one retained might be introduced in evidence, without a notice to produce the other. *Hubbard v. Russell*, 24 Barb. 404.

Before a certified copy of a paper is evidence, or before parol evidence can be given of the contents of a paper, it must be shown that there was an original which was duly executed. *Fellows v. Hyring*, 23 How. 230; *Metcalf v. Van Benthuyzen*, 3 N. Y. 424; *Hampshire v. Floyd*, 39 Texas, 103; *Bigelow v. Young*, 30 Ga. 121. If the lost instrument was attested by a subscribing witness who is within the jurisdiction of the court in which the evidence is to be offered, that witness must be called before the contents of the instrument can be given in evidence. *Hewitt v. Morris*, 5 Jones & Sp. 18.

In some cases the law will presume the loss or destruction of a written instrument so as to admit secondary evidence of its contents, without formal proof of the preliminary facts. Thus where promissory notes have been surrendered to the maker upon payment in cash or new obligations the law presumes the destruction of the surrendered notes, and permits secondary evidence of their contents. *Chrysler v. Renois*, 43 N. Y. 209; *Jackson v. Root*, 18 Johns. 60; *Betts v. Jackson*, 6 Wend. 173, 181; *Yoter v. Sanno*, 6 Watts, 164, 166.

So in an action under the statute authorizing the purchaser of a lottery ticket to sue for and recover double the sum paid with double costs, it is competent to prove the purchase of lottery tickets without producing the tickets or accounting for their non-production. *Grover v. Morris*, 73 N. Y. 473; *Wilkinson v. Gill*, 74 id. 63. As to the compulsion of an attorney to produce a paper belonging to his client, see "*Privileged Communications*."

The loss of a paper may be shown by the party who owned it, if he lost it; or by any other person who may have lost it or destroyed it. Since the amendment of the law permitting parties to swear as witnesses for themselves, the statute authorizing parties to prove the loss of papers becomes of little consequence, and no reference will be made to the cases on that question. After being sworn, the party is ex-

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amined on his own behalf, and he may then be cross-examined by the opposite party.

Where a paper was deposited with a third party with instructions to furnish copies on request, but not to part with the original, a copy of the agreement may be given in evidence after the proof of the death of the custodian, and that the original could not be found among his papers. *Krise v. Neason*, 66 Penn. St. 253.

This evidence is intended for the justice alone, to enable him to determine whether parol or secondary evidence shall be admitted. The proof of the loss of a paper will be sufficient, whenever it appears that the party has made all due and reasonable search for it, in those places in which it was usually kept, or in which it might reasonably be expected to be found, if such search is unsuccessful.

The sufficiency of the proof of the loss of a paper is a preliminary matter addressed to, and determined by, the court exclusively; and its sufficiency is to be passed on in view of the peculiar features which characterize each case as it arises. *Graham v. Chrystal*, 1 Abb. (N. S.) 121.

The question of the sufficiency of the proof of loss and unavailing search is so far a matter in the discretion of the trial court, that there must be an admission of secondary evidence wholly without preliminary proof to authorize an appellate court to find error. *McCulloch v. Hoffman*, 73 N. Y. 615.

The question is peculiarly one for the justice, and he will only require such proof as satisfies him that an honest attempt has been made to produce the paper, and a failure to find it after a reasonable and diligent effort for that purpose.

All that the law requires as a ground for the admission of secondary evidence is a reasonable assurance that evidence of a higher nature is not withheld or suppressed by the party offering it. *Clark v. Hornbeck*, 2 Green (N. J.), 430.

The loss of a paper may be proved by presumptive evidence as well as any other fact. *Clark v. Hornbeck*, 2 Green (N. J.), 430.

Secondary evidence of the contents of a release may be given after the party offering the evidence has testified that he has not seen the original for four years; that he has made diligent search and inquiry for it; that when he last saw it he delivered it to one W., and after W. has testified that he did not have it. *Augsbury v. Flower*, 68 N. Y. 619. So where a witness testifies that a letter is lost and he does not know what has become of it, a *prima facie* case is made for the in-

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roduction of parol evidence of its contents. *Voorhees v. Dorr*, 51 Barb. 580; *Indianapolis, etc., v. R. R. Co. Jewett*, 16 Ind. 273.

The secondary evidence being admitted, it becomes the province of the justice or jury to pass upon its credit and weight. It takes the place of primary evidence and is entitled to the same consideration. *Bagley v. McMickle*, 9 Cal. 430. The sufficiency of the preliminary proof is a question for the court; the weight of the secondary evidence is for the jury. The opposite party may be sworn for the purpose of rebutting or explaining the evidence given, to show the loss of a paper, and he will also be liable to cross-examination.

A paper produced, on notice, by the adverse party, must be proved by him who offers it, in like manner as if he had himself produced it, unless the party who produces it is a party to the instrument, or claims a beneficial interest under it.

A notice to produce a paper need not be given but once; and if once regularly given, the party on whom the notice is served will be bound to produce the paper at the trial, notwithstanding the cause may be adjourned several times after such service. *Jackson v. Shearman*, 6 Johns. 19. And the notice, properly given in a justice's court, will be sufficient even if the cause is removed to the County Court, by appeal, and then tried there. *Wilson v. Gale*, 4 Wend. 623; *Reab v. Moore*, 19 Johns. 337.

§ 9. **Sufficient to prove the substance of the issue.** Another general rule is, that the substance only of the issue needs to be proved. This rule is founded on the principles of good sense and justice. If a party proves the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to incumber the record; and the proof of them would be as immaterial as the averments themselves.

The old law was quite strict as to a variance between the allegations in the pleadings and the evidence introduced to prove them. But since the enactment of the Code, variances are comparatively of little importance.

A variance between an allegation in a pleading and the proof must be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby to his prejudice. Code of Civil Pro., § 2943. Under the Code, a liberal system of practice has sprung up, which is well illustrated by the cases reported.

The cases decided soon after the enactment of the Code were some-

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what like the practice under the old law, and variances were regarded in cases in which they would now be disregarded. In one case the complaint alleged that an injury had resulted to the plaintiff's cow, in consequence of the neglect of the defendant, a railroad corporation, in not putting up *cattle-guards*; but the proof showed that the injury arose from a neglect to put up *fences*; and this was held to be a material and fatal variance, for which the judgment below was reversed. *Parker v. Rensselaer & Saratoga R. R.*, 16 Barb. 315. In another case, the action was for the recovery of the price of hay sold; the answer alleged that the hay delivered "was very poor, and of very little value." This allegation was held not to authorize proof that "the hay was good for nothing, and that no use could be made of it whatever." *Diefendorff v. Gage*, 7 Barb. 18.

The technical strictness of the two cases just cited is not now followed, but a much more liberal rule is adopted, both in relation to complaints and answers, and the proof offered in support of them. And first, as to complaints. If the complaint alleges a sale and delivery of goods to the defendant, it will be sufficient to prove that the goods were purchased "by order of the defendant," for a third person, and that the delivery of the goods was made to such third person. *Rogers v. Verona*, 1 Bosw. 417.

So, where a complaint describes a note sued on as being given by "Orrin North" and the note offered in evidence appears to have been made by a firm of two persons doing business under the name of "Orin North," the note and protest may properly be received in evidence. *Bank of Cooperstown v. Woods*, 28 N. Y. 545.

In an action for trespass upon lands, the plaintiff may prove acts of trespass within the time alleged in the complaint, and he may also prove acts of trespass committed prior to the time alleged in the complaint, although this could not have been done under the old practice. *Relyea v. Beaver*, 34 Barb. 547. The decision does not turn upon the materiality of the variance between the allegations in the complaint and the proof, but the question whether the opposite party has been misled or will be prejudiced by the admission of the testimony. *Ib.*

In an action for trespass for a forcible and wrongful taking of goods from the possession of the plaintiff, he need not allege the ownership of the goods; but if he does allege it, and the answer denies it, the issue will be immaterial, and no proof need be given by the plaintiff to sustain the allegation. *Kissam v. Roberts*, 6 Bosw. 154, 163. As against a mere wrong-doer, possession is all that need be alleged or proved. *Ib.* And if the defendant has set up title to the property in

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a third person, he must, in some manner, connect himself with it, to constitute a legal defense to the action. *Ib.*

A variance between the complaint and the proof as to the details of a fraudulent conspiracy and the mode in which it is carried out is not a failure of proof within the meaning of the Code, if the proof establishes such a conspiracy and an injury to the plaintiff consequent upon the carrying out of the fraud. Without proof to the satisfaction of the court that the defendant has been misled, the variance will be deemed immaterial and no amendment of the pleading required. *Place v. Minster*, 65 N. Y. 89.

The cases in which the proof given on the trial of common-law actions has been held to be a departure from the entire scope and meaning of the complaint may be arranged under two principal divisions:

1. Where the contract was framed in tort, and the proof disclosed a contract, or *vice versa*. *Ransom v. Wetmore*, 39 Barb. 104; *Whitcomb v. Hungerford*, 42 N. Y. 177; *Saltus v. Genin*, 3 Bosw. 250.

2. Where the action was framed either in contract or tort, and the proof was of a different contract or tort. *Place v. Minster*, 65 N. Y. 89.

Thus if a complaint charges defendants as carriers, and the proof shows that they are forwarders; *Hempstead v. N. Y. Central R. R. Co.*, 28 Barb. 485; or if it charges the defendant as the guarantor of a note, and the proof is that he indorsed the note; *Covil v. Conkling*, 4 Duer, 45; or if it alleges an agreement between the defendant and a third person, and an assignment of it to the plaintiff, and the proof shows a contract between the plaintiff and the defendant, the action must fail. *Curtiss v. Marshall*, 8 Bosw. 22.

In an action for the recovery of money due for services rendered, the complaint alleged that a specified sum was due for services rendered at a time specified; the answer was a general denial. On the trial the plaintiff proved that he worked for the defendant for six months, and that he was to be paid one dollar a day. The evidence also disclosed the fact that there was a written contract in existence, which the defendant offered in evidence, but it was rejected, because it was inadmissible under the pleadings. This was held erroneous, and the question was decided to be one of evidence and not of pleading. *Harris v. Story*, 2 E. D. Smith, 363.

So where the complaint claims to recover for work and labor performed, and the complaint is founded upon a special agreement only, which is not proved, the plaintiff will be entitled to recover for services rendered, if the proof authorizes it, if no objection is made as to the variance; and if an objection of that kind is raised, the justice ought

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to allow an amendment of the complaint. *Irvine v. Wortendyke*, 2 E. D. Smith, 374. So if the action is founded upon contract, and the complaint alleges that the defendant received money as an agent and supercargo of the plaintiff, and that he omits or refuses to account and pay over; and the answer alleges that the transaction between the plaintiff and the defendant was a joint adventure; and the court, jury, or referee, find as a fact that the answer is true, this is not a material variance, since it establishes the substance of the complaint, which is an indebtedness of the defendant to the plaintiff; and, therefore, the plaintiff cannot properly be nonsuited, nor his complaint be dismissed for that reason. *Poirer v. Fisher*, 8 Bosw. 258. The fact that the defendant was arrested in the action as an agent does not make any difference in the rule. *Ib.*

In an action on the case for a false warranty, in the nature of an action for a deceit, it is not necessary to allege or to prove fraud on the part of the seller of the goods; it is sufficient to allege and establish the warranty, and that it is false. *Fowler v. Abrams*, 3 E. D. Smith, 1. If an action is brought for the recovery of the price of goods sold and delivered, and the complaint alleges such sale and delivery, it will be sufficient proof to authorize a recovery by the plaintiff, if he establishes by evidence that the defendant took personal property belonging to the plaintiff, and converted it to his own use by selling it and receiving the money therefor. The plaintiff is authorized by law to waive the tort, and to claim to recover for goods sold and delivered, if he elects to do so. *Harpending v. Shoemaker*, 37 Barb. 271. To reject evidence, showing the conversion of the property in such a case, when it is offered by the plaintiff, is erroneous. *Ib.* If, however, the complaint is framed for the recovery of money, in an action upon contract, he will not be permitted to recover by proving a cause of action for a fraud; *Fisher v. Fredenhall*, 21 Barb. 82; and generally, when the complaint in an action alleges facts showing a cause of action in tort, no recovery can be had by proving on the trial a cause of action in contract, *Degraw v. Elmore*, 50 N. Y. 1; *Barnes v. Quigley*, 59 id. 265; *Whiteside v. Hyman*, 10 Hun, 218; *Walter v. Bennett*, 16 N. Y. 250; even though facts may be stated in the complaint, by way of inducement, which might sustain an action on contract. *Barnes v. Quigley*, 59 N. Y. 265. The court will look beyond the immaterial averments in a pleading to determine the *gravamen* of the action, and having determined the nature of the action, as whether founded on a tort or breach of contract, will confine the plaintiff to the cause of action alleged, and will not allow him to change the form of his action on the trial by reason of

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his having inserted in his complaint one or more allegations irrelevant to the cause really made by the pleading. *Beard v. Yates*, 2 Hun, 466; *Graves v. Waite*, 59 N. Y. 156.

But the fact that such irrelevant allegations are inserted in the complaint will not render it necessary or proper for the plaintiff to give evidence sustaining them on the trial, nor will it preclude a recovery on the real cause of action alleged and proved. *Smith v. Frost*, 70 N. Y. 65; *Greentree v. Rosenstock*, 61 id. 583; *Conaughty v. Nichols*, 42 id. 83; *Ross v. Terry*, 63 id. 13; *Ledwich v. McKim*, 53 id. 308; *Graves v. Waite*, 59 id. 156.

When the complaint alleges, as the basis of the cause of action, facts which assume the legal transfer of property to the defendant, the plaintiff cannot on the trial treat the transfer as tortious and claim to recover as for a wrongful conversion of the property. *Lewis v. Mott*, 36 N. Y. 395. It was held that where a complaint was so framed as to charge conversion of personal property, it would not be sufficient to establish a mere breach of duty on the part of the defendant, which would be a different cause of action; and the variance was held to be fatal, and not amendable, and a nonsuit was granted. *Moore v. McKibbin*, 33 Barb. 246. Such a case is not a mere variance, but an entire failure to prove the cause of action. *Ib.* The complaint need not allege that an instrument sued on is a sealed one, and if it alleges a cause of action upon contract, the proof of a cause of action, by the production of a sealed instrument, is not a variance, nor was it so, even under the old practice. *Smith v. Kerr*, 3 N. Y. 144; *Mosher v. Lawrence*, 4 Denio, 419. Where there is a variance between some of the allegations of a complaint and the proof, and nothing more appears, the court has no power to nonsuit, on the mere ground that such variance, whatever it may be, is material. *Chapman v. Carolin*, 3 Bosw. 456. If the variance operates to mislead the defendant, the court must grant an amendment of the complaint, upon such terms as shall be just to the defendant, such as granting an adjournment, if necessary, besides the imposition of such costs as will result from granting the amendment and the adjournment. *Ib.*

When it appears that the defendant was not, and could not have been, misled by a variance between the allegations in the complaint and the evidence introduced, the variance may be disregarded without any amendment. *Craig v. Ward*, 36 Barb. 377; *Babbett v. Young*, 51 id. 466; *Boynton v. Boynton*, 43 How. 380; *Place v. Minster*, 65 N. Y. 89. But, when all the material allegations in the complaint are denied, and the plaintiff, instead of proving the facts alleged in the

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complaint, disproves them, he will not be entitled to recover, although he may have established facts which would entitle him to recover in another action for a distinct cause of action, which was entirely inconsistent with the one set out in the complaint. *Saltus v. Genin*, 3 Bosw. 250. In an action to recover for money paid, laid out, etc., by the plaintiff for the defendant, the plaintiff will not be permitted to introduce evidence to charge the defendant as indorser of a promissory note. *Cottrell v. Conklin*, 4 Duer, 45. The complaint may be amended so as to admit the proof. *Ib.* The proper time to object to a variance between the allegations in a complaint and a paper offered in evidence is when such paper is offered. *Mosher v. Lawrence*, 4 Denio, 419.

An objection that the case made by the proof on the trial varies from the allegations in the complaint must be distinctly made at the trial, in the court below, or it will be waived, and will not be heard on an appeal. *Belknap v. Sealey*, 14 N. Y. 143; *Barnes v. Perine*, 12 id. 18.

The rules as to variances between the evidence and the allegations in the answer, are similar to those in relation to complaints.

When the defense set up in the answer differs, in its entire scope and meaning from the evidence introduced on the trial, the court cannot treat it as a mere variance, and disregard it, nor direct the answer to be amended so as to conform it to the facts proved. *Texier v. Gouin*, 5 Duer, 389.

In the case last cited, the action was brought by the plaintiff as indorsee against one defendant as maker and the other as indorser of a promissory note. The answer admitted the making and indorsement of the note, but set up that it was without consideration; and, also, that it had been transferred to the plaintiff merely as a collateral security, and had been obtained by false representations. On the trial the defendants offered, and were permitted to show payment of the note by the maker, under the objection of the plaintiff; and the defendants had judgment, which was reversed on an appeal on the ground that the evidence was not admissible under the allegations in the answer. The rule now established by the Court of Appeals is, that though an answer may set up a defense defectively, even in a matter of substance, the court will not be authorized to reject evidence in proof of the defense at the trial. *White v. Spencer*, 14 N. Y. 247, 250. If a pleading is defective in substance, it ought to be demurred to, and if this is not done, the party pleading the defective matter will be permitted on the trial to establish it fully by evidence, since the opposite party could not be misled in such a case. But it must be remembered that a *defense* in

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an answer, as distinguished from a counter-claim, is not a subject of demurrer in a justices' court, and if it is so defectively stated as to furnish no answer to the cause of action set up in the complaint, if taken as true, should be treated as a nullity on the trial, and no evidence should be received in its support. The object of evidence is to enable the court or jury to determine the issues raised by the pleadings; and when none are raised, there is nothing calling for evidence on the part of the defendant. See *post*, §§ 11, *Relevancy of Evidence*.

A variance between the allegations in the answer and the evidence must be disregarded, unless the evidence varies in its entire scope and meaning from the defense set up. *Cobb v. West*, 4 Duer, 38. In the last case cited, the action was for the recovery of money claimed to be due for work and labor performed, and materials furnished, in repairing a building. The defense was a general denial; and a special defense, alleging that the plaintiff agreed with the defendants to support and keep up the building and earth on a specified lot, during the excavations for the cellars for adjoining buildings, etc., and to furnish all the materials and do the labor for the sum of \$500, to be paid when the work was completed. The evidence was, that the plaintiff agreed for \$200, to keep up the building in good order, and to leave it well supported. It was also proved that the defendant had a right to stop the plaintiff in the work at any time, by paying him for what he had done. It was held that the defense was established, and that the omission of the allegations in the answer as to the right of the defendants to stop the work was immaterial.

If an answer alleges a tender of money, it will be proper and sufficient evidence to show a waiver of the tender, as proof of the averment of the tender itself. *Holmes v. Holmes*, 9 N. Y. 525. The cases cited are sufficient to illustrate the liberality which the court indulges, in relation to variances between the evidence and the allegations in the pleadings. As the practice now stands, there are few cases in which an amendment of the pleadings may not properly be made, for the purpose of obviating the objection, and for the furtherance of justice. The law in relation to amendments will be fully discussed elsewhere.

§ 10. **Burden of proof.** There are several general rules which are of great use in determining whether the plaintiff or the defendant will have to prove the issue on record. One of the most useful of these rules is the one which requires that the point in issue is to be proved by the party who asserts the affirmative, that is, the affirmative in substance, not in mere form. Upon the party who has to give such proof

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is said to rest the burden of proof ; or, as it is technically called, the *onus probandi*. *Johnson v. Plowman*, 49 Barb. 472.

Where a warehouseman takes goods upon storage for hire, he is answerable for their loss, or the loss of any part of them, where it does not arise from the inherent nature of the goods, such as absorption, deterioration or like causes, unless he shows that the loss occurred under circumstances which exonerated him from all blame ; or if he cannot show that, that he exercised a degree of care in their safe-keeping, which repels any suspicion or presumption that the loss occurred through his negligence or dishonesty. *Arent v. Squire*, 1 Daly, 347. Where a quantity of gin, in pipes, was stored with the defendant as a warehouseman, and upon its re-delivery it appeared that there was a considerable deficiency in the quantity, it was held that the burden of proof was on the defendant to show that the loss was not occasioned by his negligence or dishonesty. *Ib*.

In an action upon an insurance premium note, it is incumbent upon the plaintiff to give some evidence of the existence of losses, which render an assessment upon the note proper. *Jackson v. Roberts*, 31 N. Y. 304.

In an action against bankers or collecting agents, to recover damages for their neglect to present a note intrusted to them for collection, or to give notice of non-payment to the indorsers, the burden of proof is on the defendants to show the insolvency of the indorsers, if they rely upon that fact as a defense. *Coghlan v. Dinsmore*, 9 Bosw. 453.

One of the surest tests for ascertaining upon which side the affirmative really lies is, to consider which party would be successful if no evidence at all were given ; or, what amounts substantially to the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer or other pleading, there would or would not be a defense to the action, or an answer to the previous pleading. In an action for the recovery of money, alleged to have been lent to the defendant, if the answer contains a general denial of the complaint, the burden of proof will evidently be upon the plaintiff. But, in such a case, if there were no denial of the loan of the money, or of the allegations in the complaint, but the defendant interposed an affirmative defense alone, in which he alleges payment of the money, the burden of proof would be on the defendant to show payment, because the answer admits the loan, and the only question to be tried is, whether it has been repaid, and, on that issue, the defendant holds the affirmative.

To establish, as a defense, that a pre-existing debt was paid by the note of a third party, it is necessary for the defendant to prove that the note

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was given to the creditor, and received by him upon the express agreement that it should extinguish the previous debt. *Crane v. McDonald*, 45 Barb. 354.

There are cases in which both parties hold the affirmative as to the issues to be tried, as, where the plaintiff sues for the recovery of money lent, and the defendant interposes a general denial, and also a claim for a set-off. In such a case the plaintiff would be bound to prove his case; and if he does so and then rests his case, the defendant will then be required to establish his set-off by evidence or it will not be allowed.

In determining who is bound to introduce evidence to sustain his side of the case, it is important to recollect that there are cases in which some legal presumption stands for proof until it is rebutted; and that although the issue may, in form, cast the affirmative on a party, yet this legal presumption is still sufficient proof, until the presumption is rebutted by evidence on the other side.

Whenever the law presumes in favor of the affirmative, it lies on the party who denies the fact, to prove the negative. In an action upon a bill of exchange or a promissory note, if the defendant answers that there was no consideration for it, he must prove that fact, for the law presumes a good consideration. *Lacey v. Forrester*, 2 C. M. & R. 59; *Kinsman v. Birdsall*, 2 E. D. Smith, 395.

So, where the negative involves a criminal omission by the party, and consequently, where the law, upon general principles, presumes his innocence, the affirmative is presumed; and, therefore, when an action was brought against the defendant for putting a dangerous commodity on board of a vessel, as freight, without giving notice thereof to the captain or other person on board, whereby a loss ensued, it was held that the plaintiff was bound to prove that notice was not given. *Williams v. East India Co.*, 3 East, 192.

In actions brought to recover damages for injuries to the person, alleged to have been caused by the negligence of the defendant, the burden of proof is on the plaintiff to show not only the negligence of the defendant but also that he was not guilty of contributory negligence. *Warner v. New York Central R. R. Co.*, 44 N. Y. 465; *Curran v. Warren Chemical and Manufacturing Co.*, 36 id. 153.

How these facts shall be proven and what is sufficient evidence of negligence on the part of the defendant, and of due care on the part of the plaintiff is another question. The mere fact that an accident occurred may, under the circumstances of a given case, amount to *prima facie* proof of negligence on the part of the defendant, without showing what the particular negligence was, or in what particular

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he failed to exercise due care. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; S. C., 12 Am. Rep. 720; *Carpon v. London & Brighton R. R. Co.*, 5 Q. B. 747; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312.

So the proof given on the part of the plaintiff to establish the negligence of the defendant may, under the circumstances of the case, render other proof of due care on the part of the plaintiff unnecessary in the first instance. It must not be understood that it is incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing due care on his part. It is enough if the proof of the negligence of the defendant and the circumstances of the injury establish, *prima facie*, that the injury was occasioned by the negligence of the defendant, as such evidence would exclude the idea of a want of due care on the part of the plaintiff contributing to the injury. Ordinarily in this class of actions, when there has been no fault on the part of the plaintiff, the fact will sufficiently appear in showing the fault of the defendant, and that it was the cause of the injury; and when it does, no further evidence on the subject is necessary. *Button v. Hudson River R. R. Co.*, 18 N. Y. 248. But the fact that the plaintiff was not guilty of contributory negligence must appear in some way. *Smith v. Smith*, 2 Pick. 621; *Warner v. New York Central R. R. Co.*, 44 N. Y. 465; *Lane v. Crombie*, 12 Pick. 177; *Kennard v. Burton*, 25 Me. 49; *Moore v. The Central R. R. Co.*, 4 Zab. (N. J.) 284; *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 35; *Gough v. Bryan*, 2 Mees. & Wells. 773; *Martin v. Great Northern R. R. Co.*, 30 Eng. L. & E. 473. The particular mode of proof is unimportant. The evidence of the fact may be direct and positive or only circumstantial. *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Hoffman v. Union Ferry Co. of Brooklyn*, 47 id. 176. Or it may be inferred from the circumstances of the case. *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65. But it must be shown in some way, and there will be no presumption that a person will exercise due care to avoid an injury which will take the place of such proof. *Warner v. New York Central R. R. Co.*, 44 N. Y. 465.

When a loss has been occasioned by the apparent negligence of a ferryman in providing safe and sufficient means to perform what he has undertaken to the public, the burden is upon him to show that the accident was not occasioned by his fault. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

In an action against a warehouseman for damages arising out of the loss of goods intrusted to the defendant if it appears that the goods

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were lost by a burglary committed upon the defendant's warehouse, the burden is on the plaintiffs to show affirmatively that the burglary was occasioned by, or was not prevented by reason of, some negligence or omission of due care on the part of the defendant. *Claflin v. Meyer*, 75 N. Y. 260. But when the evidence shows that goods were delivered to a warehouseman and he failed or refused to deliver them on demand, the burden is on the defendant to account for them in some way and show that they have been lost without his fault. *Fairfax v. New York Cent. & H. R. R. Co.*, 73 N. Y. 167; S. C., 67 id. 11. The distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie. But when the bailee has shown a loss, or where the goods are injured, the burden is on the plaintiff, as the law will not intend negligence. *Schmidt v. Blood*, 9 Wend. 268. It will be seen as the result of these authorities that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. By this it must not be understood that a warehouseman refusing to deliver goods can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor is there any real shifting of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff suing him for the loss of goods must in all cases allege and prove negligence. This burden is never shifted from him. If he proves a demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by courts as *prima facie* evidence of negligence, but if, either in the course of the plaintiff's own proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman. *Claflin v. Meyer*, 75 N. Y. 260.

In certain cases the statutes prohibit the bringing of an action without leave of court first obtained. In such cases, the plaintiff's lack of authority to sue is not a matter of defense to be pleaded and affirmatively proved by the defendant, but the burden is on the plaintiff to allege or at least to prove his authority to sue in order to maintain his action. *Scofield v. Doscher*, 72 N. Y. 491. The rule is different, when the defense of the statute of limitations or of usury is interposed. In such cases the burden is on the defendant to allege and prove his defense.

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Ib. And it is a general rule that a defendant who resists a recovery upon the ground of the illegality of the contract has the burden of proof, there being nothing illegal upon its face. *Bank of the United States v. Davis*, 2 Hill, 451; *Holbrook v. Wilson*, 4 Bosw. 64. Where the defense is usury, and the contract sued upon is not necessarily usurious, the *onus* is upon the party seeking to impeach it for usury to prove the guilty intent, and that the contract is a cover for usury and for the loan of money upon usury. *Matthews v. Cox*, 70 N. Y. 239; *Thomas v. Murray*, 32 id. 605; *Booth v. Swezey*, 8 id. 280; *Smith v. Marvin*, 27 id. 137.

In actions by creditors against the heirs at law and next of kin of deceased persons to recover the shares of real and personal estate received by the defendants, which the plaintiffs claim should be applied to the payment of their claims against the estate, the burden is on the plaintiffs to show that their case is within the statute, and as a material part of their case must show affirmatively that the action is brought after the expiration of three years from the time of granting letters testamentary or of administration. *Selover v. Coe*, 63 N. Y. 438. This seems to be the only exception to the general rule that the burden of establishing the defense of the statute of limitations is with the party asserting it.

Where an action is brought to recover damages for a breach of contract, the burden is on the plaintiff to prove the breach and amount of damages, and he can recover only the damages thus proved. *Quinn v. Van Pelt*, 56 N. Y. 417.

So in an action *ex delicto* for the breach by an attorney of his professional duty, the burden rests upon the plaintiff to prove the amount of damages he has sustained. *Quinn v. Van Pelt*, 56 N. Y. 417.

So when a person brings an action to recover moneys paid under protest to obtain the possession of his goods from a person who claims a lien thereon, and refuses to deliver the same without payment of the lien, the burden is on the plaintiff to show that the claim of lien was unfounded, that he did not owe the money and that it was unjustly extorted by duress of his goods. *Briggs v. Boyd*, 56 N. Y. 289.

In the absence of a statute changing the rule, the legal presumption is that all conveyances are made in good faith and not fraudulently, and the burden of proof rests upon the party seeking to impeach the conveyance for fraud. *O'Neal v. Boone*, 82 Ill. 589.

It is sometimes important to a defendant to insist that the burden of proof is upon the plaintiff, as in the cases mentioned, especially if the plaintiff is unprepared to substantiate the allegations by evidence. But

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the question generally arises upon the question who shall have the right to begin, as it is sometimes termed.

The general rule is, that the party who holds the affirmative of the issue is entitled to introduce his evidence first, and in reply, and he has also the right to open the case and to close the argument in summing up to the court or jury. This is frequently a matter of much importance, and for that reason the rules will be further explained as to the right to begin.

Where the defendant holds the affirmative of all the issues made in the pleadings, and opens the case by calling the first witnesses, he is entitled to the closing address to the jury. *Elwell v. Chamberlain*, 31 N. Y. 611.

In an action upon a promissory note, if the only defense interposed is usury, the defendant is entitled to begin, as a matter of right, and to refuse it is error. *Huntington v. Conkey*, 33 Barb. 218; *Ayrault v. Chamberlain*, id. 229. But in actions in which the claim is for the recovery of unliquidated damages, and the plaintiff has any thing to prove on the question of damages, or otherwise, he is entitled to begin. *Ib.*; *Fry v. Bennett*, 3 Bosw. 200, 233. In an action for the recovery of money, if the only defense is payment, and no evidence is given at the trial, the plaintiff will be entitled to recover nominal damages, but nothing more. *New York Dry Dock Co. v. McIntosh*, 5 Hill, 290. In such a case, if the defendant proves the payment of any sum, the plaintiff will then be bound to prove that his demand exceeds the payment, unless that fact appears in some other way. *Boyd v. Weeks*, 5 Hill, 393; S. C., 2 Denio, 321.

So, in an action of trover for a watch, if the answer does not deny the value of the watch, that is not an admission that the value is that stated in the complaint; that is a matter which must be proved in such a case, or even in case of a default to answer at all. *Connoss v. Meir*, 2 E. D. Smith, 314. The plaintiff is sometimes required to prove a negative, as we have already seen.

There are, however, exceptions to that rule, if the matter to be proved lies especially within the knowledge of the defendant, and where he may show the affirmative very easily.

In an action to recover a penalty for selling spirituous liquors without a license, it will be sufficient for the plaintiff to prove the sale of such liquors, without proving that the defendant had no license. That evidence is a matter of defense, and the defendant will be bound to show a valid license or he will be liable to the penalty. *Potter v. Deyo*, 19 Wend. 361; *Mayor of New York v. Mason*, 1 Abb. 344.

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In an action against a defendant who sets up a bankrupt's discharge, the plaintiff is bound to prove any matter which he claims invalidates it, since it is presumed to be valid. *Sherwood v. Mitchell*, 4 Denio, 435. The defendant would, however, be bound to prove the discharge itself, like any other affirmative matter; but when proved it would be presumed valid.

Whenever the pleadings throw the affirmative of the issue upon the plaintiff, as to any matter of proof, or as to any one of the defendants, where there are several, he will be entitled to open and close the case. But during the course of a trial the burden of proof apparently changes from side to side, according to the state of the evidence.

In an action upon a note, if the answer denies its existence or validity, and then interposes a defense by way of set-off, the burden of proof will be upon the plaintiff, in the first instance. But after the proving of the execution of the note, the burden apparently shifts to the defendant, who must meet the proof offered, if he wishes to rebut it; and if he relies upon his set-off, he must prove it. If he proves the set-off, and also gives evidence as to the execution or validity of the note, the burden of proof again shifts to the plaintiff, who may give evidence in reply to the matter of executing the note, and also in contradiction or by way of avoidance as to the set-off.

This apparent shifting of the burden of proof during the course of the trial has nothing to do with the question as to who shall begin or open and close the case. If it belongs to either party, at the commencement of the trial, the right continues to the close of the case.

But this "shifting" of the burden of proof, as it is termed, is apparent rather than actual. As a matter of law the burden of sustaining the affirmative of an issue involved in an action is upon the party alleging the facts constituting the issue and so remains during the trial. It often happens during the progress of a trial that a party gives evidence sufficient to establish, *prima facie*, his allegations, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action remains throughout the trial with the party upon whom it rested at the beginning. *Heinemann v. Heard*, 62 N. Y. 448; *Lamb v. Camden & Amboy R. R. & Trans. Co.*, 46 id. 271; *Clafflin v. Meyer*, 75 id. 260.

Because a party holding the affirmative of an issue introduces evidence, which, uncontradicted, proves the fact alleged by him, he is not thereby relieved from the burden of establishing that fact by the pre-

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ponderance of all the evidence given upon the issue; nor is the other party required to satisfy the court or jury that the fact was not as alleged by his adversary. The party holding the affirmative is still bound to satisfy the court or jury affirmatively of the fact alleged by him or he is not entitled to a verdict. If the evidence tending to establish, *prima facie*, the issue is contradicted, explained away, or otherwise neutralized by the adverse party, the party holding the affirmative must produce further proof, or fail in the case. It is not enough that the evidence given on the issue caused the scales to once turn in his favor if they are afterward evenly balanced when the testimony is all in. The scales must *ultimately* turn in his favor or he cannot succeed. *Ib.* And see *Button v. Hudson River R. R. Co.*, 18 N. Y. 248.

§ 11. **Relevancy of evidence.** The object of every trial is to ascertain the truth of the allegations put in issue; and no evidence is admissible which does not tend to prove or disprove such issues. It is not necessary that the evidence should bear directly upon the particular matters in issue, for the evidence offered may be relevant and material otherwise. In an action upon a promissory note, it would be offering evidence directly upon the issue, if a witness were called to prove the execution of the note in his presence; but evidence to impeach the character of that witness would be equally relevant and competent, although the evidence bears collaterally upon the issue. *Newton v. Harris*, 6 N. Y. 345; *Whiting v. Otis*, 1 Bosw. 420.

The rule that no evidence is admissible which does not tend to prove or disprove the issue joined excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. *Townsend Manufacturing Co. v. Foster*, 51 Barb. 346. See, also, *Jackson v. Smith*, 7 Cow. 717; *Elliott v. Gibbons*, 31 N. Y. 67. Evidence not material to the issue cannot be admitted merely to affect the question of costs. *Tucker v. Stephens*, 4 N. Y. Sup. Ct. (T. & C.) 593.

After a witness has stated what he has seen and heard, which tended to establish the existence of a copartnership, it is competent to prove by him, negatively, that he had no knowledge or information to the contrary. *Conklin v. Barton*, 43 Barb. 435. Where individuals are sued as partners, for goods sold to them in their business as hotel-keepers, and the partnership is denied, a bond, purporting to have been executed by both of the defendants, for the purpose of obtaining a tavern-keeper's license, is admissible in evidence as tending to establish a partnership, where it is shown that one of the defendants executed the bond and the other ratified it afterward. *Ib.*

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In an action to recover back moneys claimed to have been paid to the defendant on a bond and mortgage given to him by the plaintiff, the court allowed the plaintiff to prove that he had the money by which payment might have been made, as bearing on the issue whether a payment had in fact been made. *Dishon v. Reynolds*, 17 Hun, 137. On appeal to the General Term the court affirmed the judgment, holding that while such evidence was not very cogent, the fact was one which in the judgment of the jurors might aid them in arriving at the probable truth. *Id.* So in an action to recover for professional services, claimed to have been rendered by an attorney for the defendant, the defendant may show an agreement entered into between himself and another attorney, by which the latter was employed for a specified sum of money to perform the services for which the plaintiff claims. *Pomeroy v. Pierce*, 5 Hun, 119. So where an action is brought to recover the amount of certain loans made to the defendant by the plaintiff, and the issue is as to whether the moneys loaned had been repaid, evidence showing that subsequent loans of a similar nature had been made by the plaintiff to the defendant and repaid by the latter should be received as tending to raise a presumption, of greater or less force, that the older claims had also been paid. *Reed v. Smith*, 1 Hun, 263.

When it becomes important to determine whether credit was given to the defendant or some other person it is not error to admit proof of the defendant's solvency. *Moore v. Meacham*, 10 N. Y. 207. And see *Harris v. Wade*, 61 id. 630. But in a later case the court held that it was error to receive evidence of the pecuniary inability of the son upon the question whether the plaintiff gave credit to him or to the father. *Green v. Disbrow*, 26 N. Y. 334. See *Keeler v. Salisbury*, 33 id. 648, 656; *Daby v. Ericsson*, 45 id. 786, 791.

It is frequently difficult to determine whether proof of a particular fact offered in evidence will or will not become material, and in such cases it is quite usual, in practice, for the court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material. The court, however, is not bound to take that course; and if the evidence is objected to by the other side, the court may require the counsel offering the evidence to show how it will become material, by stating what other facts are proposed to be proved in connection with the offered evidence. If the party is required thus to show how the evidence is material, he will be bound to do so, or the evidence may be properly rejected. *Roy v. Targee*, 7 Wend. 359; *First Baptist Church of Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. 448; *Van Buren v. Wells*, 19 Wend. 203; *Adsit v. Wilson*, 7

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How. 64; *Cass v. New York & New Haven R. R.*, 1 E. D. Smith, 523. It is no error to exclude evidence which when offered appears to be wholly immaterial; *McGrath v. Bell*, 42 How. 182; S. C., 1 Jones & Sp. 195; and it is no error to admit testimony which was irrelevant at the time of its admission, if it is afterward made relevant and pertinent by other testimony subsequently introduced. *Black v. Camden and Amboy R. R. and Transp. Co.*, 45 Barb. 40.

Care ought to be taken in offering to prove propositions. An offer to prove two connected facts, one of which is relevant and one of which is irrelevant, will justify the court in rejecting the entire offer. *Harger v. Edmonds*, 4 Barb. 256. So, too, in offering evidence, care ought to be exercised as to the manner of offering it. When an offer is made to prove connected facts or propositions, some of which are admissible and others of them inadmissible, the court may legally reject the entire evidence. *Hosley v. Black*, 26 How. 97; S. C., 28 N. Y. 438. In such a case the proper course would be to offer each proposition separately. If evidence is offered and it is excluded, on the ground that it is irrelevant and immaterial at the time of the offer, such exclusion will not be erroneous, nor will the rule be changed by the fact that in the subsequent course of the cause facts are proved which would have rendered the rejected evidence admissible, if offered after such facts were proved. *Heroy v. Kerr*, 8 Bosw. 194. In such a case the proper practice is to renew the offer of such excluded evidence after proof has been given which renders it admissible; and if it is then rejected, it will be error. *Ib.*

The court can never exclude relevant testimony because it does not at once establish the issue to which it relates. The different links must be introduced in succession. The party against whom it is introduced is amply protected against any prejudice, by his right to call upon the court to direct the jury to disregard it for all purposes, where it is not *prima facie* evidence of any material issue. *Murphy v. Boker*, 28 How. 251. In such a case, if the party omits to call upon the court to give such direction, it will not be a valid ground of complaint that the court did not volunteer to warn the jury against being misled by the evidence, nor will it be a ground for granting a new trial on the ground of an oversight. *Ib.*

Evidence which is apparently irrelevant may be shown to be relevant by either referring to matters already proved in the cause, or by a statement of some additional evidence which is offered to be given in connection with the proposed fact. It is always proper to ascertain as certainly as possible that the evidence offered is relevant and material

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before it is received. But there are times when it is not advisable to apprise the witness about to be examined of the facts expected to be proved by him; or the counsel himself may not be sufficiently advised as to the facts; these or any other sufficient reasons are to be weighed by the justice upon such a question. But, in every case, counsel are bound, if required, to inform the *court* how the evidence is relevant, so that he may act understandingly in relation to the admission of the evidence. This may be done by making the statement in writing and handing it to the court.

Evidence to impeach the character of a witness called by the opposite party is always relevant; so of evidence to sustain the character of a witness which has been thus attacked. *Newton v. Harris*, 6 N. Y. 345. So, on cross-examination, it may be shown that the witness is hostile to the party against whom he is called, and that he has made statements indicating such hostility, and if he denies making such statements, he may be contradicted by other witnesses. *Ib.*; *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242.

Evidence may be admissible as against one of two defendants, but not as to the other; in that case the evidence must be received, but it must be limited in its effect to the defendant against whom it is admissible, and be disregarded by the court and jury as to the other. *Black v. Foster*, 28 Barb. 387; *Fox v. Jackson*, 8 id. 355. An objection to the evidence should not be general in such a case, but should be limited to the evidence improperly offered. *Ib.*

In an action of replevin by a vendor against the general assignee of a fraudulent vendee, it is competent to show that the vendee made fraudulent representations upon which he obtained the goods; and the plaintiff may also show that the vendee obtained goods at other places by similar frauds at about the same time. *Hall v. Naylor*, 18 N. Y. 588; *Cary v. Hotailing*, 1 Hill, 311, and cases; *King v. Phillips*, 8 Bosw. 603; *Hathorne v. Hodges*, 28 N. Y. 486; *Miller v. Barber*, 66 id. 558; *VanKleek v. Leroy*, 4 Abb. App. Dec. 479.

So, on the sale of goods in which it is alleged that there was a fraud, in the sale, it is competent to show that the defrauded party subsequently ratified the sale with full knowledge of all the facts. *Bronson v. Wiman*, 8 N. Y. 182. And his declarations to that effect are proper evidence. *Ib.*

Evidence to prove that the acceptance of a bill of exchange was obtained by false representations of existing facts is relevant, although there is no offer to show that the misrepresentations were known to the holder of the bill, because such evidence would be sufficient to cast on

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the holder the burden of proving a valuable consideration. *New York, etc., Bank v. Gibson*, 5 Duer, 574.

So, where an action is brought for the recovery of damages for a personal injury occasioned by the negligence of the defendant, resulting in a loss of services by the plaintiff in his business, evidence showing how much the plaintiff was earning from his business, or realizing from fixed wages, at the time of the injury, is relevant and competent and therefore admissible. *Grant v. City of Brooklyn* 41 Barb. 381.

In an action against a defendant for a breach of his covenant to do certain acts, it is not competent to show that he was prevented by inevitable accident, nor is evidence of excuse of non-performance thereof admissible under an answer alleging performance. *Oakley v. Morton*, 11 N. Y. 26. But, in an action against a carrier for non-delivery of goods at a distant place, where the plaintiffs failed to give evidence of the market value of the goods at the place of delivery, it was held that the defendant might give in evidence their market value at the place where they were shipped, and the expense of transportation, as a proximate method of ascertaining the damages. *Richmond v. Bronson*, 5 Denio, 55.

In an action against a railroad corporation for injuries received in consequence of the negligent manner in which its cars were run, it is relevant to ask a competent witness within what distance such a train as the one in question could be stopped with ordinary brakes, on an ascending grade, running at such a rate of speed that a man could run faster on foot than the train was going at the time. *Mott v. Hudson River R. R.*, 8 Bosw. 345. See, also, *Field v. N. Y. C. R. R.*, 32 N. Y. 339.

Evidence which is clearly irrelevant may be excluded by the court on its own motion, even if both parties are willing to receive it. *Corning v. Corning*, 6 N. Y. 97; *Cooper v. Barber*, 24 Wend. 105. No court is bound to waste its time by sitting to hear such evidence. *Ib.* Evidence may be competent to prove the fact proposed, and yet it may be irrelevant, because the fact proposed is itself irrelevant under the issues made by the pleadings. *Purchase v. Mattison*, 6 Duer, 587.

But relevant evidence cannot properly be excluded because it was not noticed by counsel in opening the case or defense. *Nearing v. Bell*, 5 Hill, 291.

Where a judge excludes the whole defense upon the opening of the defendant's counsel, on the ground that the matters proposed to be proved do not constitute any defense, a single exception to such decision is sufficient. It is not necessary for the defendant's counsel to re-

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peat his statements, and take a separate ruling on each of them. *Sawyer v. Chambers*, 44 Barb. 42; 43 id. 622. Evidence to contradict facts admitted by the pleadings is neither relevant nor competent.

A party who seeks to reverse a judgment on account of the exclusion of evidence offered by him must show affirmatively by his exceptions, case or return, that the evidence was relevant at the time when it was offered and excluded. *Van Amringe v. Barnett*, 8 Bosw. 358.

While it is error to reject evidence which in any degree tends to prove the issue, *Lytle v. Erwin*, 26 How. 491, yet if its materiality is not apparent at the time it is offered, an offer must be made in such terms as to leave no room for doubt as to its competency and materiality under a proper definition of the law, or a general exception to its exclusion will not be available unless it appears plainly that the court understood the ground which in law might have justified its reception. *McGrath v. Bell*, 42 How. 182.

A judgment will not be reversed on account of the admission of immaterial evidence in nowise prejudicial to the appellant. *Wattson v. Campbell*, 38 N. Y. 153.

§ 12. **Written evidence.** Written instruments are, first, of a public nature; secondly, of a mixed nature, partly public and partly private; thirdly, of a private nature.

Public documents, again, are either judicial; or, secondly, not judicial; and, with a view to their means of proof, they are either, first, of record; or, secondly, not of record. A complete review of this subject is not consistent with the nature or the plan of this work, and, therefore, nothing but the most common and most useful principles and cases will be noticed.

The manner of proving the statutes or the common law of other states, nations, governments or territories is provided for by the Code. Vol. 1, p. 140, § 942.

“A statute or joint resolution passed by the legislature of the State may be read in evidence from a newspaper, designated as prescribed by law to publish the same, until six months after the close of the session at which it was passed, and at any time from a volume printed under the direction of the secretary of State.” Vol. 1, p. 138, § 932.

A record may be proved, either, first, by mere production, without more; or, secondly, by copy. Copies of records are either exemplifications; or, secondly, copies made by the authorized officer; or, thirdly, sworn copies. An exemplification is under the great seal, or under the seal of a particular court.

The reason of permitting a copy to be given in evidence in such cases

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is that inconvenience to the public would result from removing documents which may be wanted in different places at the same time. When any record is exemplified the whole must be exemplified, for the construction must be gathered from the whole taken together. The seals of every court of record prove themselves, and are supposed to be known to all persons. There are many cases in which the law makes a copy of a record or paper evidence, when properly certified by the clerk with whom it is deposited. These cases will be noticed in a proper place hereafter.

Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is a deviation from the general rule, that the best evidence must always be produced, but it is permitted for the sake of public convenience.

The copy must be one of a complete record, for until it becomes a permanent record it is transferable, and the reason for admitting a copy does not apply. The copy, too, should be of the whole record, or of so much, at least, as concerns the matter in question; and, moreover, it ought to be an exact copy, and, therefore, if it contains abbreviations, and the original is written in words at length, it will not be admissible.

It is a general rule, that whenever the original is of a public nature, a sworn copy is evidence, and that whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy. But where the document when produced would require support from collateral proof, it has been thought that a copy is not admissible, as in the case of a paper in which it would be necessary to prove the handwriting of a party to such paper.

When admissible, the copy must be proved by one who swears that he has compared it with the original, taken from the proper place of deposit. It was formerly thought sufficient for this purpose, either that the witness should have read the copy whilst another read the original, or *vice versa*, for it would not be presumed that a person willfully misread the record; but it has since been determined that it is not sufficient that the witness holds the copy, while another reads the record; there must be a change of hands, or the witness must himself read the copy with the original. *Slane Peerage*, 5 Cl. & F. 24; *Harrison v. Borwell*, 10 Sim. 380. It is not necessary, however, that the record should have been read by an officer of the court. *Gyles v. Hill*, 1 Camp. 471. But, before a document can be read as a copy of a record, it must be proved that the original either came out of the hands of the officer of the court, or from the

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proper place of depositing the records of the court of which it purports to be a record, and the contents of the document itself cannot be referred to in support of such proof. *Adamthwaite v. Synge*, 1 Stark. 183. A copy is never admissible where the original is produced.

Under the Revised Statutes a certificate of a town or county clerk in whose office a chattel mortgage is filed, stating that the paper is a copy of the original mortgage, is no proof of the existence of the mortgage, nor that the paper purporting to be a copy of the mortgage is a copy. The original mortgage must be produced and proved, or its non-production accounted for so as to authorize secondary evidence. The mortgage and its contents must be proved by common-law evidence. *Bissell v. Pearce*, 28 N. Y. 252; *George v. Toll*, 39 How. 497; *Sunderlin v. Wyman*, 10 Hun, 493.

The Code provides that a copy of a paper filed, kept, entered or recorded pursuant to law with a clerk of a court of the State or of any public body or public board created by authority of the law of the State and having, pursuant to law, a seal, is evidence, when duly certified by such clerk, as if the original was produced. Vol. 1, p. 138, § 933.

It also provides that a copy of a paper filed pursuant to law in the office of a town clerk, or a transcript from a record kept therein pursuant to law, certified by the town clerk, is evidence, with like effect as the original. Id., § 934. But in the light of the construction given to similar provisions of the Revised Statutes in the cases above cited it is not at all clear that a certificate of a town or county clerk indorsed on a copy of a chattel mortgage is evidence of any fact except the fact of filing.

The proof of the deeds, mortgages and other instruments which are acknowledged will be explained elsewhere. See "*Acknowledgments*."

The existence of corporations may be shown by certified copies of the certificate of incorporation, when such copy is duly certified by the clerk or officer with whom the original is deposited. Such incorporations are very numerous, and are daily increasing in number, among which are railroad and steamboat companies, banking associations, turnpikes, plankroads, building associations, gas companies, manufacturing, mining, mechanical or chemical companies, and the like.

Certificates of the incorporation of villages, or transcripts from the record thereof, certified by the county clerk with whom the originals are filed, are presumptive evidence of the facts therein stated. 2 R. S. 719, § 80, 5th ed.

"Any act, ordinance, resolution, by-law, rule or proceeding of the

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common council of a city, or the board of trustees of an incorporated village, or of a board of supervisors of any county within this State, and any recital of occurrences taking place at the sessions of any thereof, may be read in evidence on any trial, examination or proceeding, whether civil or criminal, either from a copy thereof, certified by the clerk of the city, village, common council, or board of supervisors, or from any volume printed by authority of the common council of the city, or board of supervisors of the county, or of the board of trustees of any incorporated village." Laws of 1879, chap. 211, § 1. See, also, vol. 1, p. 139, § 941.

A will, which has been duly proved and admitted to probate, may be proved by the original record, or by an exemplification of it. "Every will so proved shall have a certificate of such proof indorsed thereon, signed by the surrogate and attested by his seal of office, and may be read in evidence without further proof. The record of such will, made as aforesaid, and the exemplification of such record, by the surrogate in whose custody the same may be, shall be received in evidence, and shall be as effectual, in all cases, as the original would be, if produced and proved, and may, in like manner, be repelled by contrary proof." 3 R. L. 140, § 11, 5th ed.

An exemplification of the record of a will ought to include the proofs; and if it does not include the entire record, including the proofs, it is not admissible in evidence. *Morris v. Keyes*, 1 Hill, 540. The record is but *prima facie* evidence of the authenticity of the original. *Ib.* But when the will relates exclusively to personal estate, and it is proved before a surrogate who has jurisdiction of the subject, and he adjudges the will to be duly executed, his decision is conclusive as to the execution thereof, when the question arises in a collateral action, notwithstanding it is shown that there was but a single subscribing witness to the will. *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190, 199. See *Matter of Last Will of John Kellum*, 50 N. Y. 298.

Provision is also made by law for the proof of wills of non-residents relating to lands in this State. See Laws of 1878, chap. 324; *Bromley v. Miller*, 2 N. Y. Sup. Ct. (T. & C.) 575; Laws of 1864, chap. 311, as amended by Laws of 1872; chap. 680.

"Any instrument except a promissory note, a bill of exchange, or a last will may be acknowledged or proved and certified in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence as if it was a conveyance of real property." Vol. 1, p. 139, § 937; Laws of 1833, chap. 271, § 9; 3 R. S. (5th ed.) 690, § 101.

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A bond of indemnity given to a sheriff may be proved in this manner. *Campbell v. Hayt*, 23 Barb. 555. But when the acknowledgment is taken by a justice of the peace or a commissioner of deeds, and the instrument is to be used as evidence out of the county in which such justice or commissioner resides, there must be a certificate of the county clerk residing in the county with such justice or commissioner, showing that the latter was an officer authorized to take acknowledgments, or the instrument cannot be received in evidence. *Ib.* And see *Wood v. Weiant*, 1 N. Y. 77.

County clerks and town clerks are authorized to make certified copies of many different kinds of papers, and those copies are received in evidence instead of the originals. The Revised Statutes contained certain provisions as to the admission of such certified copies in evidence which have been substantially re-enacted in the Code of Civil Procedure. See 3 R. S. (5th ed.) 677, §§ 74-77; Laws of 1848, chap. 197, § 1. The provisions of the Code are as follows :

“Where a transcript, exemplification or certified copy of a record or other paper is declared by law to be evidence, and special provision is not made for the form of the certificate, in the particular case, the person authorized to certify must state in his certificate that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.” Code of Civil Pro., § 957.

“If the officer, or the court, body or board in whose custody an original paper specified in the last section, is required to be by the laws of the State, or of another State, or of the United States, or of a territory thereof, or of a foreign country, has pursuant to those laws an official seal, the certificate must be attested by that seal. If the certificate is made by the clerk of a county within the State, it must be attested by the seal of the county.” *Id.*, § 958.

“The last section does not require the seal of a court to be affixed to a certified copy of an order or of a paper filed therein, or entry made, when the copy is used in the same court or before an officer thereof; or in the Supreme Court, when it is used in a Circuit Court or Court of Oyer and Terminer.” *Id.*, § 959.

“Where a seal of a public officer or of a corporation is authorized or required by law, it may be impressed directly on the paper.” *Id.*, § 960.

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County clerk's certificate of a copy of record, etc.

STATE OF NEW YORK,
Fulton County Clerk's Office, }
 January 24, 1865.

I, Mortimer Wade, clerk of the county of Fulton, do hereby certify that I have compared the foregoing copy of a bond (or whatever the instrument may be), and of the indorsements thereupon, with the original records of the same remaining on file in this office (or, with the originals now remaining on file in this office), and that the same are correct transcripts therefrom and of the whole of such originals.

In testimony whereof, I have caused the seal of the County Court of said county to be hereunto affixed, this 24th day of January, 1865.

MORTIMER WADE. [L. S.]

Town clerk's certificate of a copy of paper, etc.

STATE OF NEW YORK,
County of Fulton and Town of Broadalbin. }

I, Charles Allen, town clerk of the town of Broadalbin aforesaid, do hereby certify that I have compared the foregoing copy of a chattel mortgage (or other paper, describing it by name), and of the indorsements thereon, with the original mortgage (or other paper) now on file in this office, and that the same is a correct transcript of such original chattel mortgage (or other paper) and of the said indorsements, and of the whole of the said originals.

In witness whereof, I have hereunto set my hand, this 24th day of January, 1865.

CHARLES ALLEN.

Where the official character of the clerk is not stated in the body of the certificate, as in the preceding forms, the clerk should add his official title to his name. When the certificate shows the officer's character, that will be *prima facie* evidence that he is such officer. *Thurman v. Cameron*, 24 Wend. 87. But, if the certificate does not show the official character of the person who signs the certificate, that fact may be shown by other evidence.

The certificate must conform to the requirements of the statute in relation to the matters which are required to appear in it, or it will not be sufficient to authorize the reading of the copy of the certified paper in evidence. The certificate must show that the paper certified contains a copy of the whole of the original; it is not enough to state that it is a correct copy.

Where proofs by certified copies of papers are substituted for com-

mon-law evidence, all the forms directed by the statute, whether preliminary or substantial, must be strictly complied with. *Rogers v. Jackson*, 19 Wend. 383, 385.

A justice's official certificate of a judgment is evidence for himself equally with other persons. *Maynard v. Thompson*, 8 Wend. 393.

It must be remembered, however, that the report or certificate of an officer is evidence only of the facts which by law he is required or authorized to certify. *Board of Water Com. of Cohoes v. Lansing*, 45 N. Y. 19.

A copy of a notice of mechanic's lien, in which the signatures are not proved or acknowledged, is not, though certified by the county clerk, admissible as evidence of the due filing of the proper notice of lien. *Sampson v. Buffalo, N. Y. & Philadelphia R. R. Co.*, 2 Hun, 512.

§ 13. **Judicial documents.** Judicial documents may be divided into: *First*. Judgments, decrees and verdicts; *Secondly*. Depositions and inquisitions, taken in the course of legal proceedings; *Thirdly*. Writs, summonses, attachments, warrants, pleadings, complaints and answers, etc., which are incident to legal proceedings. With respect to judgments, decrees and verdicts, may be considered: *First*. Their admissibility and effect; *Secondly*. The means of proving them; *Thirdly*. The mode of answering such evidence.

Judgments, verdicts, etc. In treating of the admissibility and effect of judgments and verdicts, it is important to consider, in the *first* place, for what purpose a judgment or verdict is offered in evidence; whether with a view to establish the mere fact that such a verdict was given, or such a judgment rendered, and those legal consequences which flow from that fact; or, *secondly*, with a view to a collateral purpose; that is, not to prove the mere fact that such a judgment has been rendered, and so as to let in all the necessary legal consequences of that judgment, but as a medium of proving some fact as found by the verdict, or upon the supposed existence of which the judgment is founded. For, establishing the fact that such a verdict has been given, such a judgment rendered, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed that the court has made a faithful record of its own proceedings. And, in the next place, the mere fact that such a judgment was given can never be considered as an act done between third persons or strangers, being a thing done by public authority; neither can the legal consequences of such a judgment be so considered; for, where the law gives to a judgment a par-

Judgments, verdicts, etc.

ticular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more a transaction between strangers and third persons than the law which gives it force.

But, with reference to any fact upon whose existence the judgment is founded, the proceeding may or may not be a thing transacted between strangers and third persons, according to the circumstances of the case. For instance, if B., being indicted, is convicted of beating A., the record of the judgment would be incontrovertible evidence of the fact that B. had been so convicted; it would be conclusively presumed that the court had kept a faithful record of its own proceedings. It would also be conclusive, as to all the legal consequences of such conviction. For instance, one of such legal consequences is, that B. shall not be punished a second time for the same offense; and, consequently, the record would be conclusive, when shown to the court, to protect him from a second prosecution for the same offense. So, if B. had been acquitted, and had brought an action against A. for a malicious prosecution, it would have been necessary to prove the fact of acquittal; and here, again, the record would have been conclusive evidence to show that fact. But next suppose, that upon B.'s conviction, A. had brought an action to recover damages for the assault, and had offered to prove the assault by the record of conviction, he would then be offering the judgment, not with the view to prove the mere fact of conviction, or to establish any legal consequence to be derived from it, but for a collateral purpose; that is, to prove the fact upon whose supposed existence the judgment was founded with respect to such facts; that is, the facts upon which such judgment professes to be founded, and then the judgment may or may not be evidence, according to circumstances, considering the nature of the facts themselves, and the parties.

A record is, in no case, direct and positive evidence of any fact which it recites, as having been found by a jury, or otherwise ascertained; it is in the nature of presumptive evidence only, for even the jury who found the facts may have acted upon mere presumption, without the aid of any direct evidence. If, therefore, no rule of policy intervened, no verdict could ever establish any more than that the jury, in the particular case, presumed, from some evidence or other, that the fact was true. But public policy requires that limits should be opposed to the continuance of litigation upon the same subject-matter, and, therefore, the law will not permit a matter, which has once been solemnly decided by a court of competent jurisdiction, to be again brought into litigation between the same parties or their representatives. Consequently, a judgment between the *same parties*, upon the

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same subject-matter, is usually conclusive, as to private rights. *Brown v. Mayor*, 66 N. Y. 385; *Blair v. Bartlett*, 75 id. 150; *Krekeler v. Ritter*, 62 id. 372; *Barr v. Bigler*, 16 Abb. 177; *Maltonner v. Dimmick*, 4 Barb. 566; *White v. Coatsworth*, 6 N. Y. 137; *Smith v. Hemstreet*, 54 id. 644; *Castle v. Noyes*, 14 id. 329; *Tuska v. O'Brien*, 68 id. 446.

On the other hand, it is an elementary rule of law and a principle of justice, that no man shall be bound by the act or admission of another to which he was a stranger; and consequently no one ought to be bound, as to a matter of private right, by a judgment or a verdict to which he was not a party, where he could make no defense and from which could not appeal, and which may have resulted from the negligence of another or may even have been obtained by means of fraud and collusion. *Knauth v. Bassett*, 34 Barb. 31; *Yorks v. Steele*, 50 id. 397; *Elwood v. Deifendorf*, 5 id. 398; *Case v. Reeve*, 14 Johns. 81; *Castle v. Noyes*, 14 N. Y. 329, 335.

Under the old rules of evidence, such a judgment or verdict was rejected as evidence, because it might have been founded upon the evidence of the party who claims a benefit from it, and he would thus receive the advantage which would result from his evidence, when he could not be a witness in the action in which such judgment might be offered as evidence.

This rule no longer exists, since either party may be a witness, and the reason of the rule also ceases. But there is another rule which operates to exclude such a verdict or judgment, as evidence, on a matter of private right, which is this: a person who could have received no prejudice from the verdict, had it been given the contrary way, shall not derive any benefit from it when it turns out to be in his favor, and because a judgment operates by way of estoppel, and estoppels must be founded upon mutuality.

The admissibility and effect of a verdict or judgment is now to be considered, with a view to the proof of the judgment itself *as a fact* and its *legal consequences*. A judgment which was rendered by a person who had competent authority to do so is evidence to protect him against all actions for any matter judicially done within the scope of that authority. For his immunity is a legal consequence of his acting in that situation, and the judgment is offered, not to prove the truth of the facts upon which it is founded, since, with a view to such a defense, the truth of those facts is not material, but in order to prove the fact of a judgment rendered by a competent authority, and so to establish the immunity of the judge, which is a legal consequence of the

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judgment. *Horton v. Auchmoody*, 7 Wend. 200; *Robbins v. Gorham*, 26 Barb. 586; S. C., 25 N. Y. 588; *Mather v. Hood*, 8 Johns. 44; *Weaver v. Devendorf*, 3 Denio, 117.

There are other cases in which a judgment is allowed to operate in favor of one who was not a party to the action.

In an action by A. against a sheriff or a constable, for wrongfully and unlawfully taking and selling his goods, the defendant may give in evidence a judgment against A. in favor of B., a third person, and also prove that he, the officer, by virtue of an execution issued upon that judgment, seized the goods in question, because they were the property of A., and liable to be sold on execution. So, in an action by A. against a constable for selling his goods, the officer may show in evidence a judgment rendered against B., and that the property belonged to him, and that such property was sold upon such execution.

A judgment on contract against several partners is *prima facie* evidence for one of the partners against the others, to prove their liability to contribution. So, in an action against a principal for the negligence of his agent, the recovery in the former action, if there is one, is evidence, in an action by the principal against the agent, not to prove the negligence, but to show the amount which the principal has suffered from such negligence; the negligence, however, must be proved by other evidence than the judgment. So a verdict and judgment in a former cause, between other parties, is admissible, for the purpose of introducing evidence to show that a witness gave evidence, on such former trial, which was directly contrary to what he swears on the present trial.

It has been laid down by great authority, that, in civil actions, the judgment of a court of *concurrent* jurisdiction directly upon the point is, as a plea or answer, a bar, and as evidence, conclusive between the same parties upon the same matter *directly* in question, in another court; and that the judgment of a court of *exclusive* jurisdiction is, in like manner, conclusive upon the same matter, coming *incidentally* in question in another court, between the same parties, for a different purpose. But that the judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from such judgment.

The principal position amounts to this: that no matter, once litigated and determined by a court of competent authority, shall be brought a second time into controversy between the same parties.

It is essential, then, to consider the five following points, viz.: The

identity of the parties ; the identity of the matter litigated ; the nature and manner of the adjudication ; the application of the adjudication to the fact to be proved ; and the effect of the judgment.

First, then, as to the identity of the parties. The general rule is, that no one can be bound by a verdict or judgment, unless he was a party to the action, or is in privity with the party, or possesses the power of making himself a party ; for, otherwise, he has no power of cross-examining the witnesses, or of adducing evidence in furtherance of his rights ; nor could he challenge jurors, or appeal from the judgment ; in short, he is deprived of the means provided by law for ascertaining truth and excluding error, and, consequently, it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger.

But one who claims in privity with another is in the same situation with the latter, as to any verdict or judgment, either for or against him, whether he claims as privy in blood or estate, or as privy in law. Accordingly, the heir may give in evidence a verdict for his ancestor ; and a verdict against the ancestor binds the heir. But, although a verdict and judgment is evidence for one claiming in privity with him, this must be understood of a claim acquired subsequently to the verdict. If a party, after a verdict and judgment against him, assigns his interest, the assignee is bound by the verdict rendered against such assignor.

In an action upon a promissory note or upon an account, if the defense is payment, and there is evidence given, and a verdict is rendered in favor of the defendant, such verdict will be conclusive against any person to whom the plaintiff subsequently transfers the note or account.

If personal property is sold with a warranty of title, and an action is brought against the vendee by a third person who claims title to it, such vendee should give the vendor notice of the pendency of the action, and request him to defend it ; if he defends the action and fails, or if he refuses to defend it, after such notice, and the vendee defends as well as he is able, but unsuccessfully, the verdict will be conclusive against the vendor, in an action by the vendee against him for the failure of the title. *Brewster v. Countryman*, 12 Wend. 446. And the vendee is not bound to appeal from the judgment rendered against him in the action by such third person. *Ib.* A record of recovery in a former action is not evidence against any but parties or privies to such former suit.

If the former judgment was recovered against a person who was the

Private documents or writings.

servant of the party against whom the record is offered in evidence, it will not be admissible, even though such servant attempted unsuccessfully to defend in that character. *Alexander v. Taylor*, 4 Denio, 302.

Secondly, as to the identity of the fact. It is essential not only that the parties should be the same, but that the *same fact* should have been in issue in the former action; for if it was not in issue the court or jury could not have passed upon it; nor could there have been any appeal from the judgment rendered thereon.

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And *the cause of action* is the same, when the same evidence will support both actions, although the actions may happen to be different in form. Thus a judgment in trespass will be a bar to an action of replevin for the same goods. And a verdict in trespass or trover will be a bar to an action for money had and received for the same goods. For further explanation, see "*Former Recovery*," etc., vol. 2, p. 735.

Thirdly, as to the nature and manner of the adjudication. The judgment, decree, sentence or verdict must be directly upon the precise point; and it is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment, as having constituted one of the grounds of the judgment. As to the conclusiveness of a former recovery, or as to the necessity of pleading it, see the title "*Former Recovery*," etc., vol. 2, pp. 657, 735.

§ 14. **Private documents or writings.** Private writings and entries may, with a view to their operation in evidence, be distinguished into those: *First*. To which the person against whom they are offered was party or privy. *Second*. Entries made by third persons. And they may be considered, first, with respect to their nature, admissibility and effect in evidence; and, secondly, with respect to the means of proof. Documents offered in evidence against one who was a party or privy to them are either under seal or not under seal. All documents to which a person was party or privy are in general admissible in evidence against him, since they operate as acknowledgments or admissions on his part, or that of another through whom he claims, that the facts contained in them are true, particularly if the admission was against the interest of the party so making it.

All written contracts are made for the express purpose of being afterward used as evidence of the contract; the only difference between sealed and parol contracts in this respect being this — that the former

Subscribing witness.

are more solemnly authenticated, and not so easily revoked. So essential is it that the rights of men should be evidenced by documents of this nature, that the law itself requires, in many instances, the evidences of a deed to notify and establish the particular facts, as in the case of a conveyance of lands, etc.; and in many other cases a written contract or memorandum is essential to the validity of the agreement, as in the case of contracts within the provisions of the statute of frauds, or new promises to revive debts barred by the statute of limitations, etc.

As a general rule, an admission under seal is conclusive upon the obligor, and estops him from asserting or proving to the contrary. Thus if the condition of a bond recites that a particular suit is depending in a particular court, the obligor is estopped from saying that there is no such suit there. So, if the condition of a bond be to perform the covenants in a particular indenture or instrument, he is estopped from saying that there is no such instrument, etc.

But, although where a distinct statement of a particular fact is made in the recital in a bond or other instrument under seal, and a contract is made with reference thereto, it is not competent to the parties bound by that deed to deny the recital in an action upon it between them; and although the same rule may apply where the instrument is not under seal, yet in an action not founded on the instrument, but wholly collateral to it, the parties are not so bound, even in an action between themselves, but may show the circumstances under which the admission was made, in order to prove that it is not entitled to weight.

Under the rules of pleading established by the Code, matters of defense, by way of estoppel, must be pleaded.

As to entries by third persons against their interest, or as to entries in the usual course of business, or as a part of the *res gestæ*, etc., and where they are evidence against other persons, see *ante*, 435, 436.

§ 15. **Subscribing witness.** It was at one time an elementary principle, that the execution of every attested instrument, whether under seal or not, must be proved by the subscribing witness, if he could be produced, and was capable of being examined. *Jones v. Underwood*, 28 Barb. 481; *Barber v. Terrell*, 54 Ga. 146; *Kalmes v. Gerrish*, 7 Nev. 31; *Hodneth v. Smith*, 2 Sweeny, 401; S. C., 41 How. 190; 10 Abb. (N. S.) 86. The execution of a sealed agreement could not be proved by the evidence of one of the parties who executed it, if there was a subscribing witness; *Jones v. Underwood*, 28 Barb. 481; and the most deliberate acknowledgment of a sealed instrument, if made out of court, was not sufficient to dispense with the calling of a

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subscribing witness. *Fox v. Reil*, 3 Johns. 477; *Henry v. Bishop*, 2 Wend. 575.

But an admission of a party that he executed a bill of exchange or promissory note dispensed with the necessity of calling a subscribing witness thereto; *Hall v. Phelps*, 2 Johns. 451. See *Palmer v. Manning*, 4 Denio, 131; *Shaver v. Ehle*, 16 Johns. 201; *Pentz v. Winterbottom*, 5 Denio, 51; *Giberton v. Ginocchio*, 1 Hilt. 218. And when an instrument was not under seal, and was merely collateral evidence, the production of the subscribing witness was unnecessary. *Rundle v. Allison*, 34 N. Y. 180, 184; *Hall v. Phelps*, 2 Johns. 451. The same rule applied where a person, present at the execution of an instrument, but not then called as an attesting witness, subscribed it, as such, at a time subsequent to its execution; *Henry v. Bishop*, 2 Wend. 575; *Hollenback v. Fleming*, 6 Hill, 303, 305; or where a person put his name to the instrument as an attesting witness without the knowledge or consent of the parties. *Sherwood v. Pratt*, 63 Barb. 137. So where a party, claiming a beneficial interest under a written instrument, produced it at the trial, under notice for that purpose, he could not insist upon proof of its execution by the subscribing witness, or in any other manner, if the interest claimed was of an abiding nature and had reference to the subject-matter of the action. *Betts v. Badger*, 12 Johns. 223; *Jackson v. Kingsley*, 17 id. 157.

The rules in relation to proof of an attested instrument have lost much of their importance in actions pending in a justice's court. The statute now provides that "Except in the case of written instruments, to the validity of which a subscribing witness or subscribing witnesses is or are necessary, whenever, upon the trial of any action, civil or criminal, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto." Laws of 1883, chap. 195.

The instruments, to the validity of which a subscribing witness is necessary, are wills and codicils, deeds in fee, or of a freehold estate, including powers authorizing the execution of instruments granting such estates contained in a deed or will; and except in the case of wills and codicils, an acknowledgment by a party, duly certified, dispenses with the necessity of a subscribing witness. The statute, therefore, renders it unnecessary to call a subscribing witness except to prove the execution of a will or codicil, or of an unacknowledged deed; and

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the cases are rare in which either wills or conveyances of land are offered in evidence in a justice's court. In the exceptional cases the decisions rendered before the enactment of the statute quoted may be of value.

Proof of the execution of an instrument by a subscribing witness will be dispensed with, when such witness is dead, or incompetent to give evidence on account of insanity, or when he is out of the country, or is beyond the reach of a subpoena which is issued by the court in which the trial is had. *Cook v. Husted*, 12 Johns. 188; *Teall v. Van Wyck*, 10 Barb. 377; *People v. Rowland*, 5 id. 449; *Hodnett v. Smith*, 41 How. 190; S. C., 2 Sweeny, 401; *Ballinger v. Davis*, 29 Iowa, 512.

If the subscribing witness is out of the reach of a subpoena, but his evidence could be taken upon a commission, the party is not required to take his evidence in this manner, but may prove the instrument in the same manner as though there were no subscribing witness to it. *Glubb v. Edwards*, 2 Moo. & R. 300; *Teall v. Van Wyck*, 10 Barb. 377; *People v. Rowland*, 5 id. 449. And proof of the handwriting of such subscribing witness is enough in such a case. *Ib.*

In like manner proof of the handwriting of attesting witnesses may be received, when they cannot be found after strict and diligent inquiry. But every case upon this subject must depend upon its own peculiar circumstances. The search must be diligent, and made in good faith. Diligent inquiry at the former residence of the witness, and information from his former neighbors as to his removal and place of settlement, if out of the jurisdiction of a subpoena, would be a sufficient excuse, because no party could reasonably be required to go farther in pursuit of a witness under such circumstances. *Van Dyne v. Thayer*, 19 Wend. 162, 165. Proof that the subscribing witness himself informed a party that his residence was out of the State, or out of the jurisdiction of the court, is sufficient evidence to dispense with his testimony. *People v. Rowland*, 5 Barb. 449.

Absence beyond the jurisdiction of the process of the court is sufficient; it need not be shown that he is out of the State, or out of the country, when the action is in a justice's court, if he is beyond the reach of a justice's subpoena. *McPherson v. Rathbone*, 11 Wend. 96; *Teall v. Van Wyck*, 10 Barb. 377.

The search and inquiry for a subscribing witness should be made in proper season; and where the subscribing witnesses to a written contract, on which the plaintiff sued, were the sons of the defendant, and the plaintiff made no attempt to subpoena them until the day be-

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fore the trial, although such defendant and his sons resided sixteen miles from the place of trial; this was held not to be sufficient diligence to dispense with the subscribing witnesses, notwithstanding it appeared that the defendant had told a falsehood to the subpoenaing party, as to the absence of the witnesses. *Mills v. Twist*, 8 Johns. 121. Due diligence, and such as would govern a prudent man in a sincere search after a witness, must form the standard in these cases. Information derived from nobody knows whom, or belief taken up upon mere conjecture, is certainly not enough. *Van Dyne v. Thayer*, 19 Wend. 162, 165.

If the party who is required to call a subscribing witness, is guilty of collusion in keeping him out of the way, he will have to make a clear case before the attesting witness will be dispensed with. *Clark v. Saunderson*, 3 Binn. 195, 198; *Crosby v. Percy*, 1 Taunt. 365. So, on the other hand, where it is shown that the witness is kept out of the way by the party against whom his evidence is to be given, this will be taken into the account in determining whether the witness may be dispensed with. *Hill v. Phillips*, 5 Carr. & Payne, 356. And, where a plaintiff made diligent efforts, in due season, to subpoena a subscribing witness who was a son of the defendant, and who was kept out of the way of the subpoena by the defendant or his family, the plaintiff was permitted to prove the instrument without calling such subscribing witnesses. *Ib.* And see *Burt v. Walker*, 4 Barn. & Ald. 697.

An instrument, purporting to be attested by a subscribing witness, may be proved as if there were no subscribing witness, where the name of a fictitious witness is inserted as that of an attesting witness; or where the name of the real person has been written upon the instrument, but not by himself; or where the person who has put his name as attesting witness did so without the knowledge or consent of the parties; *Sherwood v. Pratt*, 63 Barb. 137; or where the attesting witness, on being called, denies any knowledge of its execution. In such case, the due execution of the instrument may be shown by proving the handwriting of the party, or by his admission, etc. So, if the subscribing witness fails to establish the due execution of the instrument, the party calling him may establish the fact by other evidence.

If the witness recognizes his signature, and says that he has no recollection of the fact that it was executed in his presence, but that, on seeing his signature to it, he has no doubt he saw it executed, this is sufficient proof of the execution. *Hall v. Luther*, 13 Wend. 491; *Crabtree v. Clark*, 7 Shep. 337.

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If there are several attesting witnesses, the absence of all must be accounted for before evidence of handwriting can be given. *Jackson v. Gager*, 5 Cow. 383; *Jackson v. Christman*, 4 Wend. 277. But when the absence of all the attesting witnesses is accounted for, it will be sufficient to prove the handwriting of them.

If there are several subscribing witnesses, it is not necessary to call more than one, if he can testify to sufficient facts to make the proof; but if he cannot prove any of the signatures but his own, the other witnesses, if living, and competent to testify, and within reach of a subpoena, must be called, or their absence accounted for. *Jackson v. Le Grange*, 19 Johns. 386. Before the execution of the instrument can be established, by proving the signatures of the subscribing witnesses, their absence must be duly accounted for. Where this is done, it will be sufficient to prove the signature of the subscribing witness alone; it is not necessary to prove the handwriting of the party. *People v. Rowland*, 5 Barb. 449; *Sluby v. Champlin*, 4 Johns. 461; *Lush v. Druse*, 4 Wend. 313. But, where proof of the signature of the party can be made, it is always best to establish that, as well as that of the signature of the attesting witness. *Jackson v. Waldron*, 13 Wend. 183, 184, 197, 198.

It is always necessary to establish the *identity* of the party, and to show that the person who executed the instrument is the party to the action, or the person to be charged. Identity of name will generally be *prima facie* evidence that the party to the action is the same person who executed the instrument. But, if it is a long time since the signature was made, or if the name is a very common one, and there are several persons of the same name in the vicinity, some additional evidence of identity must be given.

Where a written instrument is proved by establishing the handwriting of a deceased witness, the opposite party may attack the character of such witness in the same manner as though he were living, and had testified at the trial. *Losee v. Losee*, 2 Hill, 609, 612.

§ 16. **Handwriting.** The simplest and most obvious proof of handwriting is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur where such a direct kind of evidence cannot possibly be procured. The writing may be secret in its nature; or, no person may have been present at the time; or, if a person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence which the nature of the case admits is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired

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a knowledge of his handwriting; for, in every person's manner of writing, there is a certain distinct, prevailing character, which may be discovered by observation, and when once known, may be afterward applied as a standard to try any other specimen of writing whose genuineness is disputed. A witness may therefore be asked, whether he has seen a particular person write; and if he answers in the affirmative, he may further be asked whether he believes the paper in dispute to be in his handwriting. This course of examination involves two questions: First, whether the supposed writer is the person of whom the witness speaks; and secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second a question of judgment or a comparison, in the mind of the witness, between the general standard and the writing produced. All evidence of handwriting, except when the witness has seen the document actually written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge. This kind of evidence, like all probable evidence, admits of every possible degree from the lowest presumption to the highest moral certainty. It may be so weak as to be utterly unsafe to act upon; or so strong as, in the mind of any reasonable man, to produce conviction. The witness may have been in the constant habit of seeing the person write, day after day, for years together, on common transactions, and in the course of important business. On the other hand, it may be found, on inquiry, that he has seen him write only a few words, many years ago, or perhaps only once; or, the specimens which he saw may have been slight and imperfect, made in a hurry, at distant intervals, or, from some other cause, not the fair average specimens of his general character or style of writing, but deviating from the general form; in which cases, the impression on the mind of the witness would be imperfect, faint and inaccurate. But, whatever degree of weight his testimony may deserve, which is a question exclusively for a jury, or the justice sitting in their place, it is an established rule, that if he has seen the person write, he will be competent to speak to his handwriting, though he may have seen him write only once. *Hammond v. Varian*, 54 N. Y. 398; *Magee v. Osborn*, 32 id. 669.

Another method of acquiring a knowledge of handwriting is by means of a written correspondence. If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he

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may be admitted to speak to that person's handwriting. *Hammond v. Varian*, 54 N. Y. 398.

It is universally conceded that evidence of handwriting may be opinion merely; and it is as universally conceded that a witness who has either seen the party write, or who, not having seen him write, has received letters from him which have been "acted upon" by him as genuine, is competent to give an opinion as to his handwriting. And this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was seen, or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances. *Miles v. Loomis*, 75 N. Y. 288.

The opinion of the ordinary witness founded only upon a mental comparison of the disputed writing with a single signature seen by him twenty years before would be worth little, but it would undoubtedly be competent. *Miles v. Loomis*, 75 N. Y. 288; *Jackson v. Van Deusen*, 5 Johns. 144; *Eagleton v. Kingston*, 8 Ves. 473.

If the identity of the writer of the letters is established, the witness who received them will frequently be able to give more satisfactory evidence, than one who has seen that person in the act of writing; for the latter may have seen him write but seldom, and on occasions not calculated to excite attention; while the other may have had frequent opportunities of re-perusing the letters, and the letters themselves having been written on subjects of business, will probably have more consistency, and exhibit a fairer specimen of the general character of handwriting. It is not necessary that the witness should have been a correspondent of the writer, to render him competent to speak to handwriting, if he has seen specimens of his writing upon which he has acted, and which the writer recognized as his, in the course of business.

In the cases which have been mentioned, the proof of handwriting is founded upon a knowledge of its general character. The witness is supposed to have formed a standard in his mind, and with that standard to compare the writing in question.

Formerly a witness was not permitted to compare writings in court, and from that comparison, give his opinion as evidence upon the question of the genuineness of the signature in question if the only knowledge he had was founded upon such comparison of hands. *Wilson v. Kirkland*, 5 Hill, 182; *People v. Spooner*, 1 Denio, 343; *Boyle v. Colman*, 13 Barb. 42. But the courts have in their later decisions shown a disposition to relax the rule, and it is now settled beyond question in this State that when the genuineness of a signature is in

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question in an action experts in handwriting who have no other knowledge of the handwriting of the person whose signature the one in question purports to be, than that derived by a comparison in court of such signature with other signatures of the person to instruments proved and properly in evidence, are competent as witnesses to give their opinion, derived from such comparison, as to the genuineness of the disputed signature, and as to whether it appears to be a natural or simulated hand. *Miles v. Loomis*, 75 N. Y. 288; *Goodyear v. Vosburgh*, 63 Barb. 154; *Johnson v. Hicks*, 1 Lans. 160; *Roe v. Roe*, 8 Jones & Sp. 1. See *Hazleton v. Union Bank*, 32 Wis. 34; *State v. Hastings*, 53 N. Y. 452; *Benedict v. Hunt*, 53 Ind. 381; *Bragg v. Colwell*, 19 Ohio St. 407; *Hynes v. McDermott*, 82 N. Y. 41, 49.

Where a signature is alleged to be a forgery, the defendant cannot give in evidence other instruments executed by him, to enable the jury to compare the signatures with the one in question. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Hoyt v. Stuart*, 3 Bosw. 447. And if a witness has testified to the genuineness of a signature, he cannot, on cross-examination, for the purpose of impeaching him, be shown other signatures, not in evidence, nor in issue in the case, and be asked if they are genuine, with a view to contradicting him, if he is mistaken as to the genuineness of such irrelevant papers. *Ib.*; *Bank of the Commonwealth v. Mudgett*, 44 N. Y. 514; *Randolph v. Loughlin*, 48 id. 456; *Ellis v. People*, 21 How. 356.

But when a party claiming that the instrument upon which an action is brought is a forgery, at the request of the adverse party writes his name in open court, the signature, so acquired, may be put in evidence by the party at whose instance it was made, for the purpose of having it compared by the court or jury with the signature in controversy. *Browner v. Loomis*, 14 Hun, 341; *Chandler v. LeBarron*, 45 Me. 534; *Roe v. Roe*, 8 Jones & Sp. 1; *Doe v. Wilson*, 10 Moore's Priv. Council Cas. 202. But see *King v. Donahue*, 110 Mass. 155.

In the Supreme Court of the United States it is well settled that if a paper admitted to be in the handwriting of a party, or subscribed by him, is in evidence for another purpose, the signature or paper in question may be compared with it by the jury. *Moor v. United States*, 91 U. S. 270; *United States v. Chamberlin*, 12 Blatchf. 390. So in this State it held that, in an action upon a promissory note, where the defense is forgery, a comparison of the handwriting of the note in controversy with other genuine writings of the alleged maker, which have been introduced in evidence in the cause, is allowable, for the purpose of aiding the jury in determining, from such comparison, whether the

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alleged signature is genuine. *Dubois v. Baker*, 30 N. Y. 355; affirming S. C., 40 Barb. 557; *Ellis v. People*, 21 How. 356; *Van Wyck v. McIntosh*, 14 N. Y. 439, 442; *Doe v. Newton*, 5 Ad. & El. 514.

Before the statute of 1880, it was held that on an issue as to the genuineness of a signature, other papers executed by the defendant and conceded to be genuine, but which were not properly in evidence for other purposes, could not be received in evidence or submitted to the jury for the purpose of comparison with the disputed signature. *Randolph v. Laughlin*, 48 N. Y. 456. And see *Hynes v. McDermott*, 82 id. 41. That statute provides that "comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Laws of 1880, chap. 36.

A witness may be asked on the trial whether a promissory note was written with the same ink, including the body of the instrument and the signature; or whether there appears to be an erasure on the note; or whether the erasure was made before or after the body of the note was written; whether either of the edges of the note were cut edges, or the ordinary foolscap edges. All such questions are proper, because they call for facts which are apparent, and which the party has a right to prove, if material. *Dubois v. Baker*, 40 Barb. 557; 30 N. Y. 355. The proof of such facts is not proof of mere matter of opinion. *Ib.* But if the question, whether the erasure was made before or after the body of the note was written, is a matter of opinion, it is a question upon which a bank cashier is entitled to give an opinion as an expert. *Ib.* And where notes and receipts of a party are in evidence for other purposes of the action, and conceded to be genuine, a witness who is an expert may state in what respect the character of such notes and receipts differ from the handwriting of another note, whose genuineness is questioned. *Ib.*

In an action upon a bond, where there is any competent conflicting evidence as to the genuineness of the defendant's signature, the plaintiff is entitled to have the case go to the jury, whose finding upon the question will be conclusive. *Magee v. Osborn*, 32 N. Y. 669. In such a case, if a witness swears that he has seen the defendant write, and that he believes the signature to the bond to be genuine, this is sufficient evidence to require the case to be given to the jury. *Ib.*

§ 17. **Alteration of written instruments.** The law strictly guards

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the rights of parties, by prohibiting an unauthorized alteration of written instruments. And, if either of the parties to such an instrument makes a material alteration in it after its execution and delivery, such alteration will render the instrument void, although there are two exceptions to the rule: one is, if the alteration was made by the consent of the other party; and the other is, where the alteration itself is an immaterial one, or is one which consists in merely supplying words, which the law would intend in the absence of any written words. Erasures or alterations are sometimes made at or before the execution of an instrument; and at other times they are made afterward by consent. Where such an altered instrument is offered in evidence, it is sometimes made a question whether any explanation must be made by the party offering it, as to such alteration, before it can be given in evidence. The cases have not been entirely consistent upon this point.

It has been held that when a paper is produced by a party, and it appears upon its face to have been altered by any interlineation, erasure, or blemish, the party producing it ought to explain this appearance, by showing that the interlineation, etc., was made at or before the execution of the instrument, or that it was made afterward by consent, or that it was made by a stranger, or that the alteration was an immaterial one, or that it was accidentally done, or that it was procured to be done by the fraud of the opposite party. In this State, the party who produces an altered instrument is generally bound to explain the alteration or erasure, if it is in a material point. *Jackson v. Osborn*, 2 Wend. 555; *Chappell v. Spencer*, 23 Barb. 584. And this is especially the rule when the alteration is suspicious, and is beneficial to the holder. *Tillou v. Clinton & Essex Ins. Co.*, 7 Barb. 564; *Acker v. Ledyard*, 8 id. 514; *O'Donnell v. Harmon*, 3 Daly, 424.

An alteration in the date of a promissory note, made by an agent of the maker, under a mistaken supposition that he had authority to do so, will not render the note void, where there is no evidence of a fraudulent intent. *Van Brunt v. Eoff*, 35 Barb. 501.

In an action upon a guaranty indorsed upon the back of a promissory note, it will be sufficient to prove the signature to such guaranty, and if the defendant claims that he is a mere indorser, and entitled to the rights of such a party, he must prove by some evidence that there was no guaranty written there at the time he wrote his name there, for the law will not presume that the guaranty was written above the name without proper authority. *Small v. Sloan*, 1 Bosw. 352.

In *Maybee v. Sniffen*, 2 E. D. Smith, 1, 10, the rule is laid down thus, after a careful review of the cases: "The instrument, with all

the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effect upon the parties respectively, ought to be submitted to the jury; and the *court* cannot presume, from the mere fact that an alteration appears on the face of the instrument (whether under seal or otherwise), that it was made *after* the signing."

The law does not require that an instrument shall be written throughout with the same colored ink; and the fact that two kinds of ink of different colors were used will not of itself be sufficient to authorize a court to exclude the paper from the jury. *Smith v. McGowan*, 3 Barb. 404, 406. So if there is an erasure of one name, and another is written upon it, that of itself will not invalidate the instrument, though such circumstances may be weighed by the jury, upon the question of alteration, etc. *Ib.*

Where a paper is required by law to be filed in some office, as with the county clerk, and the paper is so filed with the clerk, and is produced by him at the trial, any alteration which may appear will not require explanation, since the clerk will not be presumed to have done it and no presumption could be indulged against the party because it was not in his possession. *Devoy v. Mayor of New York*, 35 Barb. 264. If words are erased, it will be sufficient explanation if it is shown that it was done before the execution of the instrument. *Newell v. Salmons*, 22 Barb. 647.

The rules as to alterations of written instruments are the same whether applied to deeds or to other written instruments. If such an instrument is altered or destroyed by a stranger who had no authority to do so, the rights of the parties will not be affected by his acts. In such cases the existence of the original must be shown, and the alteration or destruction will authorize proof, as in the case of a lost paper, if that kind of proof is necessary. The law in relation to the alteration of instruments, either by consent, without authority, has already been fully discussed. See vol. 2, pp. 679-694.

§ 18. **Account books.** Entries which are made in books of account constitute a very important branch of the rules of evidence. The practice of receiving books of account in evidence has been long established, both in this State and in the other States of the Union. And they were first admitted as evidence, too, at a time when the parties could not be witnesses in the action, either for or against themselves. In this State, at that time, the parties were not permitted to add anything to the value of the books as evidence, by swearing to the truth of their contents, though, in some of the other States, such an oath was

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permitted. Books of account are clearly evidence which is manufactured by the party, and for his own convenience and interest. They have, therefore, always been received in evidence with caution, and subject to several important qualifications.

It is important to bear in mind that the rules in relation to the admission of books of account as evidence were established long before parties to an action were allowed to be witnesses. And those rules which were thus established remain entirely unchanged by the Code, which permits parties to be witnesses. *Tomlinson v. Borst*, 30 Barb. 42; *Stroud v. Tilton*, 3 Keyes, 139; *Swain v. Cheney*, 41 N. H. 232; *Jackson v. Evans*, 8 Mich. 476. And, notwithstanding the fact that a party may be a witness in his own favor, and may thus be able to establish his case by common-law proof, yet he is not obliged to do so, but may introduce his books of account as evidence, as formerly, provided he makes proper preliminary proofs to authorize their reception. *Tomlinson v. Borst*, 30 Barb. 42.

The leading case in this State, in relation to the admissibility of books of account, as evidence, is *Vosburgh v. Thayer*, 12 Johns. 461, decided in the year 1815. In that case it was established that such books could be received as evidence, if the owner of the book proved the following facts :

1. That the party had no clerk.
2. That some of the articles charged had been delivered.
3. That the books produced are the account books of the party.
4. He must prove that he keeps fair and honest accounts, and this proof must be made by those persons who have dealt with him and have settled from those books.

The rule which requires proof that a party had no clerk has not been maintained to the fullest extent ; and it is questionable whether the rule itself is not considerably shaken. At any rate, it must appear that there was a person employed by the owner of the books, who was really a clerk in the proper sense of that term. A clerk, in the ordinary acceptation of the term, when applied to the business of merchandising, or trade and commerce, or as employed by the court, in the case of *Vosburgh v. Thayer*, means a person who is employed as an assistant in a shop or store, for the purpose of selling goods and keeping the books of account of his employer. A person who is employed as a foreman in a business where several assistants are also employed, but who never made any entries in the books of the party, is not a clerk, within the meaning of this rule, although as foreman he may have delivered to the other party many of the articles charged against him in

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such books. *Sickles v. Mather*, 20 Wend. 72. The reason why proof was required that the party kept no clerk was to prevent a resort to such evidence as books of account, until it was shown that the party had no common-law proof of the sales. But the case just cited was one in which the foreman was certainly a competent witness, who could have proved the delivery of nearly or quite all the articles charged on the books, and yet the court did not require his production as a witness, because he was not properly a clerk within the ordinary signification of the term. He was, however, a competent witness, who could have given common-law proof of the sales of the property claimed to have been sold. That case shows, therefore, that the books of a party will not be rejected, merely because he may happen to be able to prove his case by common-law evidence. So, too, the case of *Tomlinson v. Borst*, which has been cited, also shows that books of account are not to be rejected, because the party is himself a competent witness. These two cases, therefore, establish the mere existence of common-law proof of the sale of property charged in books of account, does not require the production of such witnesses to authorize the admission of the book in evidence; nor does their non-production render the books inadmissible. And the rule as it now stands, if it is to be enforced by the courts, merely requires proof that the person offering the books had no clerk, as that term has been already defined. See *McGoldrick v. Traphagen*, 88 N. Y. 337.

The original rule required that proof must be given that the party had no clerk, and that qualification has not been expressly overruled, and therefore it is best to observe it in practice, notwithstanding it is evident that the reason of the rule has been disregarded, by allowing such books as evidence, without calling a party, or his foreman or agent, if he is not strictly a clerk. See *Jackson v. Evans*, 8 Mich. 479.

Books of account are admissible in evidence on the usual preliminary proof, though the entries were made by a deceased clerk, if they are verified by the oath of the party. *Stroud v. Tilton*, 3 Keyes, 139; *Bland v. Warren*, 65 N. C. 372. Entries by deceased persons, made in the due course of business and pursuant to their ordinary duties, are admissible in evidence. *State v. Phair*, 48 Vt. 366.

In *Gould v. Conway*, 69 Barb. 360, it was said by JOHNSON, J.: "There is no case or rule of evidence which holds that the books of account of a party are proper evidence to prove an indebtedness against another, where such books have not been kept by the party himself, but have been kept by a clerk employed by him." See *Waggeman v. Peters*, 22 Ill. 42.

Account books—Must be matter of book account.

Must be matter of book account. Notwithstanding books of account are admitted as evidence, they are not competent evidence upon every subject for which a party might desire to use them.

A most important rule, in relation to such books, is, that the charges contained in them must relate to such things as are a matter of book account, or they are not competent evidence. To aid trade and commerce was the object in view when such books were allowed to be used as evidence. And this object ought, therefore, to be kept constantly in view, whenever a question arises as to the admissibility of books of account, for the purpose of proving the indebtedness of a party charged. The sale of goods, wares and merchandise may be proved by such books; but they are not competent evidence for the purpose of proving a loan of money; *Low v. Payne*, 4 N. Y. 247; *Case v. Potter*, 8 Johns. 211; *Vosburgh v. Thayer*, 12 id. 461; nor for the purpose of proving the payment of money. *Irvine v. Wortendyke*, 2 E. D. Smith, 374, 376.

This rule excluding books of account as evidence of a loan or payment of money may be subject to modification when it is shown that the person offering the books in evidence is engaged in a business justifying charges for money loaned or money paid, as for example, when he is engaged in the business of banking or receiving money on deposit and paying it out. *Cummins v. Hull*, 35 Iowa, 253; *Veiths v. Hagge*, 8 Clarke (Iowa), 163; *Young v. Jones*, id. 219. In that case the party must show that he is engaged in business justifying such charges. *Ib.*

There are, also, numerous other cases in which one party may have a legal claim against another, but the existence of which cannot be established by means of books of account as evidence. And, therefore, such books are not competent evidence to prove the existence of a party's claim in such instances as the following: Entries in books of account are not legal evidence to establish a claim made by one town against another for keeping a pauper, when the claim is founded on the mere fact that the latter town is legally chargeable with the maintenance of such pauper, and no contract is proved between such towns. But a book containing an account of the expenditures of the overseers of the poor is admissible in evidence, in favor of the town, to prove the fact of such expenditures, where the overseer is required by statute to keep such account. *Cabot v. Walden*, 46 Vt. 11. A cause of action arising out of tort is not a matter of book account. Plans of an architect for the alteration or erection of a building are not matters properly chargeable in a book account. *Sloan v. Grimshaw*, 4 Houst.

Account books — Must be matter of book account.

(Del.) 326. But charges for sawing lumber are. *Conoway v. Spicer*, 5 Harr. (Del.) 425. A claim arising upon a bond, a bill of exchange, or a promissory note, or an indebtedness arising upon a special contract, is not a matter of book account. Nor can a party establish a bailment, or an agency in that manner. And so a special agreement to pay interest, or in relation to a mistake made in a previous settlement, or special damages arising on account of the breach of a special contract are not a matter of account. And so of a claim against a person who is liable as a guarantor for the liabilities of a third person who was primarily liable; or of a claim for rent, or for the use and occupation of real estate.

The foregoing instances are sufficient to show the nature of the claims which are not properly matters of book account.

Where a person deposits money in a bank, and the proper officers of such bank make entries of that fact in the bank books, and also in the pass book of such depositor, such entries will be evidence in favor of the depositor, as against the bank. *Jermain v. Denniston*, 6 N. Y. 276. And if such depositor makes or indorses a note, payable at such bank, while the deposit remains there, and the bank officers make entries in the bank books which show such note paid, such entries will be competent evidence of payment, in favor of the depositor, in any suit which may be subsequently brought upon such note, by any person who has purchased the same after it became due. *Ib.* In the absence of any proof to the contrary, or of suspicion as to the time of making the entries, they will be presumed to have been made at the time they bear date. *Ib.*

The books of account of a bank, however, are not evidence, of themselves, as against its depositors or customers, as to the facts contained in such books, if there is no evidence given by the bank to show the truth of the entries made. *White v. Ambler*, 8 N. Y. 170.

Books of a bank, not kept by either party to an action, nor relating to transactions between them, but referring only to transactions between the defendant and the bank, cannot be used as evidence to show the amount of paper which has been discounted by the bank for the defendant, and the number of notes discounted and renewed. *Per-rine v. Hotchkiss*, 58 Barb. 77.

Entries in partnership books are not evidence for one partner against another on an accounting between them, unless it appears, or may be presumed, that the latter not only had access to the books, but actually inspected them. *Taylor v. Herring*, 10 Bosw. 447; *Adams v. Funk*, 53 Ill. 219. Where the defendant was a mere dormant partner, who

Account books — Not evidence of a single charge.

took no part in conducting the business except to give his notes for its liabilities, and merely visited the place of business occasionally, and there was no evidence that he ever looked at any of the books, it was held that the entries in the books were not admissible against him in favor of his partner. Such entries, made by a book-keeper employed by the partnership, are not admissible, on the ground of their being made by a neutral agent, unless it is shown that the book-keeper was authorized by them to determine with what sums each should be charged. Entries in partnership books are *prima facie* evidence in favor of one partner as against another partner who had access to them, and an opportunity to inspect them, notwithstanding he may have omitted to do so. *Taylor v. Herring*, 10 Bosw. 447; *Fairchild v. Fairchild*, 64 N. Y. 471. See *Topliff v. Jackson*, 12 Gray (Mass.), 565. Book entries made by one of several partners are evidence against them all after a dissolution. *Walden v. Sherbourne*, 15 Johns. 409.

After a physician has proved an employment professionally, the entries, in his books of account, of the visits made have always been received to show the number of visits. *Clarke v. Smith*, 46 Barb. 30. Such book is evidence of nothing else, and for this purpose it has not been considered necessary, as in other cases, where books are admitted in evidence, to prove that he keeps correct books, or that others have settled by them. *Id.* 32, per INGRAHAM, J. An objection that the alteration of the law, by admitting parties as witnesses, has rendered books of account unnecessary, as evidence, even though allowed in other cases, would not apply in a case where the other party is dead, because in that case he could not testify. *Ib.* On the other hand the courts have held that the diary in which a physician has entered his visits is not admissible as evidence in his favor unless he first proves that the entries were made by him, that he keeps correct books, and that others have settled with him on the strength of the entries therein contained. *Knight v. Cummington*, 6 Hun, 100.

It must be remembered that a person's books may be evidence against him as containing his written admissions, while they are not evidence as against the adverse party. *Ward v. Leitch*, 30 Md. 326.

Not evidence of a single charge. Books of accounts are not competent evidence in any case where there is but one single claim or charge. The object of allowing books as evidence was to meet the case of furnishing evidence of numerous transactions. So, again, the rule which requires proof of the delivery of some of the items charged could not be complied with except by proving the single item claimed. The rule is the same although there may have been several articles sold, if

Account books — Must prove some of the items charged.

there was but one single transaction by way of sale. If that is the only dealing between the parties, books of account are not competent evidence to prove such sale. *Corning v. Ashley*, 4 Denio, 354. But while a tradesman's books are not admissible in evidence to prove a single item, they have been admitted to prove one charge for a lot of goods purchased on different days. *Le Franc v. Hewitt*, 7 Cal. 186.

Must prove some of the items charged. The courts have inflexibly required an observance of this rule, by requiring proof that there was a delivery of some of the goods claimed to have been sold and delivered, or of the rendition of some of the services charged. It is not sufficient to prove that some goods have been sold and delivered, or that some services have been rendered. The law requires proof that some of the items charged have been delivered, or that some of the services charged have been rendered. See *Foster v. Coleman*, 1 E. D. Smith, 85; *Vosburgh v. Thayer*, 12 Johns. 461; *Tomlinson v. Borst*, 30 Barb. 42; *Burke v. Wolfe*, 6 Jones & Sp. 263.

Where the plaintiff, a physician, claimed to recover for professional services rendered "in April, 1851, and continuing to 1853," and the only proof of his services was that he attended the defendant's family, as a physician once in the year 1849, it was held that the proof was insufficient to prove any item in the account sued upon. *Morrill v. Whitehead*, 4 E. D. Smith, 239.

But after a physician has proved an employment professionally, the entries in his books of account or diaries, in which all his visits are entered, are evidence to show the number of visits made. *Clarke v. Smith*, 46 Barb. 30. And see *Knight v. Cummington*, 6 Hun, 100. So, in an action to recover upon an account for goods sold and delivered, there must be proof of a delivery of some of the items charged in the account. *Conklin v. Stamler*, 8 Abb. 395; S. C., 2 Hilt. 422.

This rule, however, does not require a party to prove the largest possible number of items of his account; and where a mechanic sued to recover for services rendered, and for goods sold and delivered, it was held that proof of two of the items charged was sufficient to render the books competent as evidence. *Linnell v. Sutherland*, 11 Wend. 568. It is always prudent to prove such a number of items as show that there is a regular course of dealing between the parties, if such evidence is conveniently attainable. And the greater the number of items proved the more satisfactory will the evidence be that the account books are correct.

In proving the fairness of the books, by those who have dealt with their owner, it must appear that the settlement related to accounts which

Account books — Manner of keeping books.

were kept during the period embraced in the account between the litigating parties, or, at all events, to such accounts as existed before the commencement of the action in which the books are offered. *Foster v. Coleman*, 1 E. D. Smith, 85. But it is not necessary that the settlement should have been made before the commencement of such action; it will be sufficient if the settlement was made at any time before the trial. *Ib.*

Manner of keeping books. The law does not require that books of account should be kept in strict accordance with the most approved system of book-keeping. Public convenience and the attainment of justice are the great objects desired. Still, there are some rules which ought to be observed for the purpose of securing those very objects. The entries of charges ought to be made in those books of the party which are employed by him for the purpose of entering his daily and usual accounts with such persons as deal with him. And they ought to be made in conformity to the prevalent manner of keeping his books.

In some of the other States of the Union, it has been held that if the accounts stand insulated, as on the front leaf of the book, and not falling into regular order with other charges, or if they are kept on separate sheets of paper when the party has books of account, they will be rejected.

In this State there are no reported cases upon such questions. Of course all entries must be made in those books which the party keeps as his account books, or they will not be evidence. But, in the very nature of things, there must be very many informal books which are kept with the strictest integrity, and yet with all the skill which the owner of the book possesses. Books of accounts ought rarely, if ever, to be rejected merely on account of defects of form, if they comply with the substantial requirements of the law. The principal point for consideration is, whether the party made the entries with honest intentions, and according to the facts as they actually transpired. And, though books informally kept are not to be commended as examples for imitation, yet, it will be found that dishonest charges may be discovered in books which are kept with admirable skill, neatness and method.

The truth is, books may be worthy of the most implicit confidence, although very informally kept. And, on the other hand, there may be the grossest frauds, and the most unjust claims, found in books which are kept in strict conformity to the rules which the law prescribes. It is always proper to understand the requirements of the law in relation to books of account, and to apply those legal rules in such a manner as

to advance the interests of justice as well as those of trade and commerce.

The presumption of law is in favor of honesty and fair dealing, and, therefore, there is a fair presumption that books are honestly kept, if there is nothing in their appearance or in the evidence in the case which destroys that presumption. But, if they are not kept in conformity with the rules which the law prescribes, or if it is shown that they are false and fraudulent, they will not be regarded as of any value as evidence.

The rules of exclusion are quite limited in number, if the prerequisites are proved, which entitles books to be read in evidence. And many of the rules laid down, together with the cases cited, relate to the credit which ought to be given to this kind of evidence, rather than to its admissibility as evidence for the consideration of a court or jury.

Common to all classes of business. As the principle which admits books of account is the convenience of society, so the rule will extend to all persons who fall within the reasons for establishing the principle. And, therefore, books of account are competent evidence in favor of all persons whose business requires the keeping of books. Indeed it would be difficult to determine many cases against the employment of such books, upon the principle that the person keeping them was not entitled to use such books in the way of keeping an account of his business transactions, provided he is engaged in any of the usual avocations of life, in the way of trade or commerce. Such books are common to the merchant, the manufacturer, the mechanic, the professional man, the farmer, the day-laborer, and to numerous other classes of citizens. *Foster v. Coleman*, 1 E. D. Smith, 85, 89; *Sickles v. Mather*, 20 Wend. 72, 75; *Burleson v. Goodman*, 32 Texas, 229; *Landis v. Turner*, 14 Cal. 573. The principal charges contained in such books usually relate to the sales of property, or to the rendition of services. When the charges relate to the sale of property, it must be upon a sale of personal property, for a charge founded upon a sale of real estate would not be a matter of book account. The right to make the charges may arise upon an express contract between the parties, or, in some cases, it may arise by implication of law. If a person purchases articles upon credit, and requests that they shall be charged to his account; or, if he obtains them in person, or by his agent, without paying for them, he authorizes the vendor to charge them in account.

The general rule is, that the right to charge must exist at the time of the delivery of the property; and the right must be certain and absolute, and not an uncertain right, dependent upon some contingency

Account books — Entries, by whom made. — No clerk.

for its validity. A contingent or conditional claim may be valid, if it subsequently becomes an absolute one; but that fact does not render it a proper item of charge, as a matter of book account. Charges are frequently and commonly made for services rendered. And the services rendered by an attorney or counselor at law, or of a physician or surgeon, are proper items of book account. So of services rendered by the infant son of the plaintiff, or by his apprentice or hired servant. So of charges by a postmaster for postage due, or by a justice of the peace for his fees. So of charges for work done by the month, at a fixed price, and payable at a future day; or for services rendered in making betterments on the defendant's land, if done at his request; or for repairs done to a vessel; or for the use of horses and carriages furnished by the plaintiff to the defendant, at his request. Some of the items above specified carry the rule as to the nature of the claims which may be made a subject of book account to its extreme extent, and perhaps extend it beyond the rule adopted in this State.

Several instances in which claims are not regarded proper subjects of book account have already been noticed. *Ante*, 502, 503.

The true distinction between items properly chargeable as a matter of account and those which are not so is, to ascertain whether the demand is one which arises in the usual course of trade or commerce, or whether it is a special and independent transaction, not in the ordinary course of trade or commercial dealings. It ought to be such as shows a course of dealing as distinguished from separate and single transactions; for one of the reasons assigned for allowing books as evidence at all is, that the course of dealing on credit shows the confidence of the debtor in his creditor by permitting him to make charges. Work, labor or services ought, as a general rule, to be executed before they are chargeable as items of account.

Entries, by whom made. The entries ought to be made by the party himself; but it is not indispensable that it should be done by the hand of the party owning the books. He may employ an agent to do his writing, if he cannot write. And, in such a case, the entries will be made by himself as legally as though he had made them with his own hand. Books containing entries made in this manner will not be rejected in this State, merely because there is attainable common-law proof of the charges, *ante*, 500; unless the person making such entries is strictly a clerk, in which case it would be advisable to call him as a witness.

No clerk. One of the prerequisites to be established, before books can be received as evidence, is, that the party keeps no clerk. This

Account books—Credit for jury.

fact may be proved by the party himself; or, it may be substantiated by any one who knows that fact. Any member of the family, or any near neighbor or intimate acquaintance, or in short, any person who is familiar with the mode in which the party transacts his business in its daily movements, may show that no clerk is employed about it. A mere foreman, who delivers goods, is not a clerk, within the meaning of this rule. *Sickles v. Mather*, 20 Wend. 72. And the rule is the same, even though such foreman makes an entry upon a slate, of the sales which he makes, and the owner of the books subsequently transcribes them into his day books. *Ib.* The rule excluding books of account kept by a party who keeps a clerk applies only where there is an employee who has something to do with and has knowledge generally of the business of his employer as to goods sold or work done, so that he can testify on the subject. One whose business is simply to keep the books is not a clerk within the meaning of this rule. *McGoldrick v. Trap-hagen*, 88 N. Y. 334.

Number of witnesses to prove dealings. It is quite usual to prove the fairness of the books and the manner of dealing, by calling two or three or more witnesses who have dealt with the owner and settled from the books in question. But, in legal strictness, it is not necessary to call so many persons. A single witness who has dealt with the party, and has settled from the books, will be sufficient proof to render the books *competent*, and, therefore, admissible in evidence. *Beattie v. Qua*, 15 Barb. 132; *Morrill v. Whitehead*, 4 E. D. Smith, 239, 241.

But the credit of a book is dependent upon its character, and the greater the number of persons who have found its entries accurate and just, the more reliable will such book be as evidence. It is not necessary, nor is it proper or usual, to call a large number of witnesses, but merely to prove by a reasonable number, say two or three, that the books are of fair character. If the character of the books is attacked, then a greater number may be called for the purpose of sustaining it, upon the same principle that the character of a witness is sustained.

Credit for jury. When a party offers to introduce his books of account as evidence, and he has proved those preliminaries which the law requires, the books will be competent evidence, if the items of the charges are matters of book account. And if due proof is given, so that the books are admissible, and they are received in evidence by the court, such evidence cannot legally be disregarded by a court or jury, any more than a court or jury can properly disregard the evidence of a witness who is not in any manner impeached.

Account books — Credit, how impeached.

But there are cases in which such books bear suspicious marks upon their face, as where material alterations appear in them, and no explanation is given in relation to it; or where the manner of keeping the account of a particular person differs from that of the general manner of keeping the book; in these and similar cases the credit due to the book is for the jury or a justice sitting in their place. So, too, if the books are fair on their face and the preliminary proofs are entirely sufficient, yet if the character of the book is attacked by showing that some of the entries are false or unfounded; or that false accounts are charged in the books against other persons, who prove the falsity of such charges, the credit of the books is a question of fact which is to be settled in the same manner as the credit of a witness is determined, for the books are, in one sense, a witness. See *Hutchinson v. Market Bank of Troy*, 48 Barb. 302.

Credit, how impeached. Any evidence is proper if it legally shows that the accounts are false and fraudulent. And if that fact is established, the books will be entirely disregarded. So, too, if it is clearly shown that any of the charges are false, and that they were intentionally entered in the books for the purpose of injustice, the jury may disregard the whole book, if they see proper to do so, on the principle that a book which is deliberately and intentionally false in some things is equally false as to all the other items. This need not necessarily be the result, for the jury may, on the entire evidence in the case, allow some of the items and disregard others, if justice and truth will thereby be promoted.

Again, it is competent to show that mistakes exist in the accounts, as charged in the books. And this evidence will go to the credit of the books, as to its reliability for accuracy, although the fairness of the owner, or the motive in making the erroneous charges is not questioned. A witness who makes numerous mistakes in his statements may cause doubts as to his accuracy, although his integrity is unquestioned; and the same rule applies to books of account.

There is a distinction between attacking the credit of books, by showing that they are false and fraudulent, or that numerous mistakes exist in them, and an attack on the general moral character of the owner of the books, for the purpose of inferring that the books are false, if the moral character of the owner is impeached.

Evidence to prove the books false and fraudulent, or erroneous, is admissible. But evidence to prove that the general moral character of the owner of the books is bad is not admissible, when the object of offering the evidence is to draw the inference, that the books are in-

Account books — Existence of common-law proof does not invalidate.

competent, or that they are unworthy of credit, because the moral character of the owner is bad. *Tomlinson v. Borst*, 30 Barb. 42, 46. And see *Larue v. Rowland*, 7 id. 107, 110. Where the question of credibility has been fairly submitted to a jury, upon competent evidence upon both sides, the decision of the jury as to the credit of the books is final. *Morrill v. Whitehead*, 4 E. D. Smith, 239.

Existence of common-law proof does not invalidate. In some of the other States it has been held that books of account are not evidence as to such items as may be proved by attainable common-law evidence.

And these decisions proceed upon the principle that books of account are not a necessary means of proof where there is common-law proof, which may be introduced. Those decisions are in accordance with the principles of the common law. But that rule is not adopted in this State; and, notwithstanding the fact that the party has a foreman who has delivered the very goods in question; *Sickles v. Mather*, 20 Wend. 72; or even in the case of a delivery of the goods by the party himself, who is now a competent witness in this State, yet he need not call his foreman, nor be sworn himself, for his books are competent evidence, notwithstanding his means of common-law proof. *Tomlinson v. Borst*, 30 Barb. 42, 46. And see *ante*, 500, 501.

But entries made by a clerk who is alive and within the State must be proved by the clerk who made them. *Ocean Bank v. Carll*, 55 N. Y. 440.

Where the party has employed a clerk, who is absent and out of the reach of a subpoena for the purpose of procuring his attendance as a witness, the cases disagree as to the necessity of procuring his evidence upon a commission. The absence of the clerk from the jurisdiction of the court is held by some of the cases to be sufficient to dispense with calling him as a witness, while other cases deny this rule. If those cases which require the evidence of the witness proceed on the ground that his evidence is common-law proof, and that it must for that reason be adduced, it is opposed to the principle adopted in this State, as we have just seen. Of course the death or the insanity of the clerk would dispense with the rule requiring his production as a witness, even in those States in which the strictest rule is adopted. *Ocean Bank v. Carll*, 9 Hun, 239; *Brewster v. Doane*, 2 Hill, 537; *Halliday v. Martinett*, 20 Johns. 168; *Butler v. Wright*, 2 Wend. 369; *Sheldon v. Benham*, 4 Hill, 129, 131; *State v. Phair*, 48 Vt. 366; *Bland v. Warren*, 65 N. C. 372.

Evidence of value. Account books are not merely evidence of the

Account books — Entries, when made.

sale and delivery of goods, but they are also competent evidence of the value of the articles charged, or of the personal or professional services which may have been rendered. *Ducoign v. Schreppel*, 1 Yeates, 347. But such evidence is not conclusive, and the other party is at liberty to show the actual or true value. In the absence of other proof, the prices charged in the books will be *prima facie* evidence of value, subject to such modifications in that respect as the entire evidence in the case may warrant.

A plaintiff who properly proves his books in evidence, and shows their fairness by those who have dealt and settled with him from them, need not go further and show that the prices charged are usual and reasonable. *Bailey v. Barnelly*, 23 Ga. 582.

Entries, when made. Books of account are designed for the registration of transactions as they occur, and not as entries of past events. One of the most essential and valuable qualities of such books, and one of its superiorities over that of the mere memory of individuals is, that such entries will be accurate, because they cannot forget and that they will not be liable to change by the lapse of time. For these reasons all entries of sales or transactions ought to be made daily and immediately on their occurrence and completion.

The law does not fix any precise instant at which this shall be done, and yet it requires that there shall not be any long delays in the matter, since such delays would let in those very mischiefs which a prompt entry would prevent. For, in the first place, there might be errors by reason of inaccuracy in recollection, and in the next place it would afford opportunities for changing the character of the entries made, by substituting one materially different from the original.

The fact that the entries were not made at the time when they ought to have been does not destroy the competency of the evidence, but it goes to the credit of the book.

Where a plaintiff has offered his books in evidence the defendant is entitled to test their accuracy by showing that the entries were not in fact made at the date claimed. One mode of doing this is to show that they are not chronological in order with the other entries in the book, or had been interpolated among such entries, or bore on their face when compared with other immediately connected entries some suspicions of unfairness or bad faith. *Read v. Smith*, 1 Hun, 263.

There are instances in which the greatest care does not prevent the occurrence of mistakes by the omission to charge articles which have been sold and delivered. Such errors may be rectified, by making a proper charge, which will not invalidate the book.

So, too, there may be errors in the entries, and these may be properly corrected ; but in such a case, the error ought to be shown by evidence, and the correction ought in the same manner to be explained. Alterations and erasures do not destroy the character of the book, if they are properly explained by the evidence in the case ; and any objection will go to the credit rather than to the competency of the book. But if such alterations or erasures are gross and suspicious, and no explanations are given, the credit, if not the competency of the book, will be destroyed.

Ordinary book in daily use. All entries ought to be made in those books which are kept for ordinary and daily use, in keeping the general accounts of the party. It is by keeping books in that manner, that they derive much of the credit which they obtain. If the general accounts of a party are charged in one book or set of books, while the entries against some individual are made in a separate and distinct, book and by itself alone, this fact, of itself, is a suspicious circumstance, requiring explanation. But, more than this, such entries are not competent evidence, because it is in direct violation of that rule which requires all charges to be entered in those books which the party uses for the purpose of keeping his general accounts with his customers. *Ante*, 506.

Accounts entered upon slips of paper or upon separate sheets, distinct from the usual books of account, cannot be received as books of account. It is not necessary that such books should be bound in a substantial manner, nor need they be bound at all. Many individuals, whose dealings are limited, make an account book by folding or stitching together several sheets of paper, instead of procuring a more expensive book. And, if they keep their general accounts in such a book, that will be sufficient to render the book competent, so far as its form is concerned. But it must, of course, be proved in evidence, in the same manner as ordinary books of account are established.

Original entries. Books of account derive much of their credit from the fact that they are original entries of events as they transpired. It is not necessary, however, that the first entries should be made in the books themselves. For nothing is more common than to make mere temporary entries upon a slate, or upon sheets of paper with a pencil, or in an ordinary blotter with a pen and ink, and then to transcribe at night, into the ordinary books, such charges as may have thus been entered during the day. This practice is both convenient and legal. *Sickles v. Mather*, 20 Wend. 72. Such memoranda are mere temporary entries, and the transcribed entries are original entries

Account books — Ledger and day-book.

within the meaning of the rule. *Stroud v. Tilton*, 3 Keyes, 139; *McGoldrick v. Wilson's Executor*, 18 Hun, 443; S. C., 88 N. Y. 334; *Whitney v. Sawyer*, 11 Gray (Mass.), 242; *Jackson v. Evans*, 8 Mich. 476; *Ewart v. Morrell*, 5 Harring. (Del.) 126.

Where memoranda made by a sawyer have been copied by him from boards and slips of paper upon which they were originally made into a book, the book will be a book of original entry within the rule. *Davison v. Powell*, 16 How. 467.

But when a book is not kept by the plaintiff but by his book-keeper, who has made no sale charged but merely entered the sales reported to him by salesmen, the book so kept cannot be put in evidence as a book of account. *Gould v. Conway*, 59 Barb. 355; *Thomas v. Price*, 30 Md. 483. But see *Wilson v. Knapp*, 70 N. Y. 596; *McGoldrick v. Traphagen*, 88 id. 334.

Books are usually kept by writing with a pen and ink. But they will be valid, although kept in pencil-mark, if they are legible, and if that is the usual mode of keeping the general accounts. *Hill v. Scott*, 12 Penn. St. 168. If a book contains entries which are original, and others not original, it will be valid evidence as to the original entries, even if not so as to the others. *Wollenweber v. Ketterlinus*, 17 Penn. St. 389.

Ledger and day-book. In an extensive business, a ledger is always a part of a set of books of account. But in a limited business there are many persons whose entire accounts are kept exclusively in the day-book, without the addition of a ledger. And in keeping their day-book such persons frequently keep it in the manner of ledger entries. The name of a person is entered and the items of his account are entered under that name continuously without the intervention of any other name or account. In other words, each item is charged as it occurs, by entering the article with the date of the occurrence or entry into the book. A ledger may be so kept as to be a book of original entry. *McGoldrick v. Traphagen*, 88 N. Y. 334.

The names of each of the persons charged in the book are thus entered separately, and the accounts of each person kept separately. Such a method has its advantages in a small business, since the account of each person is readily examined and the items ascertained, without any liability to overlook any of the entries made. While, on the other hand, if the accounts of all persons are entered in order of time, and indiscriminately as to persons, it would be laborious as well as difficult to ascertain the state of each person's accounts if no ledger were kept.

But this system of entering each account separately is objectionable

Account books — Entire set must be produced.— Charges in gross.

in one point of view. It offers facilities for false entries, and for the perpetration of gross frauds. There may be interpolations, or, indeed, there may be an entire new account written up, without any certain success in detecting it. Books kept in this manner are competent evidence when the books of original entry cannot be produced; *Caulfield v. Sanders*, 17 Cal. 569; but cannot be introduced in evidence when the books of original entry can be produced. *Vilmar v. Schall*, 3 Jones & Sp. 67. A mere cash-book, or other book of temporary or occasional entries, is not admissible in proof of the charges therein. *Katwitz v. Wright*, 37 Texas, 82. See *Maine v. Harper*, 4 Allen, 201.

Entire set of books must be introduced. Where there is but a single book of accounts, it will of course be complete in itself, either as to charges or credits. But frequently, and perhaps generally, the accounts of parties are contained in several books, each of which may be separate, or each of which may constitute part of a set of books.

If a party gives in evidence entries contained in one of a set of books, he is bound to produce the entire set, or no part of the entries will be evidence, provided the entries offered refer to the other books, or provided such other books contain entries which relate to the entries offered, or if they contain entries affecting the state of the accounts between the parties. *Pendleton v. Weed*, 17 N. Y. 72; *Burke v. Wolfe*, 6 Jones & Sp. 263.

If, however, detached leaves of a book contain all the entries relating to a case it is not necessary to produce more. See *McClusky v. Falke*, 4 Rob. 87.

Charges in gross. Books of account are intended to keep a correct statement of the items of an account, with the date, quantity, price, or value of each item. And for that reason, it is a general rule, that entries are improper when made in gross or by the lump. A charge by a mechanic for "one hundred and ninety days' work" was held inadmissible. *Lynch's Ad'r ads. Petrie*, 1 Nott & McCord, 130. So a charge by a physician, of \$13, for medicines and attendance in curing the whooping cough, was rejected. *Hughes v. Hampton*, 2 Const. Rep. 745.

This rule, however, is not to be carried to extremes, for there may be instances in which it is proper to group together two or more items. A physician may properly include in one charge the items of medicine furnished as well as the compensation for his visit on any single occasion. But a merchant's bill must be made out differently. He cannot charge for a bill of goods sold in gross, but must give the date,

Account books — Witness testifying from books.

articles, quantity, value, or other specification requisite to an accurate account.

Mechanics and laborers have sometimes charged several days' labor in one item, as for instance, a week's work at a specified price per day, and then carried out the entire sum as an item. Such charges will be less frequently objected to now, because the party will generally be able to prove the entire items, by being sworn as a witness.

Witness testifying from books. Where a clerk is employed to make entries in books as a part of his business, his entries may, under some circumstances, become evidence, even when he cannot recollect the transaction so entered.

A witness testified that certain entries and memoranda were made by him; that it was his uniform practice to make such entries at the time of their occurrence, and to make them accurately as to the facts; that he had no doubt as to the accuracy of the entries in question; and that independent of the entries he had no recollection of the matters mentioned, nor could he recollect them as a matter of memory, even after refreshing his recollection by an examination of the entries; and it was held that the entries were admissible evidence. *Bank of Monroe v. Culver*, 2 Hill, 531.

So entries in a book which the witness swears he knew to be correct, when made; that he saw most of the entries made, or soon after, and that the book was the original, are properly admitted in evidence. *Krom v. Levy*, 1 Hun, 171.

On the other hand when a clerk testifies that he made a particular entry in the plaintiff's books, that he had no recollection of the facts concerning the transaction, and knew nothing of the correctness of the entry further than the fact that he found the entry in the book, the entry will not be evidence of any thing. *Peck v. Van Keller*, 15 Hun, 470. See *Moore v. Meqcham*, 10 N. Y. 207.

It has been repeatedly held in this State, that where the witness who made the memorandum was unable to recollect the facts contained in it at the trial, but was able to state that he knew that the memorandum stated what was true, when he made it; that the memorandum so made might be received in connection with the oral testimony of the witness, as evidence of the facts therein stated. *Merrill v. Ithaca & Oswego R. R. Co.*, 16 Wend. 586; *Gould v. Conway*, 59 Barb. 355; *Guy v. Mead*, 22 N. Y. 462; *Gilbert v. Sage*, 57 id. 639; *Marchy v. Shults*, 29 id. 346; *McGoldrick v. Wilson's Executor*, 18 Hun, 445; S. C., 88 N. Y. 334.

But when the witness making the memorandum had no knowledge

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of the fact except what another told him, and the one who told him did not see the memorandum when it was made, and cannot state that it was truly made at the time, the memorandum is not admissible in evidence. *Gould v. Conway*, 59 Barb. 355. See *Downs v. N. Y. Central R. R. Co.*, 47 N. Y. 83. It is indispensable to entitle a memorandum to be read that the witness should verify the handwriting as his own. This is the foundation of such evidence. *Gilchrist v. Brooklyn Grocers' Manufacturing Association*, 59 N. Y. 495. Such entries cannot be made evidence, on the ground that the witness is absent from the State, or is beyond the jurisdiction of the court, though the rule is otherwise, if such witness is dead. *Brewster v. Doane*, 2 Hill, 537; *Burke v. Wolfe*, 6 Jones & Sp. 263. See *Ocean National Bank v. Carl*, 55 N. Y. 440; S. C. again, 9 Hun, 239.

Copy of books not competent evidence. That books must be kept by making original entries has been already seen. *Ante*, 513. And when entries are thus made the original books must themselves be introduced in evidence. Copies of books of account are not admissible in evidence, if objected to on that ground. *McCormick v. Mulvihill*, 1 Hilt. 131. And where books were proved by the production of a transcript of them, which was objected to by the other side, the judgment was reversed. *Ib.* It is of no consequence whether the transcript is accurate or not, nor will it avail any thing to prove the accuracy of such transcript, for in no case is it legal evidence, if duly objected to. *Ib.* But, if such evidence is offered, and it is admitted in the court below without objection, it will not be any ground of objection on appeal, that a copy was used instead of the original books. *Peck v. Richmond*, 2 E. D. Smith, 381. And when entries in books of account are read in evidence without objection, such evidence is competent to be submitted to a jury, or to the justice sitting in their place. *Brahe v. Kimball*, 5 Sandf. 237.

Books introduced cannot be withdrawn. Each party is at liberty to prove his books in evidence, or not, as he may choose, under ordinary circumstances. But, if he elects to introduce them as evidence, when they are once admitted, the evidence becomes the property of both parties, and the books cannot be withdrawn, nor the evidence rejected, without the consent of the opposite party. *Clinton v. Rowland*, 24 Barb. 634. And see *Vibbard v. Staats*, 3 Hill, 144.

Must be received generally. Books of account, like declarations generally, must be taken together. There would be no justice in permitting a party to introduce his books to prove facts which would aid his side of the cause, and at the same time rejecting such items of the

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account as would make against him, and in favor of the opposite party. And, therefore, such books cannot be received in evidence when offered conditionally, by offering them to prove certain specified matters, and asking, at the same time, that the opposite side should be prohibited from using the books for the purpose of proving other matters which are equally competent. *Winants v. Sherman*, 3 Hill, 74. They must be received altogether, for what they are worth, or not at all. *Ib.*

Whole contents evidence. The party who introduces his books in evidence does it subject to the principle that the whole contents of the book are thereby introduced as evidence, so far as they relate to the state of accounts between himself and the opposite party. Books thus introduced may show matters which charge the opposite side, but if there are credits on the book in favor of the latter, such credits must be allowed also. So again, the rule is, that if a party makes the books of his adversary evidence in his favor to prove his credits, he is bound to take the whole account together, and to admit the whole of the debit side of the account; and the rule is the same, whether the books are produced by the plaintiff or the defendant. *Biglow v. Sanders*, 22 Barb. 147, 148; *Low v. Payne*, 4 N. Y. 247.

After a defendant has availed himself of the plaintiff's books of account, for the purpose of establishing certain credits in his favor, it is competent for the plaintiff to read from the same books, charges and entries, which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterward. *Dewey v. Hotchkiss*, 30 N. Y. 497. The defendant cannot use the books to establish credits in his favor, and at the same time deny to the plaintiff the full benefit of the charges therein against him. *Ib.* He must take the whole or none; and having elected to put the books in evidence for his own benefit, he cannot afterward be permitted to deprive the plaintiff of any charges therein in his favor. *Ib.* In such case, it is wholly unimportant whether the whole, or any portion of the entries, are in the handwriting of the plaintiffs. *Ib.*

May waive books and resort to common-law proofs. The law is clearly settled, that a party may omit to prove his books, and that he may substantiate his claims by the common-law evidence of witnesses. But, if the opposite side should call for the production of the books, and offer to introduce them as evidence, the non-production would be regarded as a circumstance showing that the books contained evidence in favor of the party so calling for their production. But the call for such books, or a notice to produce them, ought to be a reasonable one, and at a time when compliance would be a reasonable requirement; and,

License by person rendering service, etc.—Parol evidence to contradict written, etc.

in any case, the non-production of the books will not be ground of allowing any sum to the party calling for such books.

There are cases, however, in which a refusal to produce such books will justify a court or jury in the indulgence of every reasonable presumption against the claims of such party. In one case, the plaintiff owned one-half, and the defendant one-eighth, of a steamer which was subsequently destroyed by fire. At the time of the loss, there was an insurance in favor of both parties, to the amount of \$3,700. The claim was settled with the insurance company for \$3,300; of which sum the defendant was to receive \$750 for his share. He received the entire amount, and was to account to the plaintiff for the balance. After the vessel was burnt, the plaintiff sold his share of the hulk to the defendant for \$550; and, to recover this sum and the balance of the insurance, he brought an action. It appeared that this steamer was used for towing vessels, and that the defendant acted as general agent of her, receiving all the moneys earned, and paying all the current expenses. It was clear that the receipts far exceeded the expenses. The plaintiff acted as captain, and he sometimes certified as to the correctness of bills rendered against the boat, and in some cases gave orders for their payment. Such items constituted the current expenses; and the defendant claimed to be allowed for several such items, allowed to him by way of set-off or counter-claim. But the defendant did not produce the books containing the entire account, nor show the transactions of the boat or her earnings. The referee, who tried the cause, rejected several items thus claimed by the defendant; and, on appeal, the court said: "Under such circumstances the referee was justified in disregarding all such items, as it is reasonable to infer, from the concealment of the books containing the entire account, that they had been paid out of the receipts of the boat which came to the hands of the defendant as general agent for the owners." *Schenck v. Wilson*, 2 Hilt. 92, 93.

License by person rendering service, etc. There are many instances in which it is necessary to procure a license before a person can legally carry on a business, or before he can practice in a profession.

But it is not necessary to produce a license, in the first instance, because the law will presume, as between party and party, that a regular license has been procured, since it would be illegal to omit to procure it before doing such business. *McPherson v. Cheadell*, 24 Wend. 15; *Smith v. Joyce*, 12 Barb. 21; *Pearce v. Whale*, 5 Barn. & Cres. 38. And see *Sissons v. Dixon*, id. 758; vol. 2, pp. 714, 715.

§ 19. Parol evidence to contradict written instrument, etc. When the opinion of a court is desired in relation to the legal construc-

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tion of a written instrument, nothing more is necessary than to lay that instrument before the court. In such a case the instrument is to be construed by itself alone, and no question arises as to the admissibility of extrinsic evidence for the purpose of contradicting, varying or superseding the instrument.

Where an agreement is reduced to writing, its construction is always a matter of law for the court. *Chapin v. Potter*, 1 Hilt. 366; *Nash v. Drisco*, 51 Me. 417; *Mondnoch R. R. v. Felt*, 52 N. H. 379; *Wason v. Rowe*, 16 Vt. 525; *Smith v. Faulkner*, 12 Gray, 215; *State v. Lafavre*, 53 Mo. 470; *McAvoy v. Long*, 13 Ill. 147. And the rule is the same, even when the instrument has been lost, and parol evidence has been given of its contents. *Berwick v. Horsfall*, 4 J. Scott (N. S.), 450.

But in a justice's court a jury is permitted, as a general rule, to decide questions of law, as well as those of fact, upon matters relating to the merits, and not as to the admissibility of evidence.

In construing a written instrument the court will understand the words used in their plain, ordinary and proper sense, unless they have generally, in respect to the subject-matter, acquired a peculiar sense, distinct from the popular sense of the words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the intention of the parties, be understood in some other special and peculiar sense. *Lowber v. Leroy*, 2 Sandf. 202; *Harves v. Smith*, 12 Me. 429; *Mansfield, etc., R. R. Co. v. Veeder*, 17 Ohio, 385; *McWilliams v. Martin*, 12 S. & R. 260; *Goosey v. Goosey*, 48 Miss. 210; *Wilmering v. McGaughey*, 30 Iowa, 205; *Eaton v. Smith*, 20 Pick. 150; *Brown v. Orland*, 36 Me. 376; *Spears v. Ward*, 48 Ind. 541.

Another established rule is that words of common import may be construed out of their ordinary and primary sense, and may have a secondary sense assigned to them, if such appear clearly from the context to have been the intention of the parties. *Kelly v. Upton*, 5 Duer, 336; *Findley v. Findley*, 11 Gratt. (Va.) 434.

Words of legal import also, though *prima facie* to be taken as used in their technical sense, and according to their strict acceptation, may have a different sense assigned to them, if the instrument contains a plain demonstration that the parties used them in a different sense. These general rules in relation to the construction of contracts have been considered in another part of this work. Vol. 1, pp. 240-247.

What amounts to that plain demonstration must, in each case, depend on the language used, and the circumstances under which it is

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used ; and this is not a question to be determined by reference to reported cases, but by a careful consideration of the language and circumstances in the particular case under discussion.

Courts also endeavor, as far as possible, to give effect to the intention of the parties to written instruments. But it is a well-settled rule that the intention of the party is to be ascertained from the meaning of words in the instrument, and from these words alone, with the aid of such extrinsic evidence as the law permits to be used in order to enable a court to discover the meaning of the terms of the instrument, and to apply them to the particular facts of the case. *People v. Gosper*, 3 Neb. 285 ; *Morey v. Haman*, 10 Vt. 567 ; *Gray v. Clark*, 11 id. 583 ; *Hunter v. Miller*, 6 B. Monr. 612.

General rule. It is a general and inflexible rule, that whenever written instruments are appointed, either by the requirements of law, or by the compact of the parties, to be repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments, or to contradict or alter them. *Wilson v. Deen*, 74 N. Y. 531 ; *Brandon Manufacturing Co. v. Morse*, 48 Vt. 322 ; *Huse v. McQuade*, 52 Mo. 388 ; *Clark v. New York Life Ins. Co.*, 7 Lans. 323 ; *Kerr v. Kuykendall*, 44 Miss. 137 ; *Perkins v. Young*, 82 Mass. 389 ; *Cocke v. Bailey*, 42 Miss. 81 ; *Kirk v. Hartman*, 63 Penn. St. 97. This is a matter both of principle and of policy ; of *principle*, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence ; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.

It may be stated as a general rule, that oral evidence shall in no case be received as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law ; or to give effect to a written instrument, which is *defective* in any particular which by law is essential to its validity ; or to *contradict*, *alter* or *vary* a written instrument, either appointed by law or by the compact of private parties, to be the appropriate memorial of the particular facts which it recites ; for, by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.

But parol evidence is sometimes admissible to *defeat* a written instrument, on the ground of fraud, mistake, etc. ; *New York Exchange Co. v. De Wolf*, 31 N. Y. 273 ; *Wry v. Outler*, 12 Heisk. (Tenn.) 28 ; *Wharton v. Douglass*, 76 Penn. St. 273 ; *Murray v. Dake*, 46 Cal. 644 ; *Officer v. Howe*, 32 Iowa, 142 ; *Monroe v. Behrens*, 67

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Penn. St. 459; or to *apply* it to its proper subject-matter; *Fish v. Hubbard*, 21 Wend. 651; *Jones v. Dove*, 6 Oregon, 188; *Read v. Ellis*, 68 Ill. 206; *McPike v. Allman*, 53 Mo. 551; *Means v. De-La Vergne*, 50 id. 343; or to *explain* the meaning of foreign, local, technical or family terms; *Collender v. Dinsmore*, 55 N. Y. 200; *Lawrence v. Gallagher*, 73 id. 613; *Succession of Guillory*, 29 La. Ann. 495; *Hamman v. Keigwin*, 39 Texas, 34; *Foster v. McGraw*, 64 Penn. St. 464; *Bell v. Holford*, 1 Duer, 58; or to show that a writing purporting to be a contract was not in fact intended by the parties as such; *Grierson v. Mason*, 60 N. Y. 394; *Errico v. Brand*, 9 Hun, 654; *Rogers v. Hadley*, 2 Hurlst. & Colt. 227; or to *rebut* presumptions arising intrinsically. *Mussleman v. Stoner*, 31 Penn. St. 265.

In these cases, the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at *all*, or is essential to give to the instrument its legal effect.

The extent to which this principle operates, and the rules deducible from it, will be exhibited in the clearest point of view, by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes, in relation to written evidence: *First*, in *opposition* to written evidence, where it is offered with a view to *supersede* the use of written evidence, and to supply its place, or to *contradict* it, or to *vary* its effect, or wholly to *subvert* such evidence, by showing that it has no legal existence or no legal operation in the particular case; or, *secondly*, it is offered in *aid* of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject-matter, or to *explain* it, or to rebut some *presumption* which affects it, or as secondary evidence, where the original is unattainable; or, *thirdly*, it is used as *original* and *independent* evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law.

In the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law. Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same observation applies where the law prescribes a certain form of written evidence; to allow a defect in the instrument to be supplied by oral evidence would be, *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument,

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if the document offered in evidence be *defective*, so that it cannot operate without collateral aid, the defect cannot be supplied by oral testimony. See *Stone v. Browning*, 68 N. Y. 598, 604 ; vol. 2, pp. 239, 244.

In those cases in which the statute of frauds requires a written agreement, and in all other cases in which the law requires an agreement or instrument in writing, it will be sufficient, if the agreement is contained in several different writings, which, by internal reference, can be connected together so as to make one entire instrument, such as is required by the law. But they cannot be connected by mere oral testimony, nor can any defect in the writing be supplied by oral evidence. *Brewster v. Silence*, 8 N. Y. 207 ; *Draper v. Snow*, 20 id. 331 ; *Dilworth v. Bostwick*, 1 Sweeny, 581 ; *Passaic Manufacturing Company v. Hoffman*, 3 Daly, 495.

The same principle applies in all cases in which parties have, by mutual agreement, reduced the terms and conditions of the contract to writing, which is to be the evidence of their agreement, their admissions, and their intentions.

To admit oral evidence as a substitute for instruments, to which by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence ; conjecture for fact, and presumption for the highest degree of legal authority ; loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt ; to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices.

As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, so it is inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy or ambiguity in its terms ; for if a meaning could be assigned, by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that its effect would depend, not upon the instrument, but upon the force of the oral evidence, and thus the latter would virtually be substituted for the former.

There is an important distinction between ambiguities, which are *apparent* or *patent*, on the face of the instrument, and those which

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arise in the *application* of an instrument of clear and definite meaning to doubtful subject-matter. An ambiguity apparent on reading an instrument, is termed *ambiguitas patens*, or a *patent ambiguity*; that which arises merely upon its application, *ambiguitas latens*, or a *latent ambiguity*. The general rule is, that the latter species of ambiguity may be removed by means of parol evidence; *Cole v. Wendel*, 8 Johns. 116; *Ellice v. Britton*, 4 Wend. 507; *Galen v. Brown*, 22 N. Y. 37; while, on the other hand, such evidence is not admissible to explain an ambiguity apparent on the face of the instrument. *Blossburgh, etc., R. R. Co. v. Tioga R. R. Co.*, 1 Keyes, 486; *Panton v. Tefft*, 22 Ill. 366; *McNair v. Toles*, 5 Minn. 435.

By the term "*patent ambiguity*" must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves, unmeaning or unintelligible, are incapable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the *intention* of parties should be construed, not by vague evidence of their *intentions*, *independently of the expressions* which they have thought fit to use, but by the *expressions themselves*. Now, those expressions which are incapable of any legal construction and interpretation by the rules of art are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the term used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that, to give effect to an instrument, the terms of which, though apparently ambiguous, and yet capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the *expressed* meaning; and that, on the other hand, where either the terms used are incapable of any certain or definite meaning, or being in themselves intelligible, exhibit a plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the *intention* of the party, would be to make the supposed intention operate independently of any definite expression of such intention.

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By *patent* ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rule of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions, *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning. According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts. And parol evidence ought never to be allowed to create an ambiguity where none exists. *Auburn City Bank v. Leonard*, 40 Barb. 119.

As oral evidence is inadmissible, either as a substitute for a written instrument, required by law, or to give effect and operation to such an instrument, when it is defective, it follows *a fortiori*, that it is not admissible to *contradict* or even to *vary* any instrument to which an exclusive operation is given by law, whether that exclusive quality results from a positive rule of law, or from private compact.

Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists, for the purposes of evidence. If the parties have contracted by deed, as the obligation under seal imports greater deliberation and more solemnity than a mere written agreement which is not under seal, no evidence, whether oral or written, which is not under seal, can be admitted to contradict or vary it. *Lynch v. McBette*, 7 How. 113. See *Coe v. Hobby*, 72 N. Y. 141; *Roe v. Conway*, 74 id. 201. In this State, however, the consideration of a sealed instrument may be inquired into, under some circumstances. Vol. 1, pp. 129, 188, 210.

So, upon the principles already laid down, evidence is inadmissible to show that there was a parol agreement prior to, or contemporary with, the written instrument, and which varies its terms, as, for instance, to show that a note, payable on a day certain, was to be payable upon a contingency only, or upon some other day, or not until the death of the maker. *Ely v. Kilborn*, 5 Denio, 514; *Gridley v. Doll*, 4 N. Y. 486; *Crater v. Binninger*, 45 id. 545; *McEwan v. Ortman*, 34 Mich. 325; *Holzworth v. Koch*, 26 Ohio St. 33; *Henderson v. Thompson*, 52 Ga. 149; *Bissenger v. Guiteman*, 6 Heisk. (Tenn.) 277; *Borden v. Peay*, 20 Ark. 393; *Joyner v. Turner*, 19 id. 690; *Swank v. Nichols*, 20 Ind. 198; *Shaw v. Shaw*, 50 Me. 94.

Where a contract has been reduced to writing, nothing which is not found in the writing can be considered as a part of the contract; and, therefore, it is not competent to *add* to the terms of such contract, by

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means of parol evidence. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used. *Munford v. McPherson*, 1 Johns. 414; *Buckley v. Bentley*, 48 Barb. 283; *Renard v. Sampson*, 12 N. Y. 561; *Long v. New York Central R. R. Co.*, 50 id. 76; *Wilson v. Deen*, 74 id. 531; *Cleves v. Willoughby*, 7 Hill, 83; *Green v. Collins*, 86 N. Y. 246. So, too, it is to be presumed that the parties have expressed their actual intentions; and, therefore, parol evidence cannot be given to *vary* the terms of the written agreement. *Ball v. Slaughter*, 26 Hun, 353. Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an *intention*, to an effect, which is not expressed in the instrument. *Acker v. Phoenix*, 4 Paige, 305; *Phillips v. Higgins*, 7 Lans. 314; *Russell v. Croy*, 12 Johns. 427; *Champion v. White*, 5 Cow. 509; *Cook v. Eaton*, 16 Barb. 439; *Swick v. Sears*, 1 Hill, 17; *Tymason v. Bates*, 14 Wend. 671.

There are cases, however, in which parol evidence is admissible, for the purpose of defeating the effect of a written instrument, and the rule admitting such evidence in these cases does not at all conflict with the principles already discussed.

Where parol evidence is offered, not for the purpose of *adding to*, or *varying*, or *contradicting* the effect of a written instrument of admitted authority; but where, on the contrary, it is offered, in order to *disprove* the legal existence of the paper, or for the purpose of rebutting the *operation* of the instrument, such parol evidence is admissible. In such a case, if the parol evidence is offered, for the purpose of showing that the written instrument was obtained by a fraud, practiced by the party who seeks an advantage under it as against the party who executed it, the parol evidence would not contradict the terms of the written instrument, but would merely show that it is not to be regarded at all as a valid instrument.

This would not be a substitution of mere oral testimony in the place of written evidence, or preferring the weaker to the stronger evidence, but would be merely showing that the written instrument ought not to have any operation whatever; and this fact must nearly always be established by oral evidence.

Where subscriptions are made under an agreement that they are not to be binding unless a specified sum is subscribed, the subscriptions must all be made upon the same conditions, to be binding; and if some of the subscriptions are made conditionally and confidentially for

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the purpose of making up the required sum, this will be a fraud upon those who are induced to subscribe unconditionally, and they may show by parol evidence that some of the subscriptions were of this conditional and confidential character, and therefore fraudulent. *N. Y. Exchange Co. v. De Wolf*, 31 N. Y. 273.

A document purporting to be a contract, signed by both parties, is not necessarily so, and it is competent for either of the parties to show by parol evidence that it was not their intention, in signing, that it should operate as a contract, and that the real contract between them was not in writing. *Rogers v. Hadley*, 2 Hurlst. & Colt, 227. And see *Pym v. Campbell*, 6 Ell. & Bla. 370; *Grierson v. Mason*, 60 N. Y. 394; *Errico v. Brand*, 9 Hun, 654.

When the plaintiff's ground of action is, that the defendant induced him to enter into a written contract by means of a fraud, it will be entirely competent to show such fraud by parol evidence of the transaction. *Koop v. Handy*, 41 Barb. 454. In such a case, there is no merger of the oral negotiation in the written instrument. *Ib.* And where the cause of action was founded upon a fraud practiced by the defendant in the sale of goods by sample, it was held that parol evidence of fraudulent representations made during the sale were competent evidence, notwithstanding there was a memorandum of the sale in writing, signed by the defendant as vendor, which was silent as to the quality of the article sold. *Ib.* And see *Filkins v. Whyland*, 24 N. Y. 338.

There is a class of cases, too, in which parol evidence is admissible for the purpose of reforming a written contract, even when the effect or result of the evidence is to contradict, vary, or add to, the terms of the written instrument. But justices' courts have no jurisdiction of actions for that purpose. And even in courts of record, when the evidence is offered, it is not admissible unless the pleadings are framed for the very purpose of reforming such instrument. In such cases the evidence is not offered to contradict a valid existing instrument, but merely to show that, by accident, fraud, surprise or mistake, the instrument in question has never been constituted the actual depository of the intention and meaning of the parties.

The rule above stated excluding parol evidence tending to explain, modify or contradict written instruments applies to subsequent as well as to prior or cotemporaneous oral declarations of the parties. *Mott v. Richtmyer*, 57 N. Y. 49. But the rule is restricted to the parties and their privies, and cannot be invoked by a stranger to the contract. *Colman v. First National Bank of Elmira*, 53 N. Y. 388; *Dempsey*

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v. Kipp, 61 id. 462; *Lee v. Adsit*, 37 id. 78; *Hughes v. Sandal*, 25 Texas, 162; *Von Eman v. Stanchfield*, 10 Minn. 255; *Hussman v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 id. 53; *McMaster v. Ins. Co. of North America*, 55 N. Y. 222; *Lowell Manuf. Co. v. Safeguard Fire Ins. Co.*, 88 id. 591. The rule does not apply to strangers who have an interest in knowing the real truth of the case. *New Berlin v. Norwich*, 10 Johns. 229. But it does apply to a stranger claiming under one of the parties to the contract. *Selchow v. Stymus*, 26 Hun, 145.

Aiding written evidence by parol evidence. Extrinsic parol evidence is admissible, generally, to *give effect* to a written instrument, by *establishing* its authenticity, or by *applying* it to its proper subject-matter, and also as auxiliary to the latter object, for the purpose, in some instances, of *explaining* expressions capable of conveying a definite meaning by virtue of that explanation, and of *annexing customary incidents*; and also, in other instances, for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application. Where an instrument is not proved by mere production, it must, necessarily, derive its credit and authenticity from extrinsic or parol evidence.

In the next place, it is always, necessarily, a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also a matter of proof, by parol evidence.

A difficulty in this case sometimes occurs, where, although the terms of the instrument are sufficiently definite and distinct, yet the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it is not equally applicable to several distinct objects.

The illustration usually given of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons or two estates of the same name and description. The same illustration is equally applicable to a sale of personal property. Thus, if A. should agree, in writing, to sell his horse to B., and there are two persons of the name B., parol evidence is admissible to show which person was intended as purchaser. So, if A. agrees to sell his bay horse to B., and A. has two bay horses at the time of the sale, parol evidence will be proper for the purpose of establishing which horse was sold. In such cases the ambiguity is latent, and it is raised by parol evidence, and therefore it may be explained and applied to its subject by such evidence. And, as an ambiguity arising from too

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great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule, that a redundant and superfluous description, which is inapplicable to an object *well ascertained* by previous or subsequent description, will not prevent such application by means of parol evidence.

Where the description of land conveyed by deed is vague and uncertain, parol evidence of the intention of the parties as to the real boundaries is admissible; and, therefore, parol evidence is admissible, not to contradict or vary the deed, but to identify the subject-matter, so as to show what the grantor intended by a grant of "the west half of lot No. 76." *Pettit v. Shepard*, 32 N. Y. 97. But if the starting point given by a deed can be found, and the lines can be accurately run and determined by the courses and distances of the deed, the boundaries must be settled by their calls, and cannot be altered or affected by parol evidence. *Waugh v. Waugh*, 28 N. Y. 94. And, therefore, where a testator, owning two farms, adjoining each other, devised to his son, J. W., one of the farms, describing it as "one hundred acres of land which formerly belonged to my brother, J. W.;" and where he also gave and bequeathed to his grandson, R. W., the other farm, describing it as "the old homestead whereon I lived at the time of making my will, containing one hundred acres;" it was held that the latter words were not in any way descriptive, or intended to be descriptive, of the subject of devise; that the descriptions of the two pieces were definite and capable of being exactly located by the deeds; that there was no ambiguity, and, therefore, no necessity for, or any propriety in, resorting to parol proof of the testator's intentions. *Ib.*

Where a lease of premises describes them as "Nos. 162 and 164 Seventh avenue," parol evidence is admissible to show that a certain rear yard or lot passed with the demise of the two houses, upon the principle that parol evidence is always admissible to ascertain the nature and qualities of the subject to which an instrument refers. *Cary v. Thompson*, 1 Daly, 35. Upon the same principles, if the description in the instrument applies *partially* to each of two persons, or to two subject-matters, but to neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to remove it. For, as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two persons or objects may be ascertained and fixed by external evidence, it seems to follow, that where the de-

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scription, although redundant and partially erroneous, is still limited to two or more persons or objects, to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence.

Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence, through the medium of an interpreter.

Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.

The legitimate object of extrinsic evidence in such cases seems to be to explain terms which are not intelligible to all who may understand the language, but which may, nevertheless, have acquired, by custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered sworn interpreters of the mercantile language in which the contract is written. Beyond this, however, the *principle* does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the country. If they use plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, then it seems that, according to the great principle so frequently adverted to, plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would be to render it impossible to make a special contract in mercantile affairs, and to compel all persons under all circumstances, to conform to the usage of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied. It is clearly settled, that a general usage, the

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effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law. On the other hand, there is a great variety of cases in which the courts have permitted evidence to be given, to show the meaning of terms in commerce, and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as proof of *usage*, although in many cases it is rather the definition of technical language. *Home v. Mutual Safety Ins. Co.*, 1 Sandf. 137, 150; *Beals v. Terry*, 2 id. 127.

This distinction is fully recognized by the cases though often overlooked in practice; and is important, as a witness may be entirely competent to prove, as an expert, the meaning of a technical word or phrase, who would not be competent to prove a usage in the proper sense of the term. *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453. A few cases may be useful, by way of illustrating when such evidence is admissible and when it is inadmissible.

Where a sale was concluded by a bought and sold note in writing, which contained all the elements of the contract, the names of the parties, price, description of the article, time of delivery and time of payment, it was held that it was not competent to vary the written contract by asking a witness "what conversation passed on the subject of this sale prior to the actual delivery to the respective parties of the sale note," because the question was too broad, as the answer would have introduced matter both irrelevant to the issue and improper in itself. *Pollen v. Le Roy*, 30 N. Y. 550; affirming S. C., 10 Bosw. 38.

Where a written sealed lease exists, it is presumed to contain the entire agreement as to the premises, and therefore parol evidence is not admissible to prove a parol agreement, which was made before the written one, for the purpose of controlling or varying the terms of the sealed instrument. *Tibbits v. Percy*, 24 Barb. 39. This is in accordance with the established rule of law, that a written contract merges all prior and contemporaneous negotiations and oral promises in reference to the same subject; and that when the terms of the lease are in writing, the rights and duties of the parties depend upon the terms or legal intendment of the lease itself, or, as otherwise expressed, that it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking are embraced in the writing. This rule has been repeatedly applied to cases where tenants have set up oral agreements or promises alleged to have been made by the landlord at the time of, or before the execution of the lease, and as an inducement thereto. The alleged promises have in most of the cases been to put the premises in repair, but they have uniformly been held to have

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been merged in the lease. *Wilson v. Deen*, 74 N. Y. 531; *Cleves v. Willoughby*, 7 Hill, 83; *Speckles v. Sax*, 1 E. D. Smith, 223; *Howard v. Thomas*, 12 Ohio St. 201; *Brigham v. Rogers*, 17 Mass. 571. See, also, *Johnson v. Oppenheim*, 55 N. Y. 280, 294.

But there are cases in which the courts will receive in evidence a parol agreement, touching a subject not mentioned in the written lease and made for an independent consideration, paid by the tenant, not stipulated for or referred to in the lease, and sustain such prior agreement as a previous distinct collateral agreement upon a collateral and independent consideration which did not merge in the subsequent written contract of hiring. *Lewis v. Seabury*, 74 N. Y. 409. See *Erskine v. Adeane*, L. R., 8 Ch. App. 756; *Morgan v. Griffith*, 6 Exch. 70; *Hope v. Balen*, 58 N. Y. 380; *Babcock v. Deford*, 14 Kans. 408; *Polk v. Anderson*, 16 id. 243.

In an action for the foreclosure of a mortgage, given to secure the payment of a bond conditioned for the payment of money on a specified day, parol evidence is not admissible for the purpose of showing that, at the time of the delivery of the bond and mortgage, there was a verbal agreement that the money should not be due until a later day. *Hunt v. Bloomer*, 5 Duer, 302. See *Adair v. Adair*, 5 Mich. 204.

So, where a written agreement required the delivery of the entire quantity of certain articles sold before payment could be demanded, it was held that parol evidence was inadmissible to show that the parties intended that each parcel should be paid for on its delivery. *Baker v. Higgins*, 21 N. Y. 397.

So, the maker of a promissory note, in an action upon it by the payee, is not entitled to show, by parol evidence, that, at a settlement of accounts between the parties, upon which settlement the note was given, the plaintiff agreed to give it up, if he could not find a receipt from the defendant for the payment for some property which the defendant had let him have, the parties differing, at the time of giving the note, as to whether such property had been paid for. *Brown v. Hull*, 1 Denio, 400.

So, where a promissory note was given, upon the release of the payee's interest in his father's estate, upon a parol agreement between the maker and the payee, that if the interest of other heirs of the estate could not be obtained in a specified manner, both the note and the release should be void, and an action was afterward brought upon the note it was held, that evidence of such parol agreement was inadmissible. *Ely v. Kilborn*, 5 Denio, 514. In such a case the note and the release constitute a written agreement, and each instrument is the

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consideration of the other, and a failure of the condition in the parol agreement would not be a failure in the consideration of either. *Ib.*

So, where a promissory note is given for a specific sum, it cannot be shown by parol evidence that, at the time when the note was given, there was a verbal agreement between the maker and the payee that an account which the maker held against the payee should be deducted. *Eaves v. Henderson*, 17 Wend. 190.

Parol evidence is not admissible to control, explain or modify a warranty in a policy of insurance. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

Where the promise contained in a promissory note is absolute, parol evidence is not admissible for the purpose of incorporating into the contract a condition which will affect or change the character of the contract between the parties. *Thompson v. Hall*, 45 Barb. 214; *Holtzworth v. Kooch*, 29 Ohio St. 33; *Bissenger v. Guiteman*, 6 Heisk. (Tenn.) 277; *Swank v. Nichols, Adm'r*, 24 Ind. 199.

An order for the payment of money, when in the hands of the payee or his assignee, is evidence in writing of his title to the payment, which cannot be waived or contradicted by parol evidence. *Parker v. City of Syracuse*, 31 N. Y. 376. But it is competent for parties, after such order has been delivered or assigned, to waive rights that have been acquired thereby, or to modify them, which waiver or modification may be proved by extrinsic evidence. *Ib.*

A contract of indorsement cannot be varied by oral testimony. *Barnard v. Gaslin*, 23 Minn. 192; *Third National Bank v. Clark*, 23 id. 263; *Willse v. Whitaker*, 22 Hun, 242; *Haner v. Patterson*, 84 Penn. St. 274; *Fassin v. Hubbard*, 55 N. Y. 465; *Doolittle v. Ferry*, 20 Kans. 230; S. C., 27 Am. Rep. 166; *Charles v. Denis*, 42 Wis. 56; S. C. 24 Am. Rep. 383; *Wilson v. Black*, 6 Blackf. 509; *Campbell v. Robbins*, 29 Ind. 271; *Bank of Albion v. Smith*, 27 Barb. 489; *Barry v. Morse*, 3 N. H. 132; *Crocker v. Getchell*, 23 Me. 392; *Stubbs v. Goodall*, 4 Ga. 106; *Buckley v. Bentley*, 48 Barb. 283; *Goodwin v. Davenport*, 47 Me. 112. In an action on a note it cannot be shown by parol that the note was not to be paid in money. *Linville v. Holden*, 2 McArthur, 329; *Clark v. Hart*, 49 Ala. 86. Nor that there was a contemporaneous agreement to change the sum payable; *Davidson v. Bodley*, 27 La. Ann. 149; nor that there was an agreement made when the note was given that it should not be negotiated by the payee, *Knox v. Clifford*, 38 Wis. 651, but should remain in his hands to be paid out of moneys to be received for the maker and not otherwise; *Currier v. Hale*, 8 Allen, 47; nor that paper which on its face appears to be payable generally was intended by the parties

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to be payable at a chartered bank; *McLaren v. Marine Bank of Georgia*, 52 Ga. 131. See, however, *Cothran v. Cunningham*, 28 id. 177; nor that the note was to be paid on a day or on a manner different from that specified in the instrument itself; *Borden v. Percy*, 20 Ark. 293; nor that notwithstanding it appears on its face to have been given for one purpose, it was in fact given for a different purpose; *Foy v. Blackstone*, 31 Ill. 538; nor that it was intended for a receipt. *City Bank v. Adams*, 45 Me. 455; *Billings v. Billings*, 10 Cush. (Mass.) 178.

In an action for a breach of warranty, on a sale of goods upon a written contract, parol evidence is not admissible to show that, at the time of the sale, the vendor's agent represented the goods to be of a particular quality. *Harnor v. Groves*, 15 C. B. 667. If the action, however, is founded upon a fraud in procuring such sale, parol evidence is admissible to show the fraud, notwithstanding the sale may have been reduced to writing. *Koop v. Handy*, 41 Barb. 454. So, if the contract is a mere receipt for the purchase-price of goods sold, that will not exclude parol evidence of a warranty on the sale of such goods or property. *Filkins v. Whyland*, 24 N. Y. 338; S. C., 24 Barb. 379; *ante*, 527. It has been held that a party who signs a written contract as principal, will not be permitted to show, by parol evidence, that he was the mere agent of a third person, and thus charge him as principal when the name of the latter does not appear upon the face of the instrument. *Fenly v. Stewart*, 5 Sandf. 101; *Auburn City Bank v. Leonard*, 40 Barb. 119. But, in a recent case in the Court of Appeals, it was held that a subscription by an agent, in his own name, without mentioning the name of the principal, was sufficient to charge the latter; that it was valid under the statute of frauds; and that parol evidence was admissible to show who was the actual principal. *Dykers v. Townsend*, 24 N. Y. 57. See, also, *Coleman v. First National Bank Elmira*, 53 id. 388; *Ford v. Williams*, 21 How. (U. S.) 207; *Higgins v. Senior*, 8 M. & W. 834; *Short v. Spookman*, 2 Barn. & Ad. 962; *Taintor v. Pendergast*, 3 Hill, 72; *Gates v. Brower*, 9 N. Y. 205; *Briggs v. Partridge*, 64 id. 357, 362. This rule that parol evidence cannot be given to contradict or vary a written agreement does not preclude a party who has contracted with an agent from maintaining an action against the principal upon parol proof that the contract was in fact made with the principal, although the agency was not disclosed by the contract and was not known to such party at the time of making it. The courts hold that such proof does not contradict the written contract, but merely superadds a liability against a princi-

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pal to that against the agent; and that it is admissible to charge the principal, while it would be inadmissible to discharge the agent, and that the principal being a stranger to the contract cannot evoke the rule. *Ib.* See vol. 1, pp. 445-448.

It is somewhat difficult to reconcile this doctrine with the rule that parol evidence is inadmissible to change, *enlarge* or vary a written contract, and the argument upon which it is supported, savors of subtlety and refinement. But whatever ground there may have been originally to question the legal soundness of the doctrine, it is too firmly established to be overthrown. *Briggs v. Partridge*, 64 N. Y. 357, 363.

There is a well-recognized exception to this rule in case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. *Briggs v. Partridge*, 64 N. Y. 357; *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 id. 271; *De Witt v. Walton*, 9 N. Y. 571; *Stackpole v. Arnold*, 11 Mass. 27; *Eastman R. R. Co. v. Benedict*, 5 Gray, 566; *Beekham v. Drake*, 9 Mees. & Wels. 79. One not a party to a contract may show that he has rights under it because it was entered into for his benefit, though neither party to the contract can show, for the purpose of relieving himself from liability thereon, that one of them was a mere agent for a third person. *Stowell v. Eldred*, 39 Wis. 614.

Parol evidence is admissible to show that a person whose name appears at the head of an invoice as vendor is not in fact a contracting party. *Holding v. Elliott*, 5 Hurlst. & Norm. 117.

A written contract executed between parties, not in performance of a distinct and separate provision of prior negotiations and agreements between them, but covering, in its terms or legal effect, the whole subject-matter thereof, extinguishes and supersedes all such prior negotiations and agreements. *Renard v. Sampson*, 12 N. Y. 561; *Townsend v. Fisher*, 2 Hilt. 47; *Price v. McGown*, 10 N. Y. 465. In such a case parol evidence of the prior oral negotiations are not admissible in evidence. *Long v. New York Central R. R. Co.*, 50 N. Y. 76; *Hill v. Syracuse, Binghamton & N. Y. R. R. Co.*, 73 id. 351; *Cocks v. Barker*, 49 id. 107; *Barker v. Bradley*, 42 id. 316; *Wilson v. Deen*, 74 id. 531; *Peers v. Davis*, 29 Mo. 184; *Reed v. Jones*, 8 Wis. 392. But where the written instrument is a mere part performance of a written contract, there is no presumption, in the absence of all proof on the subject, that the prior contract is merged in the subse-

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quent one. *Morris v. Witcher*, 20 N. Y. 41; *Bellinger v. Kitts*, 6 Barb. 274. And whether the stipulations contained in the prior contract are merged in the subsequent one is a question of intention, upon which parol evidence is admissible. *Ib.*; *Baker v. Bradley*, 42 N. Y. 316; *Hutchins v. Hebbard*, 34 id. 24.

Parol evidence has been received to show a cotemporaneous but distinct contract on the same general subject-matter, *Duparquet v. Knubel*, 24 Hun, 653, 654; *Lewis v. Seabury*, 74 N. Y. 409; *Chapin v. Dobson*, 78 id. 74; *Unger v. Jacobs*, 7 Hun, 220; as for example an agreement by the payee of a note given for a sewing machine to furnish the maker work within a certain time, at a certain price. *Weeks v. Medler*, 20 Kans. 57.

An executory contract, whether verbal or written, for the performance of distinct and separate provisions, is not merged in, or superseded by a subsequent written contract in execution of a part only of such provisions, where there is no other evidence than the written agreement of an intent that it should be extinguished. *Witbeck v. Waine*, 16 N. Y. 532; *Miller v. Fichthorn*, 31 Penn. St. 252; *Creamer v. Stephenson*, 15 Md. 211; *Keough v. McNitt*, 6 Minn. 513; *Ruggles v. Swanwick*, 6 id. 526; *Lewis v. Seabury*, 74 N. Y. 409; *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Harbold v. Kuster*, 44 Penn. St. 392.

While a written or a sealed instrument remains in full force, and is still executory and unbroken or unrescinded, parol evidence of a parol prior agreement is not admissible, for the purpose of varying the terms of such written agreement. *Lynch v. McBeth*, 7 How. 113; *Nelson v. Sharp*, 4 Hill, 584. But where a written contract for the sale of goods is silent as to the time of delivery, it is competent to prove a subsequent oral agreement, distinct from the original contract, fixing the time for delivery. *Orguerre v. Luling*, 1 Hilt. 383. And see vol. 2, p. 680.

There are few instances, however, in which written, and even sealed instruments, may be varied or modified by parol agreements; and in such cases parol evidence may be given to show what the modification was. If a sealed agreement fixes the time for the performance of the contract, there may be a valid parol agreement extending the time of performance. *Flynn v. McKeon*, 6 Duer, 203; *Vasseur v. Livingston*, 4 id. 285. And see vol. 2, p. 680. A contract or covenant under seal cannot be modified before breach by a parol executory contract. *Coe v. Hobby*, 72 N. Y. 141.

The holder of a promissory note may treat all the makers as princi-

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pals, and parol evidence is not admissible in such a case, to show that such is not their character; but as between the makers themselves, parol evidence is admissible to show who are principal debtors and who sureties. *Robison v. Lyle*, 10 Barb. 512.

One of two makers of a promissory note may prove by parol, in an action on the note, that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal with knowledge of the suretyship. *Hubbard v. Gurney*, 64 N. Y. 457; *Higden v. Bailey*, 26 Ga. 426; *Lime Rock Bank v. Mallett*, 34 Me. 547; *Grafton Bank v. Kent*, 4 N. H. 221; *Piper v. Newcomer*, 25 Iowa, 221; *Bank of St. Albans v. Smith*, 30 Vt. 148; *Brown v. Haggerty*, 26 Ill. 469; *Riley v. Gregg*, 16 Wis. 666; *Stewart v. Parker*, 55 Ga. 656.

Although parol evidence cannot be admitted, for the purpose of contradicting or varying a written instrument, yet such evidence is admissible to explain the meaning of characters, marks and technical terms used in a particular business, and which are unintelligible to persons not acquainted therewith, where they occur in a written instrument, and the explanation is consistent with its terms. *Dana v. Fiedler*, 12 N. Y. 40; S. C., 1 E. D. Smith, 463. And where a written contract stipulated for the sale of "one hundred and fifty casks of one ton each, best madder, 12½," it was held that parol evidence was competent and admissible to prove that among dealers in the article, these figures meant 12½ cents a pound. *Ib.* See *Barnard v. Kellogg*, 10 Wall. 383; *Robinson v. United States*, 13 id. 363; *Collender v. Dinsmore*, 55 N. Y. 200, 206. So where the term "port-risk" was used in a policy of insurance it was held that it was a technical term, the meaning of which might be proved by experts in the business of marine insurance. *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453.

So where a certificate of deposit given by a banker stated that the plaintiff had deposited a specified sum in "Ills. cy.," it was held that parol evidence was admissible to show that the meaning of these words or letters was "Illinois currency." *Hulbert v. Carver*, 37 Barb. 62.

So where grain was deposited in a store, and a memorandum or certificate was given, acknowledging the receipt of the grain in store "on freight," it was held, in an action on the certificate, that the defendant might show, by parol evidence, that it was the custom, at the place where the grain was delivered, and had been for forty years, to pay for grain left on freight, after the owner had ordered it to be freighted, and not before; that this custom was known to the plaintiff; and that he himself had been in the habit, for many years, of leaving

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grain at that place, to be freighted upon the same terms. *Outwater v. Nelson*, 20 Barb. 29.

So in an action to recover damages for the conversion of a quantity of grain, the following instrument, signed by defendant, was put in evidence, by the plaintiff: "Received, Oct. 19, 1847, from —, by D. Cary, —, forty-three and forty-seven sixtieths bushels wheat, at — per bushel," and the plaintiff also offered parol evidence, to show that the transaction was a bailment instead of a sale of the grain, and the evidence was held admissible, on the ground that the contract itself was so ambiguous as not to import a contract of any description, and that it stood on the same footing as any other receipt, and that it might, therefore, be explained like any other receipt. *Sheldon v. Peck*, 13 Barb. 317.

Every demise between landlord and tenant, in respect to matters on which the parties are silent, is open to explanation by the general custom and usage of the country or of the district where the land lies, because every person is supposed to be cognizant of the custom, and to contract with a tacit reference to it. *Mangum v. Farrington*, 1 Daly, 236; *Wilcox v. Wood*, 9 Wend. 346; *Wigglesworth v. Dallison*, 1 Doug. 201; S. C., Smith's Lead. Cas. 300.

When terms of art are used in a written contract, and they have a definite meaning, known to those engaged in the particular business referred to, parol evidence is admissible to show what that meaning is, when it is not plain on the face of the agreement. *Stroud v. Frith*, 11 Barb. 300. And where a master covenanted to teach an apprentice the business of a "cabinet and mahogany door-maker," and an action was brought against the master for not performing his covenant, it was held that he was entitled to show, by parol evidence, that such business included nothing more than the making of doors of mahogany and ornamental woods. *Ib.* But although parol evidence is admissible, for the purpose of showing the meaning of these terms, it is not admissible for the purpose of showing what the parties agreed to do, except so far as the explanation of the terms has that effect. *Ib.*

Where the language employed in a written contract leaves the meaning of such contract in doubt, evidence of extrinsic facts is admissible to aid in removing the doubt. *Moore v. Meacham*, 10 N. Y. 208.

So in construing a written instrument, the court may look to antecedent and surrounding facts and circumstances to ascertain its meaning. *Blossom v. Griffin*, 13 N. Y. 569.

It is a sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be

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interpreted by its own language, and courts are not at liberty to look at extrinsic circumstances surrounding the transaction, or elsewhere, for reasons to ascertain its intent; the understanding of the parties must be deemed to be that which their own written agreement declares. *Springsteen v. Sampson*, 32 N. Y. 703. But where a literal performance is impossible, or impracticable, or where the language is ambiguous, or susceptible of more than one construction, or is vague, or general, or inappropriate to express the true intent, extraneous evidence is admissible to explain, and an antecedent parol agreement may be received to point to the intent of the parties. *Ib.* And see *Dodge v. Gardiner*, 31 N. Y. 239; *Collender v. Dinsmore*, 55 *id.* 200; *Attorney-General v. Shore*, 11 Simons, 616.

And, where the defendants were doing business, both as forwarders and carriers, and they agreed orally to transport merchandise, which was to be delivered from time to time, and subsequently, on receiving a portion thereof, to be transported pursuant to the oral contract, they executed a written instrument, stating that the property was received 'to be forwarded,' it was held that parol evidence of the oral agreement was admissible, to aid in determining whether the defendants were liable as carriers, or merely as forwarders, in a case where the goods were consumed by fire while in the defendants' hands. *Blossom v. Griffin*, 13 N. Y. 569.

Parol evidence is always admissible to apply a written contract to the facts, or to show the extrinsic facts to which the contract relates and its practical execution in reference to such facts. *Spencer v. Babcock*, 22 Barb. 326. In a contest between an attaching creditor and a mortgagee of personal property, where the mortgage described the property as "eleven thousand feet of pine lumber, of various thicknesses, now in the shop of the mortgagor," in a specified building, and where it was shown that but one-fifth part of the property was in the building specified, at the time of the execution of the mortgage, it was held that parol evidence was admissible to show that the property mortgaged was a quantity of lumber which the mortgagor had just before purchased; that a part only of it had been delivered, and that the remainder was still in the possession of the vendor. *Galen v. Brown*, 22 N. Y. 37.

It has been seen that parol evidence may be given for the purpose of showing that an absolute bill of sale was intended as a mortgage. But when it is once shown that the instrument is a mortgage, it is no more liable to be varied or contradicted by parol evidence than any other written instrument. And, therefore, where a mortgage was dated

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the 11th day of March, 1837, and payable by "the tenth day of *March, eighteen hundred and thirty*," which was an impossible time, and, therefore, in legal effect, payable immediately; it was held, that as between the parties, parol evidence was not admissible to show that the mortgage was intended to be made payable on the 10th day of March, 1838; and that the word "eight" was inadvertently omitted. *Fuller v. Acker*, 1 Hill, 473. It would be otherwise as between the mortgagee and a judgment creditor assailing the mortgage as fraudulent. The mortgagee for the purpose of repelling the fraud, may show the day of payment intended, and that the error occurred through the inadvertence of the draftsman. *Ib.*

Parol evidence that the sum specified in the condition of the mortgage exceeds the amount of the debt justly due to the mortgagee is inadmissible; if a larger sum than is really due has been inserted, the mistake can be corrected only in equity. *Patchin v. Pierce*, 12 Wend. 61.

An assignment of a mortgage, absolute in its terms, cannot be contradicted by parol evidence showing that it was given and executed with the intention of merely *discharging* the mortgage from the lien which the assignors had on the property mentioned therein. *Tyler v. Taylor*, 8 Barb. 585. The principle authorizing *strangers* to give parol evidence for the purpose of varying the terms of an instrument, cannot be applied to such a case, without also offering to show that the assignment was, by fraud, made to read differently from the actual agreement between the parties, to accomplish some covert purpose. *Ib.*

Parol proof of extrinsic circumstances may be given to apply a description to its subject-matter; and if it appears that the description is in some respects erroneous, those facts may be rejected, and what is left, if sufficient of itself, alone be regarded. *Dodge v. Potter*, 18 Barb. 193. A chattel mortgage recited an indebtedness of the mortgagor to the mortgagee in the sum of \$2,809.41, the amount of two promissory notes made by the mortgagor and indorsed by the mortgagee, which the latter had taken up and paid, and for indorsement of another note to K., for \$1,000; it was held that parol evidence might be received to show that another note, for \$600, made by the mortgagor, was one of the notes referred to in, and secured by the mortgage, although such note was not indorsed by the mortgagee; it appearing that the note was payable to the order of one B., who indorsed the same, and that it was discounted by the mortgagee. *Ib.* It was also held, that a paper, upon which a computation of the amount of these

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notes was made, at the time of executing the mortgage, was one of the extrinsic circumstances admissible upon the question of identity. *Ib.*

When a chattel mortgage described, among other property mortgaged, "one four-horse post coach called 'Steuben,' and another called 'Mayday,' at H., employed in staging," it appearing that the mortgagor, at the time the mortgage was executed, owned and possessed only two four-horse post coaches, one called "Conhocton," and the other called "Mayday," and that there was no coach called "Steuben" at H., or employed in staging there, it was held that parol evidence was admissible, to show that the coach named Conhocton was intended to be included in the mortgage, instead of the Steuben. *Dodge v. Potter*, 18 Barb. 194.

But, although parol evidence is admissible in many cases, to determine and define the subject-matter of a contract, when such evidence is explanatory, yet it is never admissible when it is contradictory. *Bell v. Holford*, 1 Duer, 58.

Parol evidence of a custom cannot be received to subvert a positive unambiguous contract. *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Collender v. Dinsmore*, 55 id. 200.

Where persons have entered into a written contract to furnish material and do the plastering on a certain building at so much per square yard, they may prove in an action to recover the contract price, a well-settled custom of plasterers in their locality to charge for the full surface of the walls without deductions for cornices, baseboards, or openings for doors or windows. *Wallis v. Bailey*, 49 N. Y. 464.

Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. *Moran v. Prather*, 23 Wall. 492; *Collender v. Dinsmore*, 55 N. Y. 200; *Barnard v. Kellogg*, 10 Wall. 383; *Bradley v. Wheeler*, 44 N. Y. 495; *Wheeler v. Newbold*, 16 id. 392. In matters as to which the contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. *Hatten v. Warren*, 1 Mees. & Wels. 466; *Wigglesworth v. Dallison*, 1 Douglas, 201. But the incident sought to be annexed to the contract must not be inconsistent with its express terms or any necessary implication from those terms. *Collender v. Dinsmore*, 55 N. Y. 200, 209. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument or the fair and

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legal import of a contract. *Allen v. Dykers*, 3 Hill, 593; *Hilton v. Lock*, 5 id. 437; *Magee v. Atkinson*, 2 Mees. & Wels. 442; *Adams v. Wordley*, 1 id. 374; *Vail v. Rice*, 5 N. Y. 155; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137.

Where a policy of life insurance provides that it may be continued from year to year, upon payment of the premium on or before specified days, the payment must be thus made or the policy will not be continued; and parol evidence is not admissible to show a usage or agreement on the part of the insurer to receive payment after the day specified. *Howell v. Knickerbocker Life Ins. Co.*, 19 Abb. 217.

So a prospectus, distributed by a life insurance company, and importing that it was careful to prevent forfeitures, is not admissible to vary or control an express provision in a policy for life, which determined a policy upon a failure to pay the premium on the first day of each succeeding year. *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516. But see 10 id. 653.

No usage can control established rules of law; and no local usage in a particular trade or business can control or affect the rights of parties. *Higgins v. Moore*, 34 N. Y. 417; *Emery v. Dunbar*, 1 Daly, 408. There may be cases, however, in which the parties are familiar with a usage, and may have long dealt with reference to it; and in such a case, it may sometimes be a question of fact whether the parties did not deal upon the terms that the custom should be regarded as a part of the contract.

Where a warrant, issued by the supervisors of a county for the collection of taxes, is signed by the proper officers, though not describing themselves as supervisors, it may, whenever it is important to do so, be shown by parol evidence that such persons, so signing the warrant, were supervisors. *Sheldon v. Van Buskirk*, 2 N. Y. 473.

Where there are several causes of actions embraced in the same complaint, and the recovery appears to be general, parol evidence is competent to show upon which cause or causes of action specified the trial was had and judgment obtained. *Stedman v. Patchin*, 34 Barb. 218. Such evidence does not contradict the record, unless the party is permitted to show that the judgment was rendered upon a cause of action not specified in the complaint. *Ib.*

The consideration clause in a deed or other written instrument, is generally open to explanation by parol proof. *M'Crea v. Purmort*, 16 Wend. 460; *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 id. 338; *Earl v. Crane*, 6 Duer, 564; *Kinney v. Whiton*, 44 Conn. 262; *Smith v. Sergeant*, 67 Barb. 243; *Wade v. Carter*, 76 N. C. 171; *McConnell v. Brayner*, 63 Mo. 461; *Holmes' Appeal*, 7

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Penn. St. 279; *McDill v. Gunn*, 43 Ind. 315; *Hebbard v. Haughian*, 70 N. Y. 54; *Bingham v. Weiderwax*, 1 id. 509; *Battle v. Rochester City Bank*, 3 id. 88.

If a deed recites that the consideration is money, it is competent to show, by parol evidence, that the consideration was not money, but iron of a specified quantity, and valued at a stipulated price. *M'Crea v. Purmort*, 16 Wend. 460. And see *Adams v. Hull*, 2 Denio, 306.

So, where a bill of goods is sold, and a bill of sale expressing a pecuniary consideration is made out and delivered with the goods, this will not prevent the introduction of parol evidence to show that the consideration was not wholly pecuniary, but consisted in a special agreement instead, and that it had been broken, to the damage of the party seeking to show such fact. *Earle v. Crane*, 6 Duer, 564.

So, where a chattel mortgage states the consideration to be \$1,000, in money advanced by the mortgagee to the mortgagor, and the consideration is attacked by the mortgagor, or his assignees or creditors, on the ground that no money was advanced, the mortgagee, for the purpose of sustaining his mortgage, may show, by oral evidence, that the real consideration was a note for \$1,000, made by the mortgagor and indorsed by the mortgagee, for the purpose of raising that amount of money for the mortgagor's accommodation; that there was a failure to raise the money upon that note, and that two notes, of \$500 each, were substituted in its place, upon which the money was obtained, and that the mortgagee has paid such notes. *McKinster v. Babcock*, 26 N. Y. 378. And, in such a case, parol evidence is admissible to show that the mortgagee indorsed the two \$500 notes, in reliance upon the mortgage as a security therefor, and that it was the object of the mortgage to secure any such substituted liabilities. *Ib.* So, a promissory note or other written promise, given for the payment of money, may be shown to be of no value, and that no action is maintainable thereon, because the consideration is fraudulent, and the fraud may be established by parol evidence. *Stewart v. Ahrenfeldt*, 4 Denio, 189. So, where a contract is ambiguous on its face, and it may include or cover either a legal or an illegal consideration, parol evidence is admissible to show the intention of the parties, and whether it was the legal or illegal consideration that was relied on in the writing. *Brown v. Brown*, 34 Barb. 533. The object of the evidence, in such a case, is not to contradict the instrument, but to apply it to the subject intended. *Ib.*

Where the terms of a written contract are definite, and free from any ambiguity, parol evidence of the subsequent acts of the parties is not admissible, for the purpose of giving construction to the contract.

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Giles v. Comstock, 4 N. Y. 271; *Lowber v. Le Roy*, 2 Sandf. 202. Where the terms are ambiguous see *French v. Carhart*, 1 N. Y. 96; *Chapman v. Bluck*, 4 Bing. N. C. 187; *Stokes v. Recknagel*, 6 Jones & Sp. 368.

Where a bill of lading acknowledges the receipt of a cargo of grain from A., A. is competent to show by parol evidence that the grain actually belonged to B., and that A. was merely his agent, having no interest whatever in the grain. *Ide v. Sadler*, 18 Barb. 32. And see *Scovill v. Griffith*, 12 N. Y. 509; *Higby v. N. Y. & Harlem R. R.*, 3 Bosw. 497.

Where the evidence in a case shows both a written and a verbal authority to a person to act as attorney, proof of a search for the written power, and of an inability to find it, is sufficient to warrant the introduction of parol proof of its contents. *Bank of North America v. Embury*, 33 Barb. 323. So parol proof of notice of the non-payment of a bill, note, or check may be given, although the notice was in writing, and the defendant has not been called on to produce it at the trial; and the rule is the same, whether the notice was given by a public notary or by a private person. *Scott v. Betts*, Hill & Denio, 363.

In construing a written contract the court will, if possible, so read it as to effectuate the intention of the parties rather than to defeat it. *Stratton v. Pettit*, 16 C. B. 420; *Walker v. Tucker*, 70 Ill. 527; *People v. Gasper*, 3 Neb. 285; *Morey v. Hamen*, 10 Vt. 567; *Cooke v. Barr*, 39 Conn. 296.

And it will interpret or construe a promise in the sense in which the promisor knew that the promisee understood it. *Barlow v. Scott*, 24 N. Y. 40; *White v. Hoyt*, 73 id. 505, 511; *Hoffman v. Aetna Ins. Co.*, 32 id. 405; *Johnson v. Hathorn*, 2 Abb. App. Dec. 465; *Mowatt v. Londesborough*, 3 Ell. & B. 307; *Potter v. Ontario Ins. Co.*, 5 Hill, 147. See *Noonan v. Bradley*, 9 Wall. 394.

But, as general rule, the intention must be collected from the face of the written instrument itself. *Kelly v. Upton*, 5 Duer, 336; *Baker v. Higgins*, 21 N. Y. 397; *Morey v. Haman*, 10 Vt. 567; *Gray v. Clark*, 11 id. 583; *Hunter v. Miller*, 6 B. Monr. 612. And if the language of the contract is plain and unequivocal it must be carried into effect according to its plain meaning, and parol evidence cannot be admitted to show that a different meaning was intended. *Curtiss v. Howell*, 39 N. Y. 211; *Kimball v. Brawner*, 47 Mo. 398; *Warren v. Jones*, 51 Me. 146.

And if the plaintiff complains upon an instrument in writing, the

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defendant cannot, in pleading, rely upon oral matter, which introduces a qualification of the contract sued on, or which shows that it was made subject to a condition which does not appear upon the face of it. *Canham v. Barry*, 15 C. B. 597; *Hosley v. Black*, 26 How. 97; S. C., 28 N. Y. 438. And see *ante*, 525.

But it may be shown that the instrument was not to take effect as an agreement until it was approved by some particular person, and that such approval has not been given; *Pym v. Campbell*, 6 Ell. & Bla. 370; or it may be shown that the instrument was not to be obligatory on the party sued until another person signed it above his signature, and that this has not been done. *Miller v. Gambie*, 4 Barb. 146; *Ely v. Kilborn*, 5 Denio, 514; vol. 1, p. 760. The facts surrounding the transaction may, however, be such as to estop the party from introducing such a defense. *Dair v. United States*, 16 Wall. 1.

In an action against the defendant for not transferring a farm, he pleaded that the agreement sued on was made subject to the condition that it should be null and void if one S. should not, within a reasonable time after the making of the agreement, consent and agree to the transfer of the farm to the plaintiff; and it was held that the defendant might prove this oral contemporaneous agreement by parol evidence, because such oral agreement merely operated in suspension of the written agreement, and not in defeasance of it. *Wallis v. Littell*, 11 J. Scott (N. S.), 369; *Murray v. Earl of Stair*, 2 Barn. & Cres. 82; *Furness v. Meek*, 3 Hurlst. & Norm. 907.

It may also be shown that an instrument on its face purporting to be a contract was not in fact intended by the parties as such. *Grierson v. Mason*, 60 N. Y. 394.

Where general words are used in an agreement, they will be so restricted as to subserve the intentions of the parties. *Coddington v. Davis*, 3 Denio, 17; S. C., 1 N. Y. 186; *Vaughn v. Porter*, 16 Vt. 266; *Baxter v. State*, 9 Wis. 38, 45; *Torrance v. McDougald*, 12 Ga. 526.

And where a written instrument has no date, parol evidence is admissible to show that it was not intended to operate from its delivery, but from a future uncertain period. *Davis v. Jones*, 17 C. B. 625. So, too, contracts must always be construed in reference to the subject-matter to which they relate, and in the light of the contemporaneous facts and circumstances. And, therefore, extrinsic evidence of the circumstances existing at the time of its execution is always admissible, not for the purpose of contradicting the instrument, but to aid in its interpretation. *Phelps v. Bostwick*, 22 Barb. 314; *Dodge v. Gardiner*,

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31 N. Y. 239; *Share v. Wilson*, 9 Cl. & Fin. 555, 569; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Rose v. Roberts*, 9 Minn. 119; *Hurley v. Brown*, 98 Mass. 545; *Field v. Schriber*, 14 Iowa, 119; *McCleary v. Edwards*, 27 Barb. 239; *Mumford v. Getting*, 7 C. B. (N. S.) 305.

And parol evidence is also admissible, to show that a bond for the payment of money, absolute in its terms, was delivered, under an agreement by which it was to be held by the obligee as a collateral security for the debt of third parties, and that it was to be canceled upon his obtaining payment from them. *Chester v. Bank of Kingston*, 16 N. Y. 336; *Nichols v. Smith*, 42 Barb. 381.

§ 20. **Parol proof as original and independent evidence.** It has already been seen, *ante*, 519, how far parol evidence is admissible to *contradict, vary, or wholly subvert* a written instrument, as well as how far it is admissible to *establish, explain and support* written evidence; and it now remains, in the *third* place, to consider in what cases parol extrinsic evidence is admissible, to prove a fact, by virtue of its own weight or authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems that the mere circumstance that a written instrument exists, which may be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law, or the agreement of the parties, constituted the *authentic* and *sole* medium of proving that fact.

To illustrate, suppose that a valid oral contract is made by two persons, in the presence of witnesses, and suppose, further, that one of those witnesses should reduce to writing the terms of the contract, such writing would not be of a higher nature than the oral evidence of the other witnesses, so as to exclude their oral testimony, because the writing in such a case was not the act of the parties, nor was it agreed that the writing should be the only legal evidence of the terms of the contract.

A written memorandum made in the manner supposed might be more satisfactory evidence as to its accuracy, especially after the lapse of a long time, but that fact does not affect the *competency* of the oral evidence of the other witnesses, although a court or jury might give greater *credit* to the written evidence in a case of conflicting evidence between the oral statements and those reduced to writing.

The drawers of a draft interposed the defense of usury, on the ground that the draft was an accommodation draft in the hands of the acceptors,

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whose agents transferred it to the plaintiff at a usurious rate of discount; but it was held that the books of such agents were not competent evidence to show the amount of the discount, or the other facts showing the transaction to be usurious, even though such facts appeared in the books, because the proof was not such as could be made by entries in the books of third persons, but must be made by living witnesses or other legal proof. *Churchman v. Lewis*, 34 N. Y. 444. But see *Metropolitan Nat. Bank v. Hale*, 28 Hun, 341.

The importance of the subject renders it desirable further to consider, first, in what instances written instruments are of an *exclusive* nature; and secondly, with respect to what *parties* and to what *facts*.

In the first place written evidence has an *exclusive* operation in every instance in which such evidence is required, by virtue of legislative enactments, such as the case of wills, deeds and mortgages of real estate, contracts within the statute of frauds, etc., etc.

In the second place written evidence has an exclusive operation in all those cases in which the parties intentionally and deliberately reduce their agreement or contract to writing, intending that the writing shall be the authentic evidence of the terms and conditions of the agreement. It is not necessary that the parties should expressly agree that the writing shall be the exclusive evidence of the contract. The simple fact that the agreement is reduced to writing is sufficient, and the law will declare that such writing was intended to be the sole and exclusive evidence of such agreement, and will exclude parol evidence of the terms of such contract.

The rule is the same in all cases in which the acts of a court of justice are the subjects of evidence. Courts of record speak by means of their records only; and even where the transactions of courts which are not, technically speaking, courts of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes.

Those proceedings in justices' courts which the law requires to be entered into the docket of the justice must be proved by the docket, and not by means of parol evidence. *Royce v. Burt*, 42 Barb. 339.

A release under seal is conclusive as to the matter stated in it, and parol evidence to contradict the terms or the legal effect of such a release is not admissible. *Strong v. Dean*, 55 Barb. 337; *Sterns v. Tappin*, 5 Duer, 294. In such a case, it cannot be shown by parol that there was not a sufficient legal consideration to sustain the instrument; nor can it be shown that the consideration was a different one from that stated in such release. *Ib.* And the provisions of the Re-

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vised Statutes, which permit an inquiry into the consideration of a sealed instrument, have not affected the common-law rule that a release under seal extinguishes the debt or claim to which it relates, even when the release recites a mere nominal consideration. *Ib.*; *Noble v. Kelly*, 40 N. Y. 415.

There are some exceptions to the rule which excludes parol evidence for the purpose of contradicting or explaining or varying the terms of written instruments. A writing, which on its face purports to be an absolute bill of sale of chattels, may be shown, by parol evidence, to have been intended as a mere chattel mortgage, vol. 1, p. 268; *Ring v. Franklin*, 2 Hall, 1; *Van Pelt v. Otter*, 2 Sweeny, 202; *Anthony v. Atkinson*, id. 228; *Singer, etc., Machine Co. v. Holcomb*, 40 Iowa, 33; or to have been given in trust for the benefit of creditors. *Britton v. Lorenz*, 45 N. Y. 51; *Day v. Roth*, 18 id. 448; *Mulford v. Miller*, 1 Keyes, 31.

Where an agreement is reduced to writing in duplicate, and each party keeps a copy, if there is a mistake in one of the instruments, it may be shown by parol evidence, by the scrivener who wrote the paper, that he made a mistake in making one of the papers. *McNulty v. Prentice*, 25 Barb. 204. In the case just cited, the written instrument was an indenture of apprenticeship, and the question in the case was, in relation to the time for which the apprentice was to serve. In the apprentice's copy, it was stated to be two years, *two* months and fifteen days; while in the master's copy, it was stated to be two years, *ten* months, and fifteen days. On the trial, the defendant, who was the master, offered to show that the word *two* was inserted instead of *ten* by a clerical error, and was made by a mistake of the person who wrote the papers; and the evidence was held competent. It will be observed, however, that, in this case, it was not strictly a correction by parol evidence alone; for the parol evidence offered was merely to the effect that another written instrument, executed at the same time, and as a part of this instrument, was the accurate one.

In an action upon a written agreement, which was signed by the defendant, he offered to show, by parol evidence, that the agreement was not to be binding upon him until he should consult a third party, and upon condition that such third party should approve of the contract; and it was also offered to show that such third person did not approve of the contract; and this evidence was held to be admissible, because it showed that, in fact, there was no agreement at all between the parties. *Pym v. Campbell*, 6 Ell. & Bla. 370.

Receipts, as a general rule, are open to explanation or contradiction,

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so far as they relate to an admission of the receipt of money or property. *Foster v. Newbrough*, 58 N. Y. 481; *Ditch v. Vollhardt*, 82 Ill. 134; *Reading v. Traver*, 83 id. 372; *Williamson v. Reddish*, 45 Iowa, 550; *Babcock v. May*, 4 Ohio, 346. Where a receipt is embodied in a promissory note the receipt is open to explanation the same as if it were in a separate instrument. *Smith v. Holland*, 61 N. Y. 635. Parol evidence is admissible to show for what purpose a receipt was given, to what fund it referred, and to inquire into the consideration. *Colburn v. Lansing*, 46 Barb. 37. A receipt may be avoided by showing that it was obtained without consideration, or by misrepresentation, or that it has been rescinded by the agreement of the parties. *VanNest v. Talmage*, 17 Abb. 99. It may be shown by parol evidence that there was a mistake made in the receipt, as to the particular moneys mentioned in it; *Ensign v. Webster*, 1 Johns. Cas. 145; or, that the receipt was given upon a condition which has not been performed; *House v. Low*, 2 Johns. 378; or, to show that provisions were received to sell on commission, instead of a sale, when the receipt expressed that they were received "for account of" the person sending them; *McKinstry v. Pearsall*, 3 Johns. 319; or, to show that there was no payment, when a note or other chose in action is received by the person giving such receipt; *Higby v. N. Y. and Harlem Railroad Co.*, 3 Bosw. 497; *Toley v. Barber*, 5 Johns. 68; *Putnam v. Lewi*, 8 id. 389; *Johnson v. Weed*, 9 id. 310; *Southwick v. Hayden*, 7 Cow. 334; or, to show that a sum receipted as money was not paid in money, but in property. *Battle v. Rochester City Bank*, 3 N. Y. 88. But, where a receipt was given for a quantity of grain, which was "subject to order any day when called for (after a day specified), without charge for storage," it cannot be shown by parol evidence, nor by evidence of usage, that this is a contract of sale, instead of a bailment. *Wadsworth v. Allcott*, 6 N. Y. 64. See, also, *Niles v. Culver*, 8 Barb. 207; *Goodyear v. Ogden*, 4 Hill, 104. So where corn was delivered at an elevator, and the following receipt taken: "Received in store of M. one load of corn, subject to storage. Number of bushels two thousand two hundred and ninety." This was held to constitute a contract of bailment only, and that parol evidence of custom or usage tending to show that the parties intended a sale was not admissible. *Marks v. Cass County Mill, etc., Co.*, 43 Iowa, 146.

A receipt showing on its face that certain specified articles "are hereby turned over and delivered to a person may be contradicted by parol proof that the articles were never in fact delivered. *Pool v. Chase*, 46 Texas, 207.

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An ordinary receipt is conclusive as to what it recites, if it is not explained or contradicted by parol or other evidence. *Lambert v. Seely*, 2 Hilt. 429. So, where the amount of a claim is, in good faith, disputed, and the claimant takes less than the sum demanded, for the purpose of a settlement, and gives a receipt in full, such receipt cannot be contradicted by parol evidence, showing that the full amount was not paid. *Palmerton v. Husford*, 4 Denio, 166; *Neary v. Bostwick*, 2 Hilt. 514; *Pierce v. Pierce*, 25 Barb. 243. But, where there is no dispute as to the amount due, and a receipt in full is given, when less than the full amount is paid, the receipt may be explained or contradicted by parol evidence. *Foersch v. Blackwell*, 14 Barb. 607.

In some instances, a receipt constitutes a part of a contract, as well as the acknowledgment of a sum of money; and in such cases, the contract part of the receipt cannot be contradicted by parol evidence. *Stapleton v. King*, 33 Iowa, 28; S. C., 11 Am. Rep. 109.

Where an injury occurred to the plaintiff by reason of the negligence of the stage driver of the defendant, and the plaintiff gave a receipt to the defendant in the following form: "Received, Brookfield, July 11, 1849, of Wm. D. Knapp, \$40, in full, for damages done to us by stage accident of the 13th of June last," it was held, that this was not a mere receipt, explainable or liable to contradiction by parol evidence, but that it was a conclusive bar to an action for damages for such injury. *Coon v. Knapp*, 8 N. Y. 402. And see *Egleston v. Knickerbacker*, 6 Barb. 458.

Bills of lading are explainable, so far as relates to the condition of the goods received. And if the bill recites that the goods were received "in good order," this does not prevent the carrier from showing, if he can, that the goods were not in good order when received. *Ellis v. Willard*, 9 N. Y. 529; *Wolfe v. Myers*, 3 Sandf. 7; *Meyer v. Peck*, 28 N. Y. 590. The presumption, however, is, that the goods were in good order, as the receipt admits; and the burden of proof is upon the carrier, to show that the goods were not in good order at the time they came into his hands. *Price v. Powell*, 3 N. Y. 322.

Where two persons are sureties for a third person, it may be shown in an action between the sureties, that one of them was surety for the other, and that they were not joint sureties. Vol. 2, p. 385; *Barry v. Ransom*, 12 N. Y. 462. But see *Norton v. Coons*, 6 id. 33. See, also, *Wells v. Miller*, 66 id. 255; *Sayles v. Sims*, 73 id. 551.

So, a mere receipt given for the purchase-price of a horse sold does not prevent the purchaser from showing, by parol evidence, that the

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horse was sold with a warranty, and that such warranty was broken. This was held in a case in which the receipt was as follows :

“TROY, *November 19, '52.*

C. B. Filkins, Bo't of C. Whyland,

One horse,..... \$150 00
C. WHYLAND.”

And it was held that this paper was a mere receipt, and not a contract of sale. *Filkins v. Whyland*, 24 N. Y. 338. Of course if the contract of sale was reduced to writing, it could not be contradicted or varied, even though it also contained a receipt for the purchase-price. *Ib.*

There may sometimes be a modification of written unsealed agreements by a subsequent parol agreement. As a general rule, it is clearly and certainly settled, that in an action upon a contract for work and labor stipulated to be performed within a definite time, an extension of the time, or an entire waiver of objections to a delay in performance, may be shown by parol evidence of the declarations or acts *in pais* of the party, who at the time was entitled to claim the performance. *Vasseur v. Livingston*, 4 Duer, 285, 292. And the same rule has been applied to sealed instruments. *Fleming v. Gilbert*, 3 Johns. 528; *Smith v. Gugerty*, 4 Barb. 615; *Crane v. Maynard*, 12 Wend. 408; *Esmond v. Van Benschoten*, 12 Barb. 366.

§ 21. **Objections to the competency of witnesses.** The question, who are competent witnesses, has been already discussed. *Ante*, 381. But, although many persons are now competent who, under the former law, were not, there are still some cases in which an objection may be taken to the competency of the person offered as a witness. The time and manner of raising the objection is sometimes a material one. And, besides that, there is a matter of fairness as to this time and manner of objecting.

If the objection arises on account of the extreme youth of the witness, it ought, in its natural course, to be taken before the witness is sworn, because the objection assumes that he is *incapable* of being bound by an oath. And the rule may be generally stated, that every objection to the *competency* of a witness ought to be taken in the first instance, and before he is sworn and examined in chief; because, if the rule were otherwise, it would afford an unfair advantage to the objecting party, since he could avail himself of the testimony of the witness if it were favorable, but who would get rid of it by raising the

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objection, if it turned out to be adverse to him. See *Milsap v. Stone*, 2 Col. T. 137.

In this State, however, if a witness is sworn in chief without objection and it appears during his examination that he is incompetent, the objection may be taken after such fact appears. *Seeley v. Engell*, 13 N. Y. 542. But a party against whom a person is offered as a witness has a right to have the preliminary oath, called the *voir dire*, administered to him, and to examine him in relation to his competency before he is sworn in chief. *Ib.*

It is not a mere matter of discretion with a justice, whether he will administer this preliminary oath to the proposed witness; for if he refuses to do so, on a proper application, his refusal will be error. *Ib.*

To be sworn on the *voir dire* simply means that the witness is sworn to speak the truth. The form of the oath indicates the nature of the oath:

Form of the oath.

You do swear that you will answer truly all such questions as shall be put to you in relation to your competency as a witness in this action.

The question as to the *competency* of a witness is always a question for the justice, and cannot be submitted to the jury. Both parties may give evidence upon the question; but, if the party objecting calls and examines the proposed witness, neither party can introduce any other evidence upon that question.

It must not be supposed that because witnesses are competent to testify, that therefore the question whether they are interested in the event of the action is a matter of no importance. A witness may be permitted to be examined, but his interest may be such that a jury would scarcely feel at liberty to regard his evidence in the same light they would that of a disinterested witness. And *interest* is as valid an objection to the *credibility* of a witness as ever it was. *Hoyt v. Lynch*, 2 Sandf. 328. When a person is offered as a witness, and he is objected to, on the ground that he is the person for whose benefit the action is prosecuted, and evidence to support such objection is offered and given by the party making it, the proposed witness is competent to disprove the allegation that the suit is prosecuted for his benefit. *Requa v. Requa*, 22 N. Y. 254.

The subject of evidence having been generally discussed, and some of the principles examined which relate to written evidence, it is now proper to notice the subject of oral evidence, and the matter of introducing such evidence.

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Oral proof is generally given by a personal examination of the witness in open court, though such examination is sometimes taken on a commission, or upon an order for that purpose. Oral testimony, it is to be remembered, in natural order precedes written evidence. It is generally more proximate to the fact than written evidence, because it is a direct communication by one who possesses actual knowledge of the fact by his senses, while written evidence in itself requires proof, and must ultimately be derived from the same source with oral evidence; that is, from those who possessed actual knowledge of the facts. The manner of procuring the attendance of witnesses will be elsewhere explained.

§ 22. **Oath to witnesses.** After the attendance of a witness is secured, the law next provides for the attaining of the highest value and importance which can be attached to oral evidence.

And for this purpose, the first great safeguard which the law provides for the ascertainment of truth in ordinary cases, consists in requiring all oral evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth, that can be devised by human wisdom, since a willful violation of the truth exposes him at once to temporal and to eternal punishment.

An oath is a declaration made according to law, before a competent tribunal or officer, to tell the truth; or it is the act of one who, when lawfully required to tell the truth, takes God to witness that what he says is true. It is a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith; or in other words, to punish his perjury, if he shall be guilty of it.

The act or ceremony of taking an oath is now usually that of laying the hand upon and kissing the gospels. But this is not strictly necessary, for in place of this the witness is allowed, if he prefers it, to swear by lifting up the right hand, and in some cases without any manual act whatever. As oaths are administered at the present day, it is important that the witness should do some *act*, for he generally *says nothing* when sworn.

The whole form of the oath is repeated to him by the person who administers the oath, and the party sworn merely assents to it by kissing the book, or by some other act done.

The entire form is far less impressive than that of the ancient practice, which placed the words of the oath in the party's own mouth, it being repeated in the first person throughout, and sometimes with

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peculiar solemnity. This form of administering an oath is now observed in some instances, as, for instance, in taking the constitutional oath of office.

The object of every oath is, to bind the conscience of the witness or person sworn, and for that reason, that form of oath and that mode of swearing should be adopted which the witness considers most obligatory.

By the principles of the common law, no particular form is essential to the oath; and therefore every witness is now sworn according to the form which he holds to be the most solemn, and which is sanctioned by the usage of the country or of the sect to which he belongs.

The Code of Civil Procedure has prescribed the form of the oath to be administered to a person offered as a witness in an action pending before a justice of the peace. See vol. 1, p. 41, § 3000. The statutory form of oath should be followed, unless there are special and sufficient reasons for the substitution of some other form of binding the conscience of the witness. See vol. 1, p. 131, §§ 845-849.

Matters of religious belief do not now render any witness incompetent, however much it may affect his credit. *Ante*, 393.

The court or officer may examine an infant or a person apparently of weak intellect produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person produced as a witness, what particular ceremonies in swearing he deems most obligatory. Code, § 850, vol. 1, p. 131.

In whatever form the oath is administered, at the request of the party sworn, he will be as guilty of perjury, both morally and legally, if he swears falsely, as though he had been sworn in the usual manner. 3 R. S. 693, § 122, 5th ed.; Code of Civil Procedure, § 851.

Where a witness is offered who is ignorant of the English language, he must be sworn and examined through an interpreter, who must be first sworn. *Schall v. Eisner*, 58 Ga. 190; *Leetch v. Atlantic Mut. Ins. Co.*, 4 Daly, 518.

Form of interpreter's oath.

You do swear that you will accurately and truly interpret between the court, the jury and the witness, A. B., in this action, between John Doe, plaintiff, and Richard Roe, defendant.

When no jury is called, omit the words, "the jury," in the form of the oath. After the interpreter is thus sworn, the oath is administered to the witness, by being repeated by the court to the interpreter, and by the latter to the witness.

Manner of testifying.

The examination of the witness is conducted, by putting the questions to the interpreter, and by his immediately repeating the substance of the question in the language which such witness speaks or understands.

Deaf and dumb persons are examined by means of an interpreter, even in the most important cases. But where such a witness can write the best mode is to require written answers. *Morrison v. Lennard*, 3 Carr. & Payne, 127. The aid of an interpreter is proper in every case in which there cannot be an intelligible communication between the witness and the counsel, court, or jury.

The form in which an oath is administered to a witness, requiring him to tell "the truth, the whole truth, and nothing but the truth," is sometimes singularly understood by witnesses. Some suppose that it imposes no obligation, except to answer as to such matters as are called for by a particular and direct question. Others again suppose that they are to tell every thing which they imagine relates to the matter in litigation, whether the evidence is relevant or not, or even whether it is legally admissible at all or not. Such extreme views are entirely erroneous. The object of the oath is to elicit the entire truth, without suppressions or additions. But such oath is always subject to the qualification, that the witness is to speak of those matters only which are legally admissible in evidence, under the decisions of the court; and, also, that they are such as are in some manner called for by the party examining the witness.

If a witness is required to narrate all that he knows of a specified transaction, he should proceed to state it fully and accurately. But, if he is informed by the examining party that certain portions of the transaction are unimportant, or if any portion of the evidence is objected to by the opposite party, he ought not to speak of that, unless directed by the court to do so. And, above all things, a witness ought never to volunteer or foist in statements which he knows are not called for by any question, or proper, as a part of any statement which he is permitted or required to make. To do such an act knowingly and intentionally is as much moral perjury as any other false swearing.

§ 23. **Manner of testifying.** The nature of evidence, whether *immediate* and within the actual knowledge of the witness, or *mediate* or hearsay, has been already explained. *Ante*, 376, 429. When a witness is admitted as competent, his evidence must be received; but even in such a case the credibility of the witness is another question, and is to be determined by those whose duty it is to weigh the entire evidence in the cause. The manner in which a witness testifies frequently has a

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most important bearing upon the credit which is accorded to his evidence.

Immediate testimony (or that within the knowledge of the witness) is given under the solemn sanction of an oath, in the presence of the public; the jury have the advantage of observing the deportment of the witness, the manner in which he gives his testimony; in particular, whether, as one relying on the consistency of truth, he answers promptly and readily, according to the suggestions of his memory, or with hesitation and difficulty, either attempting to evade direct answers, or to gain time to weigh them, in order to avoid contradictions and inconsistency; whether he readily answers all questions indifferently, whether they make in favor of or against the party whose witness he is; or whether he gives favorable answers on the one side with willingness and readiness, and on the other with difficulty and reluctance. The attention of such a witness is called directly and immediately to the very facts of which the disclosure is material; his means of knowledge, memory, situation, connection with the parties, and his motives, are subject to the severe and trying test of cross-examination, by means of which fraudulent witnesses are often surprised and detected.

§ 24. **Examination of witnesses.** When a witness has been regularly sworn he is first examined by the party who produces him, which is called the *direct examination*, after which the other party is at liberty to examine him, which is called a *cross-examination*; and then the party who called him may examine him again, which is a *re-examination*. This is the regular mode of proceeding, and it ordinarily closes the examination of the witness. But, as we shall see hereafter, this strict mode is scarcely ever pursued in actual practice. The office of a direct examination, or examination in chief as it is also termed, is to lay before the court and the jury the whole of the evidence of the witness that is relevant and material. The office of a cross-examination is to search and sift, to correct and supply omissions, and to affect the credit of the witness. The office of a re-examination is to explain, to rectify, and put in order such matters as have been affected by the cross-examination. The examination of a single witness is an illustration of the manner of conducting the examination of all the witnesses in the cause. If the strict rules of examination are followed, the party who produces a witness is bound to ask all material questions on the direct examination, and if this is omitted it cannot be done in reply, for no new question can be put in reply which is not connected with the cross-examination and which does not tend to explain it. See *Ford v. Niles*, 1 Hill, 300; *Caldwell v. New Jersey Steamboat Co.*,

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47 N. Y. 282; *Meyer v. Goedell*, 31 How. 456; *Anthony v. Smith*, 4 Bosw. 503; *Shepard v. Potter*, 4 Hill, 202; *Hastings v. Palmer*, 20 Wend. 225; *Leland v. Bennett*, 5 Hill, 286; *Romertze v. East River National Bank*, 2 Sweeny, 82; *Seibert v. Allen*, 61 Mo. 482; *Ober v. Carson*, 62 id. 209.

In one case a learned judge said: "In strict practice, he who has the affirmative ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally, the rebutting proof of the affirmative, which closes the examination. In doing this, neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to his proof, until, by repeated experiments, he shall make it come up to the opinion of the court. An adherence to these rules, generally, will be found necessary in all courts of original jurisdiction; and, without them, confusion, loss of time, and captious and irritable conduct must follow. We say *generally*, for it will often be found necessary for the presiding court, for good reasons, to depart from them, to attain complete justice; and when they ought or ought not to be varied, must in a great measure be left to the sound discretion and prudence of the court, and a court of error ought never to interfere for such departure, except where injustice is done by it." Per MILLS, J., in *Braydon v. Goulman*, 1 Monr. 115, 117, 118. See cases above cited.

The principle is so clearly stated in the foregoing extract, that little need be added.

In a justice's court, where so many causes are tried by the party in person, or at least with the assistance of some unprofessional person, neither of whom is expected to be familiar with technical rules, it would not be proper to enforce the strict rule to its full extent. But, even in such cases, it would be proper for the justice to inform them of the nature and extent of the rule, and then require a reasonable observance of it. Where the cause is conducted by members of the legal profession, there would be more propriety in enforcing a proper and substantial compliance with the rule. The practice, however, has been so loose in this particular, in justices' courts, that it would be difficult to attempt any thing more than a general observance of the principle of the rule. If a disregard of the rule will promote the cause of justice, fair practice, and of truth, then a disregard of it will be proper; while, on the other hand, if a strict enforcement of it will defeat an unfair practice as to the introduction of evidence, or will prevent a willful or useless waste of time, or will in any manner defeat injustice or oppression, then an enforcement of the rule will be a solemn duty on the part of the

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court. The rule itself must not, however, be misunderstood in one important respect. In no case is either party bound to do more than to prove the issues which are upon him at the time he offers his evidence. He need not anticipate and disprove any matters alleged affirmatively on the opposite side. For instance, suppose the plaintiff sues on a promissory note, and the defendant interposes a general denial, with a notice of set-off for goods, wares, etc., and for work, etc. In such case the plaintiff need only prove his own side of the case by proving a liability on the note. He need not disprove the set-off until after it has been sustained by the evidence of the defense. And this same rule applies to all instances which are similar in principle.

In the examination of a witness in chief, the first rule to be attended to is, that the questions be relevant to the matter in issue. If this is not attended to and observed, the examination will be rambling, tedious and uncertain, and likely to confuse and perplex the jury, from the very circumstance of its comprising irrelevant matter. Besides, the courts have a right to prevent any questions from being put, which do not tend to the proof of some of the issues. *Ante*, 476.

A juror occasionally asks questions; whether either party can take exception is sometimes of importance to the parties. In one case, a juror put a question to a witness, and it was answered without objection by either party. But upon a repetition of the question, one of the parties objected to it; and on an appeal, where this objection was urged as a ground of error, the court said: "I have not been able to find any authority for the responsibility of a party for a juror's improper question; one has as much right to except to it as another, and neither has the power to withdraw it. It would be rather hard to make either party suffer for the illegal questioning of a juror. A more appropriate remedy would be to move to strike out the answer, or to call upon the court to direct the jurors to disregard it. But in this case the defendants were too late with their objection, after allowing it to be asked and answered once without objecting to it." *Kelly v. Commonwealth Ins. Co. of Penn.*, 10 Bosw. 83, 99.

The court has no authority to propound improper questions to a witness against the objection of counsel, and if it does so, its action will be corrected on appeal. *People v. Lacoste*, 37 N. Y. 192.

Each party is to decide whether he will offer any witnesses, or whom those witnesses shall be, and the court may then decide as to their competency. But no court has a right to require a witness to be sworn in favor of a party who does not desire to call him. And, therefore, a justice has no legal power to compel a party to be sworn as a witness

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when he objects to being a witness for himself, and when the opposite party does not call him as a witness. *McCormick v. Mulvihill*, 1 Hilt. 131. See *Rutherford v. Holmes*, 66 N. Y. 368. And when a witness has been duly sworn, the court cannot examine him so as to prevent any right which would exist in an ordinary course of examination. And, therefore, when a defendant, on the trial of a cause, called the plaintiff as a witness, and, in reply to a question put to him by the court, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary, it was held, that the defendant was entitled to offer himself as a witness, for the purpose of answering such new matter. *Myers v. McCarty*, 2 Sandf. 399.

A party cannot be compelled to accept his adversary's admissions in lieu of record evidence. *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Kimball, etc., Manuf. Co. v. Vrooman*, 35 id. 310. Nor is he bound to anticipate the evidence of the adverse party. *Dodge v. Denham*, 41 Ind. 188. Subject to the control of the court in the exercise of a sound discretion, a party may introduce evidence in whatever order he prefers. *Crosett v. Whelan*, 44 Cal. 200. And when the cause is tried before a justice without a jury it is a matter of perfect indifference in what order the evidence is heard. *Wright v. Rambo*, 21 Gratt. (Va.) 158.

§ 25. **Cross-examination.** Before entering upon a cross-examination, a preliminary question may arise whether the witness has so far given evidence in chief as to entitle the opposite party to cross-examine. If a witness is called by a party merely for the purpose of producing a written instrument belonging to the party, which is to be proved by another witness, he need not be sworn, and if he is not sworn, he will not be subject to cross-examination.

If a witness is sworn, and gives some evidence, as for instance, to prove an instrument, however formal the proof may be, he is to be considered a witness for all purposes. Or, if a witness is sworn, and would be competent to give evidence for the party calling him, the other party will be entitled, strictly, according to the general rule, to cross-examine him, although he has not been examined in chief. But, if the counsel of one of the party calls a witness by mistake, and discovers the mistake before he puts a question to him, the witness, though sworn, will not be subject to cross-examination. So, where a witness has been asked only one immaterial question, and his evidence is stopped by the court, the other party has no right to cross-examine him.

After a witness has been examined in chief, the adverse party is at liberty to cross-examine him. The purpose of a cross-examination is,

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either to impugn the credit of a witness, or to get him to explain or give a color to what he has already stated, in his examination in chief, so as to render it less unfavorable to the party cross-examining. You may cross-examine him for the purpose of showing that he has no great respect for the moral obligation of the oath he has taken; or to show that however he may design to speak the truth, his means of knowledge upon the subject of his evidence were so limited, he may possibly have been deceived in what he asserted in his examination in chief; or to show that he is interested in the event of the action, for, although interest would not disqualify him from testifying, it would be a question whether it affected his credit; or to show that he has been arrested or punished for offenses, or otherwise so degraded that no dependence can with safety be placed upon his testimony; or to impeach his veracity, by showing that he has, at other times, made declarations, by parol or in writing, or done acts inconsistent with the evidence he has given upon his examination. But, in this latter case, you will not be allowed to impeach the testimony of the witness, by proving his former declarations or acts to the contrary, unless you first cross-examine him particularly as to his having made such declarations or done such acts. This subject will be more fully explained hereafter, when treating of impeaching witnesses.

The credibility of a witness is compounded of his knowledge of the facts he testifies; his disinterestedness; his integrity; his veracity, and his being bound to speak the truth, by such oath as he deems obligatory upon his conscience.

If he be deceived in the facts, no dependence of course can be placed on his testimony, however disinterested he may be, and however unimpeachable his character may be for integrity and veracity. But because a witness cannot give all of a conversation which took place at a certain time, his testimony is not to be excluded if he can give the substance of so much of the conversation as relates to the matters in issue. *Pope v. Machias Water Power Co.*, 52 Me. 535. See *Davis v. Smith*, 75 N. C. 115. And the fact that the cross-examination of a witness has shown that his memory is weak or unreliable about the matters to which he has testified will not warrant a motion to strike out his testimony, though it will affect its credibility or sufficiency. *New Orleans, etc., R. R. Co. v. Echols*, 54 Miss. 264.

Where there is a doubt whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel who cross-examines him to question as to the sources of his knowledge; his reasons for believing the facts to be as he has stated; his reasons for

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recollecting it; the circumstances attending its occurrence; whether it was light or dark; whether few or many persons or none at all were present; whether it was late or early in the day; and whether he was near or distant at the time it occurred, and the like; so that the court and jury may be able to judge of the degree of confidence they may repose in the witness' testimony.

But, valuable as the right of cross-examination is, it is sometimes a dangerous instrument in the hands of an unskillful or inexperienced person. If, by an unfortunate or unskillful question put on cross-examination, a fact be extracted or elicited which would not have been evidence upon an examination in chief, it then becomes evidence against the party cross-examining. But a witness is not allowed voluntarily to obtrude inadmissible evidence, and if he does so, it is not to be considered as evidence in the action, and the court and jury should give it no consideration whatever. This is a just and a most important rule; for a fraudulent and subtile witness will sometimes endeavor to baffle and annoy his cross-examiner for the purpose of deterring him from pursuing his course by introducing into his answers matters which are foreign to the question put, and which are unfavorable to the cross-examining party.

With regard to the relevancy to the matters in issue of questions which may be put on cross-examination, it is to be observed that considerable latitude is allowed in this respect, where the tendency of the questions is to affect the credit of the witness. *Missouri, Kansas & Texas R. R. Co. v. Haines*, 10 Kans. 439. Strictly speaking the cross-examination of a witness should be restricted to the matters as to which he has been interrogated on his direct examination, with the exception, of course, that questions may be allowed tending to discredit him as hereafter stated. See *Stafford v. Fargo*, 35 Ill. 481; *Helser v. McGrath*, 52 Penn. St. 531; *Chicago, etc., R. R. Co. v. Northern Illinois, etc., Co.*, 36 Ill. 60; *Rhodes v. Commonwealth*, 48 Penn. St. 396; *Houghton v. Jones*, 1 Wall. 702; *Beaulieu v. Parsons*, 2 Minn. 37; *Brown v. State*, 28 Ga. 199; *Aurora v. Cobb*, 31 Ind. 492; *Union Bank v. Mott*, 39 Barb. 180; *Campan v. Dewey*, 9 Mich. 381. But see *State v. Sayers*, 58 Mo. 585.

The court is not bound to permit a cross-examination on questions about which the witness gave no evidence on his direct examination. *Chicago, etc., R. R. Co. v. Northern Illinois, etc., Co.*, 36 Ill. 60. And the court may properly refuse to allow counsel on cross-examination to question a witness as to a conversation not referred to by him

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on his direct examination. *Wilhelmi v. Leonard*, 13 Iowa, 330 ; *Da Lee v. Blackburn*, 11 Kans. 190.

The rule must not be extended beyond its meaning. On cross-examination the examining counsel should not go into an affirmative or independent case, or examine the witness on the merits, but should confine himself to controverting the *prima facie* case which the direct evidence tends to prove. It is the tendency of the direct examination of a witness, which determines the subject of it, as a test for the propriety of the cross-examination. *Compan v. Dewey*, 9 Mich. 381.

It is always competent on cross-examination to call out any fact which will break the force and destroy the effect of the testimony given by a witness on his direct examination, or which will tend to qualify the statements made by him on his examination in chief, and show that they do not necessarily establish the facts which they were introduced to prove. See *Baird v. Daly*, 68 N. Y. 547.

On the cross-examination counsel should be allowed a free range within the subject-matter of the direct examination ; *Buckley v. Buckley*, 12 Nev. 423 ; and a wide latitude should be given to a party who has to prove a negative ; *Anderson v. Russell*, 34 Mich. 109 ; or to one examining a witness who was a participant in an alleged fraud. *Anderson v. Walker*, 34 Mich. 113 ; *Jacobson v. Metzger*, 35 id. 103.

And generally the cross-examination should not be restricted to the precise subjects called to the attention of the witness on his examination in chief, but should be allowed to extend to any matter not foreign to the subject-matter of such examination, and tending to limit, modify or explain it. *Haines v. Ledyard*, 33 Mich. 319. See *Ferguson v. Rutherford*, 7 Nev. 385. If upon his examination in chief a witness testifies that he has never done a certain act, the witness may be required on cross-examination to answer whether at a certain time and place he did not state to a person named that he had done the act. *Pruitt v. Brockman*, 46 Ind. 56. If on direct examination the witness gives his opinion as to value, he may be cross-examined in full as to his reasons for such opinion. *Missouri, Kansas & Texas R. R. Co. v. Haines*, 10 Kans. 439 ; *Atchison, Topeka & Santa Fe R. R. Co. v. Blackshire*, id. 477. So if a witness swears to the general bad character of another witness he may on cross-examination be asked to name the individuals whom he heard speak disparagingly of the witness ; *State v. Perkins*, 66 N. C. 126 ; but not what was said. *Gulerette v. McKinley*, 27 Hun, 320. But see *State v. Perkins*, 66 N. C. 126 ; *Stape v. People*, 85 N. Y. 390.

If the witness is also a party, and testifies on his direct examination

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to a transaction which is not strictly within the issues to be tried, but is calculated to throw light on them, he may be cross-examined as to such other transaction, but to what extent will be a matter within the sound discretion of the judge. *Hay v. Douglass*, 8 Abb. (N. S.) 217. But a witness cannot be questioned on cross-examination as to a matter which does not tend to impeach, rebut, explain, modify or in any manner qualify any thing that he has testified to on his examination in chief. *Sumner v. Blair*, 9 Kans. 521.

Questions not strictly material may be asked a witness in reference to, and as bearing upon the course he has pursued in the transaction under consideration, and to suggest a possible motive for his acts. The rules of cross-examination allow considerable latitude in this direction by way of sifting and testing evidence given by a witness on his direct examination, and allow an inquiry into the interest, the motive, the inclinations and prejudices of the witness, his situation in respect to the parties and the like. *Lefler v. Field*, 50 Barb. 407. Thus in an action to recover the price of grain agreed to be sold and delivered, it may be shown, on cross-examination, that after making the contract there was a decline in the price of grain, not as evidence upon the issue of contract or no contract, or of delivery and acceptance, but as having some bearing upon the conduct and entire credibility of the witness. *Ib.*

It is within the discretion of the court to permit counsel on cross-examination to ask a witness whether he has not sworn falsely on some specified occasion, or in a particular suit. *Hannah v. Kellip*, 49 Barb. 342. But the witness cannot be asked whether some person has not accused the witness of swearing falsely. *Ib.*

A witness may be asked questions affecting his own character, and consequently his credit, though such questions have no relation to the matters in issue. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. *People v. Casey*, 72 N. Y. 393. Certain restrictions have been placed on this species of cross-examination in criminal trials when the accused is the witness under examination. See *People v. Brown*, 72 N. Y. 571.

In the trial of civil cases a witness cannot be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, and which would in no way affect his credit, and still less can he be cross-examined as to such facts, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. *Carpenter v. Ward*, 30 N. Y. 243; *State v. Benner*, 64 Me. 267; *Kobbe v. Price*, 14 Hun, 55; *Kailer v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 333; *People v. Cow*, 21 Hun, 47. See *Gandolfo v.*

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Appleton, 40 N. Y. 533. And if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterward be admitted to contradict his testimony on the collateral matter. *Plato v. Reynolds*, 27 N. Y. 586; *Mark v. People*, 63 Barb. 618; *Rosenweig v. People*, id. 634; *Davis v. Roby*, 64 Me. 427; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Kobbe v. Price*, 14 Hun, 55.

The principle of a rule which excludes an inquiry into such collateral matters is, that it would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues.

Witnesses are frequently cross-examined in relation to writings, such as deeds, contracts, letters, papers and documents, and justices are not a little perplexed as to the rule which ought to be observed in such cases. For that reason a few of the principles which govern in such cases will be here stated. When a witness is cross-examined as to such writings, the examination is conducted with a view either to establish in evidence the *contents* of the writing as *material* to the cause, or to *test* the *memory* or the *credit* of the witness. When the object of the cross-examination is to establish the writing in evidence, the cross-examining counsel has no right to represent or state the contents of the writing in the form of a question, and then ask the witness whether he wrote such a paper or writing to any person, with such contents, or contents to the like effect, without first showing the writing to the witness, and asking him whether he wrote the letter or paper. *The Queen's Case*, 2 Brod. & Bing. 284-315; *Speyer v. Stern*, 2 Sweeny, 516.

If the paper is shown to the witness, and he admits that he wrote it, the whole paper will be made evidence when introduced at the proper time. So, again, on cross-examination it is permitted to show a witness a part of a letter, or one or more lines, and not the whole of the letter, and then ask him if he wrote that part of it. *Ib.* But if the witness does not state whether he did or did not write what is shown him, he cannot be cross-examined as to the contents of that letter, because the letter itself is the best evidence. *Ib.* See *Gaffney v. People*, 50 N. Y. 416.

If the witness admits that he wrote the letter, he cannot be cross-examined as to the contents by means of questions put to him by the cross-examining counsel, but the letter itself must be read to show whether it contains such statements as are embodied in the question.

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If the letter or paper is admitted by the witness, it is sometimes a question when it shall be introduced in evidence. The general rule is that it is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; but if the counsel who is cross-examining suggests to the court that he wishes to have the letter or paper read immediately, in order that he may, after the contents of that paper shall have been made known to the court, found certain questions upon such contents, which could not well or effectually be done without reading it, that becomes an excepted case, and, for the convenient administration of justice, it is permitted to be read at the suggestion of counsel, but considering it, however, as a part of the evidence of the counsel proposing it, and subject to all the consequences of having it considered as a part of his evidence. *The Queen's Case*, 2 Brod. & Bing 284-315. See *Houstine v. O'Donnell*, 5 Hun, 473.

But, as a general rule, evidence given on cross-examination is to be regarded as testimony on the part of the party calling the witness, and not of the party cross-examining. *Schratz v. Schratz*, 35 Mich. 485.

On cross-examination, counsel are not permitted to ask a witness whether he has made *representations* of a particular nature, and not specifying in his question whether the question refers to representations in writings or in words. *The Queen's Case*, 2 Brod. & Bing. 284. In such a case the opposite counsel have a right to interpose and ask the court to direct the cross-examining counsel to ask whether the representation was in writing or in spoken words. *Ib.*

But, it may be properly asked, on cross-examination, whether the witness has *said* such a thing, for that implies that it was words spoken and not written. *Ib.*

The instances in which evidence is rejected, when it is sought to show the contents of a writing, by examining a witness, is founded upon the principle that the paper is the best evidence of its contents. But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry, is material only as a test to try his memory and his credit.

Such evidence is usually admissible for no other purpose than to try the credit or the capacity of the witness. What a witness stated on a former occasion may be very material evidence to contradict him, or to impeach his testimony, but can rarely be evidence of the fact stated; and it is a remarkable circumstance, that the question was never, in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised, whether a cross-examination as to

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something written by the witness for the purpose, not of proving any fact in the cause, but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed an examination for proving material facts; and whether the witness might not be cross-examined as to what he had written, without producing the writing, where, although not proved to be lost, it was not in the possession of the examining party. But the question has been decided in the English courts, one of which held, in 1852, that upon a cross-examination, a witness cannot, even for the purpose of discrediting him, be asked as to the contents of a written paper, which is neither produced, nor its absence accounted for. *Macdonnell v. Evans*, 2 J. Scott, 930. But see *Hollingham v. Head*, 4 J. Scott (N. S.) 388. In *Bellinger v. People*, 8 Wend. 595, a letter in the handwriting of the witness was shown to him, and he was then asked: "Did you not write that letter in answer to a letter charging you with forgery?" And it was held that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document, which, for any thing that appeared, might have been produced.

So, where a question is put to a witness, asking him whether he had made certain specified statements in an affidavit which was not produced, it was held that the evidence was objectionable, on the ground that the affidavit was the best evidence upon that subject. *Newcomb v. Griswold*, 24 N. Y. 298.

At common law a witness cannot properly be asked on cross-examination whether he has been convicted of a crime, as the record furnishes the best evidence of the matter; and if the proper objection is taken such evidence will be excluded. *Newcomb v. Griswold*, 24 N. Y. 298; *Rathbun v. Rose*, 46 Barb. 127; *Tift v. Moore*, 59 id. 619. And the same rule applies to a question whether a witness has been indicted for any alleged offense. *Lee v. Chadsey*, 2 Keyes, 543; 3 id. 225; *Peck v. Yorks*, 47 Barb. 131. This fact should be proven by indictment or a certified copy. *Ib.* But a witness may be asked whether he has been in jail, the penitentiary or State prison or any other place that would tend to impair his credibility, and also how much of his life he has passed in such places. *Real v. People*, 42 N. Y. 270; *People v. Casey*, 72 id. 393; *Russle v. St. Nicholas Fire Ins. Co.*, 51 id. 643. See *People v. Manning*, 48 Cal. 335. But the evidence sought to be obtained must legitimately tend to impair the credit of the witness for veracity, either directly or by its tendency to establish a bad moral character. *People v. Brown*, 72 N. Y. 571.

*Under the Code a person who has been convicted of a crime or mis-

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demeanor is notwithstanding a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining is not concluded by his answer to such a question. Code, § 832. See Cal. Code Civil Pro., § 2051; *People v. Chin Mook Sow*, 51 Cal. 597.

The fact that a person has been arrested, *Brown v. People*, 8 Hun, 562, or has been convicted of assault and battery, does not legitimately affect his credibility. *State v. Huff*, 11 Nev. 17. See *Crapo v. People*, 15 Hun, 269; *Jackson v. Osborn*, 2 Wend. 555; *People v. Gay*, 7 N. Y. 378.

A party having produced a document for the purposes of cross-examination is not bound to read it before he comes to his own side of the cause, although he may have shown it to the witness and have cross-examined him upon it. *Speyer v. Stern*, 2 Sweeny, 516. And if a party, on cross-examination, obtains proof of a document, the opposite side, it has been said, has no right to see the paper for the purpose of re-examining the witness, as to the paper being in the handwriting of the party whose handwriting is sworn to.

When a book is put into the hands of a witness to refresh his recollection, and questions are asked upon it on the cross-examination, the book is not thereby made evidence for the party producing it, and against the party cross-examining; though when a book is so produced, the party against whom it is produced may use it as evidence in his own favor. *Payne v. Ibbotson*, 3 Hurlst. & Norm. 960. Opposing counsel have a right to see a memorandum which a witness uses to refresh his memory; *City Bank of Macon v. Kent*, 57 Ga. 283; but if a cross-examining counsel merely produces a paper, and asks the witness whether it is in his own handwriting, that does not entitle the other side to see it; but if he proceeds to found any question on the document, the opposite counsel has a right to see it; and if, upon a writing being put into the witness' hand for the purpose of cross-examination, the cross-examination wholly fails, the adverse counsel is not entitled to look at the paper.

If in the examination of a witness it appears that a writing had been drawn and signed by the witness and is in the possession of the plaintiff's counsel, and the writing is produced at the request of the defendant's counsel and examined by him, the paper cannot be shown the witness for further identification and for the purpose of obtaining an

explanation of the circumstances attending its execution. *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90.

And it has been held that when a witness has been examined as to entries in a book, the adversary cannot cross-examine as to other entries which have not been used, without putting them in as evidence. Where, upon the examination in chief of a witness, a valid objection has been taken to the admission of illegal or incompetent evidence, a cross-examination as to the same matter, by the objecting party, will not waive the previous valid objection. *Simpson v. Watrus*, 3 Hill, 619; *Worrall v. Parmelee*, 1 N. Y. 519; *Duff v. Lyon*, 1 E. D. Smith, 536.

The court possesses ample power to prevent an abuse of the privilege of cross-examination. *Peck v. Richmond*, 2 E. D. Smith, 380.

Still, as the right of cross-examination is a very valuable one, the courts ought to allow it liberally and indulgently, in every case, unless there is an evident intent to abuse the privilege. In one case the court remarked, "that cross-examination had gone to an unreasonable length; but he had, in general, permitted gentlemen to go as far as they pleased, because, if there was an honest case on the other side, it would do them no good." And a learned writer comments upon the subject as follows: "The benefits of cross-examination are sometimes defeated by the interposition of the court, to require an explanation of the motive and object of the question proposed, or to pronounce judgment upon them immediately; whereas, experience frequently shows, that it is only by an indirect and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress from immateriality to materiality was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds, from his own instructions with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot, by any possibility, anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavor to satisfy the court would have the common effect of an interruption of the regular course of inquiry, and, instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation." The right of cross-examining a witness, by inquiring into

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collateral facts for the purpose of discrediting the witness, is so far a matter of discretion with the court that it may be limited by the circumstances of the case. *Allen v. Bodine*, 6 Barb. 383. And see *Fry v. Bennett*, 3 Bosw. 201, 239; *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; *White v. McLean*, 57 id. 670; *Kings v. New York Central & Hudson River R. R. Co.*, 72 id. 607; *Marks v. King*, 64 id. 628; *Commonwealth v. Lyden*, 113 Mass. 452; *Wallace v. Taunton Street R. R. Co.*, 117 id. 91; *State v. McCartney*, 17 Minn. 76; *Wroe v. State*, 20 Ohio St. 460; *Saulisbury v. Village of Ithaca*, 24 Hun, 12.

The time when a witness shall be cross-examined is also in the discretion of the court. It is usually done immediately after the examination in chief is closed. But it may be delayed by the court to any stage of the cause before the cause is finally submitted. There ought, however, to be some good reason shown, before the ordinary course is abandoned, and the exceptional practice adopted. The general rule is, that the court will require counsel to avail themselves of the opportunity of a cross-examination before the witness leaves the stand, unless for some good reason the court should allow them the privilege, at a subsequent stage of the trial. *Sheffield v. Rochester and Syracuse R. R.*, 21 Barb. 339. And, in the case last cited, plaintiff's counsel publicly inquired of the defendant's counsel, before dismissing the witness from the stand, whether any of the facts testified to by this witness would be controverted on the trial, to which the defendant's counsel replied, that they should introduce no evidence on the points testified to by him. The right to cross-examine the witness was not reserved by the defendant's counsel. At the close of the trial, the defendant's counsel called for the witness for a further examination, but he did not appear, as he had gone home without leave; and the plaintiff's counsel received no intimation that he was wanted until after he had gone. And the court held that the right to further examination by the defendants was lost by their own acts; and that the plaintiff was not bound, under the circumstances, to detain the witness longer than he had done. See, also, *Brown v. Mayor*, 11 Hun, 21; *Price v. Wilson*, 67 Barb. 1.

It may be taken as a rule that when a party is deprived of the benefit of the cross-examination of a witness, by any means, other than the act of God, the act of the party himself, or some cause to which he has assented, the testimony given on the examination in chief may not be read. *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, 87; *People v. Cole*, 43 id. 508; *Smith v. Griffith*, 3 Hill, 333. See *Forrest v. Kissam*,

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7 id. 465. It was formerly held by the court for the correction of errors, that if a witness died after his direct examination, and before the cross-examination, the evidence could not be rejected, but was to be taken as part of the evidence in the cause. *Forrest v. Kissam*, 7 Hill, 463. But the value of this case as authority has been much shaken by a later decision of the Court of Appeals, holding that it is error to suffer any evidence given by a witness in direct examination to go to the jury, when by the sudden illness, death or other cause, without fault of the adverse party, and beyond his control, the latter is deprived of his right of cross-examination. *People v. Cole*, 43 N. Y. 508.

If a party to an action is a witness, and he refuses to answer proper questions on his cross-examination, his evidence may be struck out. *Burnett v. Phalon*, 19 How. 530 ; S. C., 11 Abb. 157. See *Rutherford v. Holmes*, 66 N. Y. 368. If it appears from the cross-examination of a witness that he has not the moral sense requisite to make him a competent witness the court may strike out his testimony. *People v. Harper*, 1 Edm. Sel. Cas. 180.

Some very vague notions have prevailed as to the party to be considered as introducing evidence given on cross-examination. It is not unusual for the cross-examining party to claim the evidence drawn out by him, as evidence introduced by him and tending to prove his case. This is always an incorrect view of evidence drawn out on a legitimate cross-examination. All testimony elicited on such cross-examination, consisting as it does of facts which, though relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain or modify such facts, or to rebut or modify some inference which might have been drawn from them, must in the nature of things constitute a part of the evidence given in chief, and both alike and together must be treated as evidence given on the part of the party calling the witness. The evidence given by the witness is not that alone given on the direct examination, but that given on the direct as contradicted, explained, enlarged, narrowed or modified by the cross-examination. *Wilson v. Wagar*, 26 Mich. 452.

The rule that a party is not allowed to contradict collateral matter drawn out by him on the cross-examination of the witness of his adversary does not apply in all cases to testimony which is not collateral; but is material to the issue. The reason of prohibiting the contradiction of collateral matter so drawn out is not that the cross-examining party has by such examination made the witness his own, but that the contrary rule would lead to the trial of numerous collateral issues, and

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such, too, as the opposite party is not supposed to have expected to try. When, therefore, a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other witnesses. *Newberry v. Furnival*, 46 How. 139; *Greenfield v. People*, 13 Hun, 242.

On the other hand, the rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it, and thereby discredit his testimony, does not by any means imply that a witness may be cross-examined for such purpose, as to every fact which is relevant to the issue. The right of cross-examination for such purpose is limited to those matters which tend to contradict, discredit, vary, qualify or explain the testimony given by the witness on direct examination. *People v. Cox*, 21 Hun, 47; S. C. affirmed, 83 N. Y. 610.

§ 26. **Re-examination.** After a witness has been cross-examined, he may be re-examined by the party who called him; and upon such re-examination he may be examined as to all matters upon which he has been cross-examined, which will give an opportunity for explaining any new facts which have thus come out. Counsel have a right, on such re-examination, to ask all such questions as may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful; and also to ascertain the motive by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. *Schaser v. State*, 36 Wis. 429.

Where a cross-examination is limited to a particular subject of a conversation had by him, the re-examination will be limited to the matter inquired about on the cross-examination, and the whole conversation cannot be required on the re-examination. *Greaton v. Smith*, 1 Daly, 380; S. C. affirmed, 33 N. Y. 245. And see *Union Bank v. Mott*, 39 Barb. 180.

It has already been seen that a witness cannot obtrude evidence on cross-examination which he could not have been permitted to give on an examination in chief; *ante*, 555; but if counsel voluntarily cross-examine as to inadmissible matter, the opposite counsel is entitled to re-examine upon it. *Blewett v. Tregonning*, 3 Ad. & El. 554; *Greville v. Chapman*, 5, Ad. & El. (N. S.) 731. In the case last cited, a witness for the plaintiff stated, on cross-examination, that by the rules

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of the jockey club the owner of a horse might bet against his own horse and then withdraw him ; but it was held that he might be asked, on re-examination, whether he did not consider such conduct dishonorable.

A party calling a witness may re-examine him in respect to a matter drawn out on cross-examination or which furnishes a circumstance by which a transaction in question was impressed upon the mind of the witness. *Farmers', etc., Bank v. Young*, 36 Iowa, 45.

If the cross-examining counsel has called out collateral facts tending to create distrust of the integrity, fidelity or truth of the witness, the party calling him may on a re-direct examination ask the witness for an explanation which might show the consistency of such facts with the integrity, fidelity and truth of the witness, although circumstances are thus put in evidence which are foreign to the principal issues, and which could not have been put in evidence but for the previous cross-examination. *United States v. Barrels of High Wines*, 8 Blatchf. 475.

The party producing a witness may call his attention to an error into which he had inadvertently fallen on cross-examination for the purpose of having it corrected. *Gilbert v. Sage*, 57 N. Y. 639.

§ 27. **Further examination.** After the witness has been examined in chief, on cross and on a re-examination, it not unfrequently happens that one or the other of the parties desires to ask further questions of the witness, on account of the accidental omission to inquire as to some fact which escaped attention or recollection, or because the party then learned, for the first time, that the witness knew some fact which was not before known to such party, or for some similar reason. And so, in other cases, after the evidence in the entire case has been closed, one of the parties sometimes desires to recall a witness and further examine him ; or he may even wish to call a new witness, who has not before been sworn. In all such cases, the matter is entirely within the discretion of the court. *People v. Mather*, 4 Wend. 229 ; *People v. Rector*, 19 id. 569 ; *Clark v. Vorce*, 15 id. 193. In ordinary practice, this discretion is liberally exercised, if it is for the furtherance of justice.

As to each witness, the practice is, as we have seen, *ante*, 556, for the party who calls the witness to examine him first. He is then cross-examined and finally re-examined. So, too, on the whole trial, the party holding the affirmative of the issue calls his witnesses and they are examined, and he then rests his side of the case. The opposite side then calls his witnesses, who are also examined, and that side of the case submitted ; and finally the party opening the case introduces his evidence in reply, when, in the usual course of

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practice, the evidence in the case is considered closed. But there are so many causes of error and of omission as to the introduction of evidence, that this strict rule is scarcely ever enforced. The material rights of either party ought never to be permitted to suffer by reason of an excusable omission. A single material question may have been inadvertently omitted, and the mouth of the witness ought not to be closed for that reason. And it may sometimes be necessary to examine a witness as to entirely new matter, or to call several new witnesses, for the purpose of attaining entire justice in the cause. In such cases a further examination is permitted, and with it the right to further cross-examine, re-examine, etc.

So the court has power to permit a witness to be examined, cross-examined and re-examined, over and over again, at any time during the trial. But great care should be taken in the exercise of this discretion, so as to prevent either party from gaining any advantage over the other by any trick, artifice or fraud. If the plaintiff should declare that he had finished his evidence, and in consequence of such declaration the defendant should dismiss some or all of his witnesses, and the plaintiff should then offer to produce new evidence, which might, perhaps, have been contradicted, or answered, or explained by the witnesses who were dismissed, the court would never tolerate so unfair a practice, nor suffer a plaintiff to avail himself of the advantage of such ungenerous and fraudulent conduct.

This same rule applies, of course, to both parties, and, therefore, if the defendant declares his evidence closed, and the plaintiff dismisses his witnesses in consequence, the defendant will be precluded from calling witnesses as to any matter which might have been answered by the plaintiff's witnesses, who were dismissed.

When evidence has been duly taken on a trial, without objection, and it bears upon material issues, the court has no right to strike it out, or to exclude it from the consideration of the court or jury. *Hall v. Earnest*, 36 Barb. 585, 591. If the evidence is proper in kind, though not in degree, or if it is objectionable otherwise upon some technical ground, all right of exception to it is waived by the parties, by not objecting in time, and all rightful control over it by the court is gone. *Ib.*

It is only when evidence is received upon some *condition*, *mistake* or *contingency*, that the court can properly direct the jury to disregard it and treat it as not received. But when it has been given and received absolutely, it cannot in any way be stricken out of the case or disregarded. *Ib.*

Further examination.

Parties sometimes introduce evidence which does not answer their purpose, or they elicit an answer from a witness which is unfavorable; in all such cases they must abide by the election made and its results, for they cannot withdraw the evidence, nor require it to be struck out. *Decker v. Bryant*, 7 Barb. 183, 189; *Vibbard v. Staats*, 3 Hill, 144. Evidence once given belongs to the cause, and is the common property of all the parties. *Ib.* There are some cases in which evidence may be struck out, even after it has been given. But it is to be done by the party opposed to the introduction of the evidence. If, for instance, property has been sold by a bill of sale, and the plaintiff proves the sale by oral evidence, and the defendant first discovers on a second cross-examination that the sale was by writing, he may move to strike out the oral evidence. *Dunn v. Hewitt*, 2 Denio, 637.

So where a witness has given considerable evidence before it is disclosed that he is not a competent witness, the opposite party must then move to strike out his evidence if he would avail himself of the objection. *Heely v. Barnes*, 4 Denio, 73.

Parties sometimes estop themselves from objecting to evidence which would have been objectionable but for their own acts.

If both parties give parol evidence of the contents of a written instrument, without any objection by either of them, both parties will be held to have acquiesced in receiving parol evidence of its contents, and neither party will be permitted to object to showing fully the entire contents of the instrument by parol evidence. *Moss v. Stone*, 5 Barb. 516; *Seaman v. Benson*, 4 id. 445. And when one party agrees that the opposite party may introduce evidence which is legally inadmissible if objected to, he cannot afterward complain of the reception of such evidence, nor of the reception of other evidence of a similar character. *Rundell v. Butler*, 10 Wend. 119. When a party consents to establish a law of his own as to evidence, he must abide by it. *Ib.*

In taking notes of evidence, it is sometimes the case that a question is raised as to what the witness testified. In such a case, if the witness is requested to repeat his answer, and he does so partially, but omits to state the whole of it, or if it is claimed by counsel that a part of it is omitted, and the witness asserts that he has repeated the entire answer, the party claiming the entire answer may call the stenographer or shorthand writer of the court, and swear him as to the fact whether he has taken such answer, and whether the witness has repeated the whole of it. *Rex v. Slater*, 6 Carr. & Payne, 334. So, too, any other person would be equally competent for the same purpose, if he took the entire

answer down in the language employed by the witness, and he can swear positively that it was used by the witness.

§ 28. **Opinions and belief, skill and science, etc.** A witness is examined, either as to facts, simply, which he himself knows, or, in some instances, as to his own inferences from facts, or as to facts which he has heard from others. In ordinary cases, the witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from facts, for those are to be formed by the court or a jury, except, indeed, where the conclusion is an inference of skill and judgment. *Morehouse v. Mathews*, 2 N. Y. 514.

A witness examined as to facts ought to state those only of which he has personal knowledge; and such knowledge is supposed, if not expressly stated, upon the examination in chief; and upon cross-examination, his means of knowledge may be fully investigated, and if he has not had sufficient and adequate means of knowledge, his evidence will be struck out. A witness, on his examination in chief, must not, as a general rule, be examined as to his *belief*, or his *persuasion*, but only as to his knowledge of the facts in the case, because judgment is to be given according to the allegations and the *proofs*. An old case will illustrate this principle: The question in the case was, whether a notice of protest was duly served. The service was made by a clerk of the notary; and on the trial he was a witness, but he had no recollection whether the service was made at the proper time. He produced a copy of the protest, at the foot of which was a memorandum in these words: "Served notices of protest at indorsers' offices;" which memorandum was in his handwriting. He further testified that he had no recollection of the service, except what was indicated by the memorandum; that he was certain that the memorandum was made on the day of the protest, though he had no positive recollection when it was made; that he was confident of the service, from his invariable custom; and that it was possible that the service was not made as the memorandum stated. The court held the proof of service defective, and used the following language: "The testimony of the clerk, in respect to the time of the service, is nothing more than the conclusion he draws from the existence of the memorandum, the time of protest, and his custom in serving such notices. It was no proof of the fact that the service was made within the time required by law, but simply a conclusion formed in his mind, from the existence of other facts. If he had any recollection of the circumstance of having served the notices, however faint may have been the impression remaining upon his memory, it would be evidence of the fact to submit to a jury. But

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he had none. His memory totally failed him. When he saw the memorandum, he was convinced that he had made the service, and was willing to swear positively that he made it on the 14th, but not because the memorandum recalled or revived the recollection of a circumstance which had passed from his memory, but from a conviction in his mind, the result of an operation of reason and judgment. The recollection of a fact by a witness is one thing, and his presuming or being convinced of the existence of a fact, in respect to which he has no recollection, is another. The former is the only testimony which it is competent for a witness to give; the other, upon a fact which is disputed, is no testimony at all." DALY, J., *Taylor v. Stringer*, 1 Hilt. 377, 381. The mere opinion of a witness who has no knowledge of the subject of which he speaks is inadmissible. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499.

In another case it was important to show that a specified conversation alluded to a particular time, at which it was alleged a warranty was made as to a certain horse. The witness testified that there was nothing in the conversation from which he could say that the plaintiff alluded to the time of the sale as the period when the defendant had given this information. He was then asked by the defendant's counsel what his *belief* was as to that fact. This was objected to, but the evidence was allowed, and the judgment was reversed. The court said: "The justice erred in permitting the witness to state his *belief*, after he had sworn that there was nothing in the conversation from which he could say that the plaintiff referred to the time of the sale. *Cutler v. Carpenter*, 1 Cow. 81, 83. And see *Butler v. Benson*, 1 Barb. 527, 537. It is not proper to ask a witness what he supposed, at the time, was the effect of a particular transaction, or to ask what impression was produced upon his mind by what passed. The inquiry ought to be what was said or done. *Weber v. Kingsland*, 8 Bosw. 416. See *Higbee v. Guardian Mut. Ins. Co. of N. Y.*, 66 Barb. 462.

A witness should never be allowed to give his "best impressions" as to a matter of which he has no personal knowledge. *State v. Thorp*, 72 N. C. 186.

A witness who has testified as to conversations had with a party cannot testify as to the *impression* left on his mind by the conversation. He must either state the language used or the substance of it. *Elbin v. Wilson*, 33 Md. 135. But where a witness has testified as to facts coming under his observation and has declined to swear positively whether a certain act was or was not done, it is competent for him to testify to an impression or belief on the subject. *Blake v. People*, 73

N. Y. 586; *Snell v. Moses*, 1 Johns. 96, 103; *Lewis v. Freeman*, 17 Me. 260; *Franklin v. City of Macon*, 12 Ga. 257; *Rea v. Pedley*, 1 Leach, 325; *Regina v. Schlesinger*, 12 Q. B. 670; *Folkes v. Chadd*, 3 Doug. 157, 159. It will be error to exclude a statement made by a witness merely because he qualifies it with the remark "this is my impression," as the added clause is equivalent to saying, "this is my best recollection of the matter, though I am not absolutely certain." *Swinney v. Booth*, 28 Texas, 113.

So far as it regards mere belief or persuasion, which does not rest upon a sufficient or legal foundation, the cases just cited show that they are not competent evidence. But there are cases of persuasion or belief, founded upon the actual knowledge of the witness, in which the belief of the witness is proper evidence. On question of identity of persons, or of handwriting, when the witness is familiar with the handwriting in question, or with the person whose identity is in dispute, such witness may state his belief as to the identity of the person or the genuineness of the signature, although he may not be able or willing to swear positively. In such a case, however, the question is not merely one of belief, as in the cases cited. It is clearly a matter of recollection, and the question is, how confidently the witness can speak upon that subject. The belief of the witness, in such a case, is a mere matter of recollection, and its value is entirely a question for the jury or the justice in their place.

There are well-established exceptions to the rule that witnesses must speak as to facts alone. One of these exceptions is when the question is one of skill or science. When professional men and others give evidence on matters of skill and judgment, their evidence frequently does not, and often cannot, from the nature of the case, extend beyond opinion and belief. And the general rule is, that when the question is one of skill or science, or the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can a court or jury be enabled to form a correct conclusion. The general distinction is this, that the jury must judge of the facts for themselves, but that whenever the question depends on the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness on a fact to the exclusion of the jury, but the establishment of a new fact, relation, or connection, which would otherwise remain unproved. Not to admit such evidence would be to reject what was essential to the investigation of truth. But, to render opinions competent evidence, it is important that two things should exist in the case. First, the matter upon which it is proposed to intro-

duce evidence of opinions must be one of *skill* or *science*. *Weane v. K. D. & M. R. R. Co.*, 45 Iowa, 246; *Milwaukee; etc., R. R. Co. v. Kellogg*, 94 U. S. 469; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153. And, secondly, the witness must be shown to possess such knowledge or skill as to render him competent to give an opinion. *Hinds v. Harbon*, 58 Ind. 121; *Haggerty v. Brooklyn City & Newtown R. R. Co.*, 61 N. Y. 624; *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 id. 153. Where the question is not one of skill or science, opinions will not be evidence no matter how learned or scientific the witness may be whose opinion is asked.

A few illustrations from the adjudged cases will not be inappropriate, by way of applying these principles.

In one case, *Lamoure v. Caryl*, 4 Denio, 370, the opinion of a farmer was held to be incompetent to prove the value of the services of a clerk in a country store. And the court said, pages 373, 374: "A witness for the defendant, who had known him a clerk while in the service of the plaintiff, was asked by the defendant what his services were worth. The witness had testified that he was a farmer, and did not know what clerks in country stores usually received. The plaintiff objected to the inquiry, but the objection was overruled, and the question was answered. In general the opinion of a witness is not evidence for a jury, although there are exceptions to the rule. But they all proceed upon the principle, that the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness. The evidence of experts is received, on the ground of science or skill, and witnesses may speak on the value of property or labor, when it appears they have any peculiar sources of knowledge to guide them on these subjects, and which are not presumed to be equally within reach of the jury. The witness whose opinion was received was not shown to have any means of knowledge on this subject, beyond the range of the jury. Objection was made to his opinion being received as evidence. The objection was well founded, and should have been sustained. The parties were entitled to the judgment of the jury on the value of the defendant's services, and how were they, rightfully, to be aided by the mere opinion of a witness who had no means of information beyond their own? Opinions are to be formed by jurors, but it is the business of the witnesses to deal with facts. Even where their opinions are allowable, it is more with a view to inform the jury on some matter of fact than for the mere purpose of obtaining an opinion. The expressed opinion of an expert, or of a person acquainted with some

peculiar subject or business, is little more than a brief abstract of a long examination. The law, in such case, allows the opinion as a substitute for an extended examination. It is brief and intelligible, and may very properly be received as the result of what would be established by the evidence of the witness, if given in detail. But when the witness has no such information to impart, the law will in no case permit his opinion to be received." And see *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 78; *Mercer v. Vose*, 67 N. Y. 56; *Scott v. Lilenenthal*, 9 Bosw. 225.

The clerk might have testified as to the value of his services, as it is a general rule that one who has rendered services for another is competent to give an opinion as to their value, leaving the value of such opinion to be determined by the court or jury. *Mercer v. Vose*, 67 N. Y. 56.

An expert who has no knowledge as to the character of services rendered in nursing a sick person, or the condition of a patient at the time except from the description of other witnesses, is incompetent to give an opinion as to their value, although if he had personal knowledge of such facts he would be competent to give an opinion of the value of such services. *Reynolds v. Robinson*, 64 N. Y. 589; *People v. Lake*, 12 id. 358; *Carpenter v. Blake*, 2 Lans. 206. In such cases it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind, and thus form and express an opinion. But his opinion may be obtained by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by the counsel putting the question to be established by their evidence, and when the question is thus stated, the witness has in his mind a definite state of facts and the province of the jurors is not interfered with. *Reynolds v. Robinson*, 64 N. Y. 589.

Where a party seeks to exclude a question which calls for the opinion of a witness, on the ground that he has not been shown to be competent as an expert, such reason must be specified in the objection; and if a mere general objection is taken, it may properly be overruled. *Malory v. Perkins*, 9 Bosw. 572. So where no proper foundation has been laid for the introduction of expert testimony, the objection to the receipt of the evidence must specify that no such foundation had been laid. A general objection will not be available on appeal. *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *Levin v. Russell*, 42 id. 251; *Williams v. Sargeant*, 46 id. 481.

In putting hypothetical questions for the purpose of obtaining the opinion of experts counsel may assume facts as they claim them to exist, and an error in the assumption will not make the interrogatory objectionable if it is within the possible or probable range of the evidence. *Harnett v. Garvey*, 66 N. Y. 641.

After a witness has testified as to the character of services rendered, the average length of time the party was employed each day, etc., a witness who has heard such testimony may be asked "assuming that the services rendered were as described by the witness, what were they worth per month?" A question in this form, or its equivalent leaves it for the jury to pass upon the credibility of the testimony, upon which the opinion is based. *McCollum v. Seward*, 62 N. Y. 316.

The amount of damages which may result from the breach of a contract cannot be proved by the opinion of a witness.

In an action upon a lease for the recovery of rent, the defendant claimed to recoup damages, which he alleged he was entitled to, by reason of the neglect or refusal of the plaintiff to construct or keep in repair certain water arrangements upon the premises occupied by the defendant, for the purposes of a tavern, and an innkeeper was called as a witness for the defendant, and the witness was asked, in a great variety of forms, how much it was worth to the defendant to have that water supplied by the aqueduct, by the day, the quarter, and by the year; and what damage the defendant would sustain, per day, quarter, and year, by being deprived of the water; but this evidence was excluded, which was held right. *Harger v. Edmonds*, 4 Barb. 256. "The great objection to this species of evidence is, that it calls for the *opinion* of the witness upon a question on which the opinions of witnesses are not evidence. The diminution in the annual, quarterly, or daily value of the premises, occasioned by the withdrawal of this water; or, in other words, the amount of the damage of the defendant, arising from such withdrawal or deprivation, would depend, for its just determination, not on any professional skill or knowledge of the witness, but on a vast variety of facts, from which any sensible man could form a judgment, as well as a tavern-keeper, living in another town. The situation of the tavern, the amount of business or custom it enjoyed, the kind of customers who frequented it, the distance from a stream, well, spring, or other supply of water, and perhaps the expense of digging a well, would all be material facts on which to found a correct opinion. When these facts should be spread before a jury, with the length of time which the water was

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withheld, the jury would be enabled to give a reasonable estimate of the damages." Id. 258, per GRIDLEY, J.

So, in an action by a tenant against a landlord for his refusal to deliver possession of the premises to the plaintiff, it is not competent to prove the amount of damages by the opinions of witnesses. *Giles v. O'Toole*, 4 Barb. 261.

Again, in an action for the recovery of damages for not feeding the plaintiff's cattle as good hay as the defendant agreed to do, it is not competent to prove the amount of damages by asking a witness what damage accrued in consequence of feeding the cattle upon the hay in question, instead of the hay agreed upon. *Morehouse v. Mathews*, 2 N. Y. 514. The court said, page 516: "In the case before us, the witness could have legally testified to the degree of inferiority of the hay fed to that agreed to be fed by the defendant. He could also have testified as to the condition of the cattle when brought to the defendant's and when taken away; and to any other fact calculated to enable the court or jury to form a just opinion on the question of damages; but the mere opinion of the witness on the amount of damage was entitled to no weight. If the witness had testified that he was acquainted with the value of cattle, I think he might have been allowed to state how much less valuable these were when taken away than when driven to the defendant's, in consequence of the inferior quality of the food. But then he should state the facts upon which he founded his valuation, so that the jury might be able to appreciate his estimate at its just value." And see *Nellis v. McCarn*, 35 Barb. 115; and opinion in *De Witt v. Barly*, 17 N. Y. 345; *Schemerhorn v. Tyler*, 11 Hun, 549.

In an insurance action, a witness will not be permitted to testify what is meant by a *permanent policy*, where it does not appear that the term is one of art, or that it was employed in any particular business, or that the witness had any qualifications for interpreting it which were not equally possessed by the court and jury. *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153.

But where the question is one of skill or science, and the witness is competent to express an opinion, he may be asked his opinion. When, for instance, the witness is a brick or a tile maker, and he has followed the business several years, he may be asked whether a certain described mode of placing the brick in the kiln is a proper one; or he may be asked what effect it would have if the tiles or bricks were burned when lying flat, instead of upon an end. *Wiggins v. Wallace*, 19 Barb. 338. Whether a witness is competent to express an opinion is a question for the justice, yet if he misjudges, it is as much an error as though he mis-

judged upon any other question. *Ib.* But see *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453, 460; *Jones v. Tucker*, 41 N. H. 546.

But when a person is liable for proper advances which may be needed for the support of an infant, it is not proper to prove by a witness that certain payments were properly made for articles purchased for such infant. *Merritt v. Seaman*, 6 N. Y. 168.

In actions for negligence it is not competent to ask a witness whether the negligence of one of the parties caused the alleged injury for which the action is brought, or whether certain specified acts constitute negligence. In an action for injuries arising from a collision of vessels, it is not competent for the defendant to ask his pilot either of the following questions: "Was that collision caused by any negligence of yours?" or, "From what you discovered of the tug in coming down, was she in fault, and how?" because such questions are intended to elicit the opinion of the witness upon questions which are to be decided by the court or jury upon the evidence introduced on the trial. *Crofut v. Brooklyn Ferry Co.*, 36 Barb. 201.

So in an action to recover for damages for injuries to plaintiff's canal boat alleged to have been caused by the defendant's negligence it is not proper to ask a witness whether the defendant, in the opinion of the witness as a canal boatman, in any way omitted or neglected to do any thing which might have been done to save the boat. *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574.

An expert may be asked whether certain acts which are proven are seamanlike and proper, under a given state of circumstances, but he cannot be allowed to express an opinion as to what was or was not done as a matter of fact. *Ib.*

Upon a question of negligence in mooring a vessel, it is proper to ask a witness, who has been shown to be competent to give an opinion, what was the condition of the fastenings of the vessel as to safety; because this is a subject of science and experience, and not one of common knowledge. *Moore v. Westervelt*, 9 Bosw. 558; S. C. affirmed, 27 N. Y. 234.

So in an action to recover damages for losses sustained from fire, alleged to have been caused by the negligence of the defendant in the use of a steam dredging machine, it is not competent to ask a witness whether he considers it dangerous to use a steam dredge without a spark catcher. *Teall v. Barton*, 40 Barb. 137; S. C., 25 N. Y. 544, by name of *Hinds v. Barton*.

So, in an action by a traveler for the recovery of money which had been stolen from a locked portmanteau left in a locked room of the de-

fendant, who was an innkeeper, it was held that the opinions of other innkeepers that the plaintiff was negligent in thus leaving his money were not competent evidence. *Taylor v. Monnot*, 4 Duer, 116.

In an action against a defendant for the loss of a considerable quantity of wheat, which it is alleged was lost by reason of the negligence of the defendant in threshing it, the cases are conflicting whether the plaintiff is permitted to ask a witness how much wheat was wasted by the defendant in threshing six hundred and forty-eight bushels of wheat, according to the defendant's tally of the plaintiff's wheat. It was held that he could not do so, in *Cook v. Brockway*, 21 Barb. 331. But see *Harpending v. Shoemaker*, 37 id. 270, to the contrary, where the following question was held to be proper, after showing the witness to be competent to express an opinion: "How much less buckwheat was there than there would have been if the same had been properly threshed?"

In an action brought in a justice's court for trespasses upon the plaintiff's land by the defendant's cattle and horses, in a case in which the defendant does not appear in the action, and where the only evidence to show the amount of the plaintiff's damages, or from which the justice could properly determine the amount, was the opinions of a witness, it was held that there was not sufficient legal evidence to support a judgment in favor of the plaintiff, and it was, therefore, reversed. *Armstrong v. Smith*, 44 Barb. 120. This case overrules *Nellis v. McCarn*, 35 Barb. 115, on this point, and reviews a large number of cases. See, also, *Seamans v. Smith*, 46 Barb. 320.

In an action of trespass for damages done by the defendant's cattle, horses and sheep to the plaintiff's orchard and crops, the plaintiff was a witness in his own behalf, and after he had testified that he had one and three-quarter acres of buckwheat on his land in 1861, and that after it was cut, the defendant's horses got into the lot and tore the buckwheat to pieces and ate what they wanted, it was held the following question was competent: "State, if you can, what portion of the buckwheat the defendant's horses destroyed in the fall of 1861?" because the plaintiff was shown to be a farmer, and his knowledge rendered him competent to give an opinion; and on such a question, opinion is competent evidence. *Seamans v. Smith*, 46 Barb. 320, approving *Armstrong v. Smith*, 44 id. 120. So, in the same case, the plaintiff testified that the defendant's cattle went into one acre of his peas, and destroyed two-thirds, and that they were worth \$4 a bushel; and it was held that his counsel might ask him the following question: "If that piece of peas had not been injured by the stock, how much would it

have produced that season?" *Ib.* The plaintiff also testified that the defendant's hogs destroyed all his peas, thirty rods; that they were good peas and podded when destroyed; and that he could tell what the ground would have produced if the peas had not been destroyed; and it was held that it was competent to ask him what the ground would have produced if the peas had not been destroyed by the defendant's hogs. *Ib.*

In an action for damages to grass done by the defendant's cattle, it is proper for a witness to state the amount of meadow land trespassed upon, the quality of the grass growing upon it, and his opinion as to the value of the grass; but he cannot testify directly that the damage to the grass was a specified sum. It is for the jury to estimate the damages. *Richardson v. Northrup*, 66 Barb. 85.

In an action for the recovery of damages sustained by the plaintiff, by reason of having his land burned over, and the wood and timber thereon burned and injured, by the negligence of the defendant in improperly setting fire to brush on his own farm, it is not competent for the plaintiff to ask a witness to state, from what he saw, how much damage was done to the farm. *Simons v. Monier*, 29 Barb. 420.

In an action against a guarantor on the covenants contained in a lease that the lessor would not sow any mustard seed or white daisies on the farm during his tenancy it is not competent to ask a witness "How much was the damage to that farm in consequence of the daisies upon it?" *Thompson v. Dickhart*, 66 Barb. 604.

So in an action to recover the possession of a canal boat, with damages for the taking and detention, it is error to allow a witness to answer the question, "State the damages for the taking and withholding of the boat during that time?" *Green v. Plank*, 48 N. Y. 669. See *Van Deusen v. Young*, 29 id. 9; *Treepenning v. Corn Exchange Ins. Co.*, 43 id. 279.

In an action against a carrier for the recovery of the value of a horse, which, it was alleged by the plaintiff, had died from injuries caused by the negligence of the defendant, it is not competent to ask the opinion of a witness whether a wound, which he saw inflicted on the horse, was sufficient to cause the death of the horse, when the witness has testified previously to asking such question, as follows: "I have been acquainted with horses twenty-five years; I have owned horses for twenty-five years, from one to sixty, all the time; I have doctored all my own horses for fifteen years, and the same for other people; I doctor a horse pretty much as I do myself." *Harris v. Panama Railroad Co.*, 3 Bosw. 7. In the case last cited, the witness, after expressing an opinion

that the wound was sufficient to cause the death of the horse, testified as follows in cross-examination: "I am not a horse doctor; I have seen the skeleton of a horse, but never have seen the sinews and nerves; I was called up to doctor a horse about two years ago; the mare had run away, and had run a shaft into her shoulder; I bled the mare that night; that wound did not bleed." The court said, pages 12, 13: "Whether a man had owned only one horse or a span continuously, or has owned from one to sixty, if he has never studied the diseases of horses, and more especially if he is unskilled as to the effect of wounds, and has never treated such injuries, it is difficult to say on what principle his mere opinion upon the question whether a particular wound was sufficient to produce death, is admissible as evidence. In such a case the opinion is not based upon skill or science, which the jury cannot be supposed to possess to the same extent as the witness."

When it is alleged that a horse has a particular disease, medical books are not competent evidence to prove the existence of the disease, but the facts stated in such books must be proved in the same manner as any other facts are established on the trial. *Ib.* And see *Collier v. Simpson*, 5 Carr. & Payne, 73. A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage. *Houghton v. Gilbert*, 7 Carr. & Payne, 701.

In actions for torts, the amount of damages cannot be proved by opinions. And in an action by a landlord against a tenant for committing waste by cutting down trees, it is not competent for the tenant to prove, by the opinion of witnesses, that such acts were not injurious to the inheritance, and, therefore, not waste. *McGregor v. Brown*, 10 N. Y. 114.

But it had been held that, in an action for the recovery of damages for a negligent destruction of fruit trees it is competent to prove the value of such trees, independent of their connection with the land, if such value is proved by a witness who is competent to speak of their value, as, for instance, a nurseryman. *Whitbeck v. New York Central R. R. Co.*, 36 Barb. 644. This rule does not extend so far as to permit a witness to give his opinion as to the amount of damages which a plaintiff sustains in consequence of a wrongful act of the defendant. And, in an action by a tenant against a landlord for unlawfully cutting a door into one of the tenant's rooms, it was held that the tenant could not ask a witness how much damage was sustained in the operation of the work. *Rodgers v. Fletcher*, 13 Abb. 299.

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So in an action of trespass by a tenant against his landlord for entering upon the demised premises, and making alterations and additions to the building, it is not competent to ask witnesses the general question, what was the amount of the damage sustained by the plaintiff. *Duff v. Lyon*, 1 E. D. Smith, 536. The witness should state the facts, and they may also give evidence of any special damages alleged in the complaint, and the jury are then to estimate and assess the damages upon all the evidence. *Ib.*

So in an action for wrongfully preventing the plaintiff from using a saw-mill, it is not proper to ask a witness what amount of damage the plaintiff sustained in consequence of the mill's lying still for a fortnight. *Doolittle v. Eddy*, 7 Barb. 74. Though, if the question is improperly allowed, and the witness does not give any opinion upon the matter, but merely states proper facts, the erroneous decision will do no harm. *Ib.*

The value of a dog cannot be proved by opinion, when the action is for unlawfully killing him. *Dunlap v. Snyder*, 17 Barb. 561, overruling *Brill v. Flagler*, 23 Wend. 354; and see *Smith v. Griswold*, 15 Hun, 273; *Brown v. Hoburger*, 52 Barb. 15. In the case last cited the court says: "Opinions in regard to the value of dogs, which have no standard or marketable value, are necessarily fanciful, depending on the fancy or predilection of the witness and are not competent. In order to render opinions as to the value of a dog competent, it should first be shown that the dog in question is a marketable animal usually vendible at some proximately regular price."

In actions for the recovery of damages for a nuisance, the amount of damages sustained cannot be proved by the opinions of witnesses. *Fish v. Dodge*, 4 Denio, 312. This was so held in the case last cited, in which the plaintiff sued the defendant, for causing dust and noise to annoy the plaintiff, by doing the work of finishing steam boilers in a part of the building adjoining that in which the plaintiff lived.

There is one important exception to the rule, that witnesses cannot give opinions as evidence, when the question is not one of skill and science. It is now well settled that any person who is acquainted with the value of the particular kind of property sold, or the kind of services rendered, may express an opinion as to its value. *Rochester and Syracuse R. R. Co. v. Budlong*, 10 How. 289; *Holton v. Board of Commissioners of Lake County*, 55 Ind. 194; *Tate v. Missouri, etc., R. R. Co.*, 64 Mo. 149. But on a question of value, a witness can testify to an opinion only when shown competent to speak upon the subject. *Treepenny v. Corn Exchange Ins. Co.*, 43 N. Y. 279. Farm-

ers who have examined lands and made the usual inquiries to inform themselves may testify as to their value, although they are not residents of the immediate vicinity. *Stone v. Covell*, 29 Mich. 579.

In an action for fraud in the sale of a horse, a witness who swears that he has a knowledge of the value of horses from having kept them and dealt in them for a number of years, and who further testifies that he knows the horse in question, is competent to give an opinion as to the value of the horse. *McDonald v. Christie*, 42 Barb. 36. But, if the witness does not know the qualities of the animal spoken of, he is not competent to give an opinion of its value. *Thorn v. Couchman*, 28 How. 95, Schoharie County Court.

In an action to recover the value of articles lost by a carrier, a party who has been in this country for five years is competent to testify as to the value of articles brought with him from a foreign country, but lost by the carrier on the passage; and it may be shown that he has made inquiries here as to the value of such articles. *Merrill v. Grinnell*, 30 N. Y. 594.

A person who has been a farmer, but has abandoned that business to become a mechanic, is, notwithstanding such change, a competent witness as to the value of land in his neighborhood. *Robertson v. Knapp*, 35 N. Y. 91. So farmers and other residents of the immediate neighborhood are competent witnesses as to the price or value of land in that neighborhood. *Ib.*

A person who has acted in the capacity of book-keeper in a large brewery for more than four years is naturally and necessarily acquainted with the market price of ale and beer during that time, and he is a competent witness to speak of its value. *Kerr v. McGuire*, 28 How. 28; S. C., 28 N. Y. 446. See *Harland v. Lillienthal*, 53 id. 438.

In an action to recover compensation for drawing leases, etc., the value of such services can be proved by the opinion of an attorney at law. *Beekman v. Planter*, 15 Barb. 550.

The value of horses may be proved in this manner, by competent witnesses. And in an action for a breach of warranty in the sale of a span of horses, which were warranted to be only ten and eleven years old, respectively, when the proof showed that they were over twenty years old at the time of the sale, a witness was allowed to state what the value of the horses would be if they were of the age represented, and also what their value was at the age they were proved to be. *Rogers v. Ackerman*, 22 Barb. 134. So, in an action to recover damages for a fraud in the sale of a horse, a competent witness may be asked

what the horse in question would be worth at the time of the sale, if kind and not balky. *Nickley v. Thomas*, 22 Barb. 652.

So, the value of a stove may be proved by opinion in the same manner. *Smith v. Hill*, 22 Barb. 656.

So, in an action to recover damages for the breach of a contract of warranty in the sale of a cow, as good and young, which was not as warranted, a witness who had seen the cow was allowed to state what she would have been worth if good and young; and also to state what she would have been worth, provided she gave but four quarts of milk daily. *Joy v. Hopkins*, 5 Denio, 84.

The value of services rendered may always be proved by those competent to speak of such value. But, where the plaintiff worked for the defendant, and was boarded and clothed by him, it is not competent for the defendant, in an action for the recovery of the value of such services, to ask a witness how much the plaintiff's services were worth over and above his board, clothing, etc., without proving or offering to prove that the witness knew the quantity or value of either item assumed by the question to have been furnished. *Lewis v. Trickey*, 20 Barb. 387. Nor, in such a case, can the defendant put this general question to the witness: How much, under all the circumstances, were the plaintiff's services worth over his board? *Ib.*

So, although the value of the property may be proved by the opinions of competent witnesses, it is not proper to receive the opinion of a witness as to the value of property which he has not seen. *Westlake v. St. Lawrence Co. Mutual Ins. Co.*, 14 Barb. 206. And see *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72.

But, as one species of opinion, it is competent to show what the goods in question brought at a fair public sale by auction. *Campbell v. Woodworth*, 20 N. Y. 499. Such evidence is competent, and it is for the jury, or the court in their place, to give it such weight as it may be entitled to when compared with the other evidence in the case. *Ib.*; *Gill v. McNamee*, 42 N. Y. 44; *Dixon v. Buck*, 42 Barb. 70. So a price list stating the price at which a manufacturer will sell, or statements of dealers in answers to inquiries, are competent evidence of the market price of a marketable commodity, and is a common way of ascertaining or establishing a market price. *Harrison v. Glover*, 72 N. Y. 451; *Oliquot's Champagne*, 3 Wall. 143; *Lush v. Druse*, 4 Wend. 313.

So, when it is important to determine who was in actual possession of real estate at a specified time, a witness who knows the fact may be asked the question, who was in such possession. *Parsons v. Brown*, 15 Barb. 590. The question may be said to be a mixed one of law and

fact; but that will not render the question objectionable; and if the opposite party desires to question the accuracy of such opinion, it must be done by a cross-examination of the witness. *Ib.*

In the case of uninclosed, unoccupied woodland, it is incompetent to ask a witness whether he was in the possession of the land. The peculiar facts should be shown which in law constitute possession in such cases. If the witness should answer to such a question that he was in possession, it would prove nothing if the facts also testified to showed that he was not in possession. *Miller v. Long Island R. R. Co.*, 71 N. Y. 380.

Where the question relates to the intention of a party when he is the witness, it is sometimes competent to ask for his intentions so far as they relate to some act done by him. When it is a question of fact whether an assignment was made with an intent to hinder, delay or defraud creditors, it is competent to ask the assignor, if he is a witness, whether he intended to hinder, delay or defraud his creditors in making the assignment. *Seymour v. Wilson*, 14 N. Y. 567.

In an action to recover a balance alleged to be due upon the sale of chattels when the defense is fraud in the sale, it is not competent to ask the plaintiff, after the defendant has given in evidence the plaintiff's representations and the defects in the property sold, "Did you give, or intend to give, the defendant any thing more than your opinion in regard to the matter?" *Waugh v. Fielding*, 48 N. Y. 681.

In an action to recover damages, sustained by reason of the fraudulent representations of the defendant as to the credit and good standing of another person doing business under the designation of an agent, the defendant will not be allowed to state, as a witness, that he did not intend to mislead or deceive the plaintiff, nor that he spoke and acted in good faith in the belief that what he stated was true. *Ballard v. Lockwood*, 1 Daly, 158; distinguishing this case from *Seymour v. Wilson*, 14 N. Y. 567.

In an action for falsely representing that W., a tradesman, was trustworthy, the defendant called as a witness his counterman, who was acquainted with the transaction between the defendant and W., and asked him: "Was W., at the time of the transaction, trustworthy, to your belief?" and the defendant also called four tradesmen of the same town, who were asked as to the general reputation of W. for trustworthiness; and it was held the evidence was admissible. *Sheen v. Bumpstead*, 2 Hurlst. & Colt. 193; affirming S. C., 1 id. 358. The principle upon which this evidence was received was, that if it was a common opinion in the neighborhood among tradesmen that W. was solvent, and the

jury should find that the defendant shared in that belief, it would be some evidence that he acted in good faith in making the representation.

If the defendant believed W. to be solvent at the time of making the representation, he would not be liable. Vol. 2, p. 428.

But in an action of replevin, where it is alleged that the property in question was fraudulently sold for the purpose of hindering, delaying and defrauding creditors, the purchaser may be examined as to his intention in making the purchase. *Bedell v. Chase*, 34 N. Y. 386; *Starin v. Kelly*, 88 id. 418.

So where it is sought to impeach a general assignment for the benefit of creditors, it is proper to inquire of the assignor as to his object and intent in making it. *Forbes v. Waller*, 25 N. Y. 430; *Watkins v. Wallace*, 19 Mich. 57. And in an action for a malicious prosecution, the defendant may be asked as a witness in his own behalf, as to the absence of malice, and as to the existence of probable cause; and he may state that he believed the truth of the charge made by him against the plaintiff in the action alleged to have been malicious. *McKown v. Hunter*, 30 N. Y. 625. See, also, *Griffin v. Marquardt*, 21 id. 121. These cases in the Court of Appeals are all of them, in principle, opposed to the decision in *Ballard v. Lockwood*, above cited. There are cases in which an act is lawful or unlawful, depending on the particular intent of the actor. In such cases it is competent to prove the motive and intent of the party. *Seymour v. Wilson*, 14 N. Y. 567; *Fiedler v. Darin*, 50 id. 437; *Thurston v. Cornell*, 38 id. 281; *Snow v. Paine*, 114 Mass. 510; *Conway v. Clinton*, 1 Utah T. 215. The intent in such cases is a material fact in issue. *Cortland County v. Herkimer County*, 44 N. Y. 22. So when an act is equivocal in its character the intent must be ascertained in order to give it its proper effect and assign it its proper place in the transaction. For example, in an action upon a promissory note where the defense is usury, and it is shown that the plaintiff reserved a sum of money ostensibly for the purpose of obtaining pay for the trouble and expense incurred in obtaining the money to make the loan, it is competent to ask the plaintiff whether the sum reserved was intended as compensation for the loan, or as compensation for the trouble and expense incurred in collecting the money to be loaned. *Thurston v. Cornell*, 38 N. Y. 281. See, also, *Haughwout v. Garrison*, 69 id. 339. This is, however, an extreme case which the courts will not willingly extend. *Dillon v. Anderson*, 43 N. Y. 231.

But when the act is illegal the intent of the offender is immaterial. It will not avail one who deliberately fires his neighbor's house to

swear that he did not intend to commit arson. And one who deliberately and intentionally secures to himself \$1,650 at the end of four months in return for the present advance of \$1,500 cannot avoid the consequences of his acts by swearing that he did not intend to take usury ; that is, that he intended to give the transaction a different name from that which the law gives it, and call that a purchase and sale which the law calls a loan of money secured by mortgage. *Fiedler v. Darvin*, 50 N. Y. 437.

In one of the cases cited the court, in commenting on the authorities which hold that a witness may be asked his motive or intent in doing an act, says : "We think that they hold no more than this : That where the doing of the act is not disputed, but is affirmed, and whether the act shall be held valid or invalid hangs upon the intent with which it is done, which intent from its nature would be formed and held without avowal, there he upon whom the intent is charged may testify whether he secretly held such intent when he did the act." *Dillon v. Anderson*, 43 N. Y. 231, FOLGER, J.

It must be remembered, too, that the intent with which an act was done may be so far a part of the transaction under consideration that a witness who would be permitted to testify to it as against a living person would be incompetent to testify to it when the transaction was with a person since deceased. See *Tooley v. Bacon*, 70 N. Y. 34.

Whenever a fraudulent intent is imputed to a person, or forms an element of a crime with which he is charged, he may deny the fraudulent intent, whether the effect is to defeat a cause of action or lessen the damages or punishment which may be inflicted. *Babcock v. People*, 15 Hun, 347. Thus, in an action for a fraud, as in the case of a sale or exchange of horses, if the party charged with the fraud is a witness, he may testify that he did not cheat or defraud, and that he had no intention to cheat or defraud the opposite party. *Pope v. Hart*, 35 Barb. 630 ; S. C., 23 How. 215. In the case last cited, the action was for a fraud in the sale of a span of horses ; and on the trial, the counsel for the defendant asked him the following question : "Did you intend, on that sale, to cheat, defraud or deceive the plaintiff in any manner ?" The justice refused to allow the question to be answered ; but the Supreme Court held the question to be proper, and reversed the judgment of the justice and that of the County Court in affirmance of it.

The terms of a contract may in some cases be proved without stating the precise language used in making it. In one case, the action was for the use and occupation of certain premises which had been leased by the witness as an agent of the plaintiffs. On the trial, he testified

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to the leasing of the premises by a parol lease. The witness was then requested to "go on and state the terms on which he leased the premises to the defendant." This was objected to by the defendant, on the ground that the witness should state what was said between the parties, and that it was for the court to decide from that, what the terms of the lease were, but the question was allowed, and the witness then stated that he leased the premises to the defendant for one year, at \$50 a year, payable quarterly; that the defendant accepted it on those terms, and went on and occupied the premises. This was held right, and the court said, in *Frost v. Benedict*, 21 Barb. 248, 249: "We think the questions upon these objections were correctly decided by the justice. The question objected to did not call for the conclusion of the witness, as the counsel for the appellant supposes. The witness had just before stated the fact, without objection, that he had leased the premises for the plaintiff to the defendant, at \$50 a year, and the question required him to state the terms on which the premises were leased to the defendant. The leasing was by parol, and the question was nothing more or less than asking the witness to state what the contract was; to state what each party agreed to; to state the terms or provisions of the parol contract, or the particulars of the transaction. When the witness stated that the defendant accepted it on those terms, and went on and occupied it, it was equivalent to stating the fact that he, the defendant, agreed to take the lot upon the terms mentioned, and consummated the agreement by going into possession."

So, where the question is whether the defendant alone, or he, with other persons, employed the plaintiff to do certain work, it is competent, on the direct examination, to ask the witness this question: "On the part and behalf, and for whom were the services rendered?" *Sweet v. Tuttle*, 14 N. Y. 465. Such a question calls for a fact, not a conclusion or opinion. *Ib.* The court said, page 471: "The fact which it calls for may have been a conclusion deducible from other special facts, but this could not well appear until the question was answered and the examination then pushed somewhat further. After the inquiry was answered, the plaintiff had a right, if he pleased, to cross-examine, and it might thus have appeared that the fact stated by the witness was a mere deduction of his own mind from the special circumstances of the transaction. But this course was not taken; and on the face of the question I think the answer called for belonged to a class of facts to which a witness may be allowed to speak directly."

But this rule is never so far relaxed as to permit a witness to give

his *understanding* of an agreement or his *opinion* as to what it was. *Murray v. Bethune*, 1 Wend. 191; *Rich v. Jakway*, 18 Barb. 357; *Simmons v. Fay*, 1 E. D. Smith, 107. The witness need not give the precise words of the contract; the substance of it will be sufficient, if that is all the witness can give. *Ante*, 439. But a mere vague impression, or an understanding or opinion, is entirely illegal evidence, if properly objected to.

When it is important to determine the mental condition of a person opinions are sometimes evidence, even when the question is not one of skill or science.

When the question is whether a person was intoxicated at the time he did a certain act, it is competent to ask a witness who saw him at that time, whether, in his judgment, such person was to any considerable extent under the influence of intoxicating liquors. *People v. Eastwood*, 14 N. Y. 562; *State v. Pike*, 49 N. H. 399.

In *People v. Eastwood*, the court said, page 566: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation, merely; but the child could not, probably, describe the conduct of the man so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue. The parties who rely on their testimony will still suffer an inconvenience, for the court and the jury are always most impressed by those witnesses who can draw and act a living picture before them of what they have seen; so that if there is any controversy as to the fact, such witnesses control. If there is no controversy as to it, the general testimony answers all useful purposes."

From what has already been stated it will be seen that it is a general but not universal rule that a witness must state facts and not opinions. But the exception to this rule is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning. It extends also to the evidence of common observers testifying to the results of their observations made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to the court or jury. Where a witness has had the means of personal observation, and the facts and circumstances which lead his mind to a conclusion are incapable of being detailed and

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described so as to enable any one but the observer himself to form any intelligent conclusion from them, he may be allowed to add his opinion, or the conclusion of his own mind. What is thus given by the witness is not a mere opinion but a conclusion of fact to which his judgment, observation and common knowledge have led him in regard to a subject-matter which requires no special learning or experience, but which is within the knowledge of men in general. *Cavendish v. Troy*, 41 Vt. 99; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Eyerman v. Sheehan*, 52 Mo. 221.

The question whether a sidewalk made of rough plank laid on stringers is properly constructed or not is not a question exclusively for experts, but one which may be determined by any man of common sense, of ordinary observation and experience. *Alexander v. Town of Mt. Sterling*, 71 Ill. 417. In an action for fraud in selling an unsafe horse, a non-expert witness, who is acquainted with the disposition of the horse in question, may give his opinion as to whether the horse was safe and kind. *Sydleman v. Beckwith*, 43 Conn. 9. But in an action for a breach of warranty on an exchange of a yoke of cattle by the defendant for a horse of the plaintiff, the plaintiff asked one of his witnesses the following question: "What was the character of those cattle, orderly or disorderly"? and this was held to be an improper question, because the conclusions or opinions of the witness were not competent evidence; and that the proper way to establish the character of the cattle was to prove the facts and circumstances and submit the question to the jury for their decision. *Strevel v. Hempstead*, 44 Barb. 518. In such a case, the court, or the jury, if one is impaneled, must form their conclusions from the proof of facts, and not from the opinion of witnesses. *Ib.*

Whether a person is nervous and excited or calm, or whether drunk or sober, or whether a person is sick, requires no particular scientific knowledge, and may be testified to by any one who knows the fact. *Dimick v. Downs*, 82 Ill. 370; *Sharoneetown v. Mason*, *id.* 337. But it may be otherwise as to proving the character of the sickness. *Ib.* See *Elliott v. Van Buren*, 33 Mich. 49; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535.

To prove a tender, under an agreement made by the defendant's testator, that he would purchase a bond if it was offered to him on a specified day, a witness testified that, on that day, he presented the bond at the testator's place of business, he not being there, and being represented to be out of town; that on a subsequent day the witness called there, and found a person who answered to the name, and acknowl-

edged the agreement to be his, but said he could not redeem the bond, and who, on being told that the witness had been there twice before, said he had been out of town. There was no evidence that the testator was not out of town, or that he was out of town and within the State; and this was held to be *prima facie* sufficient evidence to excuse a personal tender on the day, and that it was sufficient to go to the jury on the question of identity. *Howard v. Holbrook*, 9 Bosw. 337.

Where the mental capacity of a testator is in question, and a layman is examined as to facts within his own knowledge and observation, tending to show the unsoundness of the testator's mind, he may characterize, as rational or irrational, the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it, to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited to his conclusions from the specific facts which he discloses. His position is that of an observer, and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question, whether the mind of the testator was sound or unsound. *Clapp v. Fullerton*, 34 N. Y. 190. An exception to this rule is recognized in the case of attesting witnesses. They are present at the very act of execution, and their opinions on the general questions of testamentary capacity are admitted from necessity; and, therefore, subscribing witnesses may be required to state not only such facts as they remember, but their own convictions as to the testator's capacity, for it may well happen that on so vital a point they may retain a clear recollection of the general result, long after the the particular circumstances are effaced by lapse of time or obscured by failing memory. *Ib.* See, also, *Rollwagen v. Rollwagen*, 3 Hun, 121; affirmed, 63 N. Y. 504.

The subscribing witnesses to a will or deed are competent witnesses as to the soundness of mind of a testator or grantor, at the time of executing the instrument, whether such witnesses are persons of science and skill or not. *Dewitt v. Barley*, 9 N. Y. 371; *Hewlett v. Wood*, 55 id. 634; *Culver v. Haslur*, 7 Barb. 314; *Brand v. Brand*, 39 How. 193. But the opinions of other persons are not thus competent unless they are possessed of the requisite science or skill to authorize

them to express an opinion on the subject. *Dewitt v. Barley*, 9 N. Y. 371; S. C., 17 id. 340.

The opinions of unprofessional witnesses must be confined to facts alone, and not allowed to embrace any matter of law. Mental imbecility, arising from old age, stands upon the same principle. *Dewitt v. Barley*, 17 N. Y. 340.

The opinion of witnesses who are not experts is not admissible on the general state of a person's mind and his mental condition, except in the case above mentioned. *Real v. People*, 42 N. Y. 270; *O'Brien v. People*, 36 id. 276.

So, upon a trial involving the question of the mental imbecility of the testator or grantor, a non-professional witness cannot be asked the broad question whether, at the time referred to, such person "was out of his mind," nor the question: "Was he so affected in his mind as to be unfit for transacting business?" *Deshon v. Merchants' Bank*, 8 Bosw. 461.

On a question of sanity or insanity, a medical witness, who is not acquainted with the person whose sanity is in question, and who has heard but a portion of the evidence on the trial relating to that question, is not competent to give an opinion on the subject. *People v. Lake*, 12 N. Y. 358.

When a question is a complex one, of law and fact, and when it is in the nature of a conclusion of law, the general rule is that it cannot be proved by opinion. *Heroy v. Van Pelt*, 4 Bosw. 60. As to exceptions to the rule, see *ante*, 591.

When the question is, whether a signature or an indorsement was recently made, it is not competent to prove the fact by the opinions of witnesses as to the age of the ink. *Sackett v. Spencer*, 29 Barb. 180. It is not a question of science or skill, and the court and jury are as competent to judge of that fact, from the appearance of the ink, and whether the name were recently written, as would be the opinion of any other person. *Ib.* And see *Phœnix Fire Ins. Co. v. Philip*, 13 Wend. 81.

Where a witness is skilled in a particular profession, art or trade, he is competent to express an opinion upon subjects connected with such profession, etc., although, at the time the question is asked, he may have abandoned it, and have engaged in another business. *Bearss v. Copley*, 10 N. Y. 93. A party may show, by an expert, that a particular machine was not constructed in a good and workmanlike manner, even though the party offering the evidence declares that he does not propose to follow it by proof of the particulars in which it was defect-

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ive. *Curtis v. Gano*, 26 N. Y. 426. And, if the court rejects the evidence, on the ground that it is not intended to show in what particulars the machine was not constructed in a good and workmanlike manner, it will be an error which will be ground for reversing the judgment. Ib. A witness who testifies that he is somewhat familiar with railroad car-brakes and with the operation of them, and has used them on a railroad, and knows which are the best brakes, is a competent witness to testify as to the distance within which any given train can be stopped with a designated class of brakes and a given number of brakemen. *Mott v. Hudson River R. R.*, 8 Bosw. 345.

The value and importance of opinions is a proper question for the court or jury. A great deal of respect is due to the opinion of a learned and scientific witness, in a matter which requires great skill to understand the subject. But the opinions of even such a witness are no more controlling than those of any other intelligent and experienced witness, when speaking upon subjects which lie within the range of common observation and experience. *Brehm v. Great Western Railway Co.*, 34 Barb. 257, 273.

The order and time of admitting evidence is so much a matter of discretion that it will be sufficient to refer to that title for all needful information upon that subject.

§ 29. **Examining witnesses separately.** It may, in some cases, be thought advisable to examine witnesses separately and out of the hearing of each other, with a view to obviate the danger of a concerted story among them, and to prevent the influence which the account given by one may have upon another. For this purpose, the court, on the application of counsel, has authority to order the witnesses on both sides to withdraw from the court-room, except those on examination. Attorneys and counsel who are witnesses in the cause, and scientific witnesses, are usually excepted from the rule. Scientific witnesses, who speak to matters of opinion, would properly, if not necessarily, be permitted to remain in court, because their opinion is frequently, if not generally, formed upon the facts which are sworn to by other witnesses.

It was formerly considered a matter of discretion with the court, whether to permit a witness to be sworn, if he disobeyed the order to withdraw; but it is now generally considered a correct practice not to reject such witness, but to allow his disregard of the order to be commented on to the court or jury, as to the credit which should be given his evidence.

In a proper case, the court may enforce the order by committing the

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witness for a contempt for his refusal to obey the order. But that practice should not be adopted, except in an extraordinary case. And it will be a rare case indeed, in which any witness can be found who will attempt to disregard such an order.

§ 30. **Leading questions.** Leading questions, that is such as instruct or intimate to a witness how he is desired to answer on material points, are not allowable on examination in chief. This rule proceeds partly on the supposition that the witness is favorable to the party who calls him, and, accordingly, it is relaxed whenever it clearly appears that the witness is hostile, or that a more searching mode of examining him is necessary to elicit the truth.

A party, in preparing to support his case by testimony, has an opportunity of examining the witnesses before the trial, and of producing at the trial those only whose testimony he thinks most likely to serve him. The assumption, therefore, that the witness is favorable to the party who calls him is not unreasonable; and in practice, the fact is generally well known to support it. This, however, is not always the case, for a party is sometimes so circumstanced that he is compelled to rely upon the evidence of a witness whom he knows to be hostile, but who also knows material facts, if he will truly and fully disclose them.

And, again, as the practice now stands in this State, either party may call the other as a witness, and the interest of the party so called is almost always and unavoidably adverse to that of the party who calls him.

Leading questions are such as may be answered in the affirmative or negative, and suggest the desired answer. *Mathis v. Buford*, 17 Texas, 152. But a question may not be leading, though it calls for a direct affirmative or negative answer, if it is no more suggestive of one than the other. *Spear v. Richardson*, 37 N. H. 23. On the other hand a question which suggests the answer is none the less leading because propounded in the alternative form. *State v. Johnson*, 29 La. Ann. 717.

A question which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, or plainly suggests the answer which the party desires to obtain from him, is leading, whether put in the alternative form or not. *Page v. Parker*, 40 N. H. 47.

Questions are objectionable as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirma-

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tive, though neither the one nor the other is directly suggested. In this case, as well as in those where direct leading questions are put, the evidence so drawn from the witness is not his genuine unassisted testimony, but a statement artfully contrived, shaped and colored by professional skill, with a complete knowledge of the facts which the party seeks to establish. If such a mode of examination were allowed it must frequently happen that a witness would not state the whole of a transaction, but a part only would be elicited, and that to secure a particular purpose; the chance also of detecting discrepancies in false or erroneous testimony would be much diminished. Nor would these inconveniences be entirely removed by the power of cross-examination, which, as it must often be conducted without any previous knowledge of the answers to be given by the witness, is not a counterbalance to the facility afforded in the examination in chief, of presenting a selected and concerted portion only of the facts. The rule as to leading questions must, however, be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be unnecessarily and inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points or facts as to which he is expected to speak, the examining counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established.

In an action to recover for work done and materials furnished in various parts of a building, under a special contract, requiring the plaintiff to conform to plans and specifications, which formed a part of the contract, other plans, as well as maps and drawings, exhibiting various parts of the building and premises on which the work was to be done, are admissible in evidence, as introductory to testimony; and a question to a witness whether such a plan is correct, though leading, is still proper, as mere inducement. *Stuart v. Binsse*, 10 Bosw. 436.

A question may be leading in form, but still be unobjectionable if merely intended to direct the attention of the witness to the subject-matter of his testimony. *Love v. Love*, 40 Iowa, 220; *Shields v. Guffey*, 9 id. 322. And where a witness is unwilling or very ignorant, leading questions should always be allowed. *Doran v. Mullen*, 78 Ill. 342; *State v. Benner*, 64 Me. 267.

Leading questions are sometimes eminently proper on direct examination, as for example, when it becomes necessary in an action to prove the contents of a lost paper, and a witness is called by the plaintiff on that point. In such case it is proper to ask the witness to state whether

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the paper in the hands of the witness is a true copy of the lost paper. *Adams v. Harrold*, 29 Ind. 198. See *Green v. Gould*, 3 Allen (Mass.), 465.

But in putting a leading question to a witness where a leading question is proper, the interrogatory must not assume facts to have been proved which have not been proved, nor that particular answers have been given which have not been given. *Carpenter v. Ambrosion*, 20 Ill. 170; *McClay v. Hedge*, 18 Iowa, 66; *People v. Mather*, 4 Wend. 229; *Stuart v. Binsse*, 10 Bosw. 436.

If a witness should appear to be in the interest of the opposite party or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of cross-examination. *People v. Parish*, 4 Denio, 153.

When one of the parties to the action is called by the opposite party as a witness, the party so called must be necessarily considered as an adverse witness, and the party calling him has a right to put leading questions to him, even if they assume the form of a cross-examination. In such a case there is no danger that a leading question will tempt the witness to testify as the examining party desires, and therefore the reason of the rule forbidding leading questions ceases.

But, when a party offers himself as a witness in his own behalf, he ought on no account to be examined by leading questions by his own counsel, for there is no danger but he will answer fully all fair and legitimate questions which may be put to him on his side of the case.

His opponent, however, may on the cross-examination go into the whole case, and in so doing may put leading questions as to the motives of the witness if his state of mind is a material question in the case. *Livingston v. Keech*, 2 Jones & Sp. 547.

The pernicious influence of leading questions is most felt and to be feared when the object of inquiry is to ascertain the details of a conversation, admission or agreement, and therefore more rigor is called for and justified in confining the direct examination in such cases to its appropriate rules. Per MARCY, J., in *People v. Mather*, 4 Wend. 248.

When an omission is caused by want of memory, a suggestion may be permitted to assist it. Thus where a witness, called to prove the partnership of the plaintiffs, was not able at the moment to specify the several names of the parties, the court permitted the witness to be asked whether certain specified persons were members of the firm. There are other cases in which some suggestions may be allowed to be given to a witness, as where he is called to prove a delivery of goods,

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consisting of numerous items, or delivered at various times. Such cases evidently do not fall within the principle which prohibits leading questions.

It has been said that when a witness has been examined by one party, he may afterward be cross-examined by the same party, as an adverse witness, when he is called by the adversary as one of his own witnesses. *Dickinson v. Shee*, 4 Esp. N. P. 67. But if a party omits, from prudential motives, to examine his adversary's witness as to any branch of his own case, there seems to be no reason why, when he afterward adopts him as his own witness, he should not be so considered for all purposes, and why the adversary should not then be entitled to cross-examine him. The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff, and the other for the defendant, and if each party calls him as his own witness, there seems to be no reason why each should not in turn be bound by the same principle — why each, in examining into his own case, should not be precluded from putting leading questions, and be entitled to cross-examine as to his adversary's case.

There is no settled and absolute rule as to what extent leading questions may be put on an examination in chief, when the object is to prove that another witness, examined on the opposite side, has, on some former occasion, made a different and contradictory statement. If, for example, a witness, on cross-examination, were to deny that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, it is sometimes considered a question whether it would be competent for the counsel in examining that third person in chief as his witness, for the purpose of contradicting the former witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions. This form of putting the question is not uncommon, but frequently passes without objection.

It has been held that where the plaintiff has testified that the defendant admitted a balance to be due, the latter may be asked as a witness whether he made such admission, and that it is not objectionable as a leading question. *Potter v. Bissell*, 3 Lans. 205.

Whether a leading question shall be put to a witness is always a matter which appeals to the discretion of the court, and the allowance or the refusal of such a question is never a ground of reversal of the judgment. *Cheaney v. Arnold*, 18 Barb. 435; *Budlong v. Van Nostrand*, 24 id. 25; *Williams v. Eldridge*, 1 Hill, 250; *Seymour v. Brad-*

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field, 35 Barb. 49; *Weber v. Kingsland*, 8 Bosw. 416. There may be cases in which there is such a palpable abuse of this discretion as may authorize an appellate court to correct it, by a reversal of the judgment, though such cases are very rare. *Ib.*

The rule that a leading question is in the discretion of the court trying an action is now so well settled that it has ceased to be considered as a matter for review upon an appeal. *Black v. Camden and Amboy Railroad and Transportation Co.*, 45 Barb. 40. See *Vrooman v. Grif-fiths*, 1 Keyes, 53; S. C., 4 Abb. Dec. 505; *Lewis v. Rogers*, 2 Jones & Sp. 64.

Where a commission has been issued, executed, and returned, it is a matter of discretion with the justice, when an objection is taken to an interrogatory as leading, to admit or to reject the answer. *Hall v. Barton*, 25 Barb. 274; *Cope v. Sibley*, 12 id. 521, overruling *Williams v. Eldridge*, 1 Hill, 249.

Leading questions are admitted on the cross-examination of a witness where much larger powers are given to counsel than in the original examination. Witnesses under cross-examination may be led immediately to the point on which their answers are required. If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts or even particular expressions. There can be no danger of leading too much, where the witness is obstinately determined not to follow.

On the other hand, instances frequently occur where the witness is adverse to the party who calls him, and leans strongly to the other side; here there must be some restriction as to the form and manner of cross-examining. It often happens that a witness, on cross-examination, waits only for a hint to shape a favorable answer, and is, in effect, the witness of the cross-examining party, though technically called the witness of the opposite side, as, when one party calls the other as a witness. To put strong leading questions to such a witness, on cross-examination, without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial.

§ 31. **Refreshing memory.** Although, in general, leading questions are not to be put to a witness, yet, where his memory has failed, he may, even during examination, read, or, if necessary, have the contents of a document read, for the purpose of reviving his former recollection. And if, by that means, he obtains a recollection of

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the facts themselves, as distinct from the memorandum, his statement is admissible in evidence.

But it is not, in every case, admissible to put a memorandum into the hands of a witness, and then request him to examine it, for the purpose of refreshing his recollection. If a witness, on his examination in chief, does not suggest any want of recollection, nor express any desire to refresh his memory, nor manifest, by his answers, any want of ability to answer, readily and fully, all questions that are put to him, the examining counsel will not be permitted to put into his hands any document, paper, or memorandum, relating to the facts concerning which he has been called to testify. *Driggs v. Smith*, 45 How. 447; *Haack v. Fearing*, 5 Rob. 528; *Squires v. Abbott*, 61 N. Y. 530, 535; *Young v. Catlett*, 6 Duer, 437. In the case just cited, the court said, pages 441, 442: "In the progress of the trial, the defendant, while examining one of his witnesses (after numerous questions, all of which were answered with great particularity, and without any suggestion or pretense of want of recollection of any detail or particular called for), required the witness to look, for the purpose of refreshing his memory, at a memorandum, copied by himself from entries made in certain books of account, at or about the time of the transactions in question, by other persons. The objection of plaintiff's counsel to his referring to any such paper, for any such purpose, was sustained, and the defendant excepted. The examination of the witness was continued and completed; and, though examined at a great length, there was no intimation of any failure of memory to recall each and all the circumstances inquired of by the defendant's counsel, and his answers were explicit and positive; nor does it appear that there was any intention to examine him as to any other facts than those to which he testified.

"If it were conceded that a copy from entries made by others was no more liable to objection than the original books, and the fact that the entries were not made by himself did not affect the question, *Huff v. Bennett*, 6 N. Y. 337, still, we do not perceive the propriety of putting into the hands of a witness a paper, for the purpose of refreshing his recollection, when his memory is already fresh and his recollection full, on the subject of inquiry. On the contrary, if the witness assumes to know and to remember, and does answer the inquiries proposed, we not only think it unnecessary to refresh his recollection, but that it would be unjust to the adverse party to permit it. An important ground for questioning the credibility of a witness, whether as untruthful or biased, is often found in his assuming to know and state what he does not know, or to recollect what, from lapse of time or other circum-

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stances, it is in a high degree improbable that he can remember; and so long as the witness assumes to answer from memory, we think he should be permitted to do so. If it might be permitted to the examining party, by anticipation, to guard against falsehood, mis-statements, or indications of partiality, by showing the paper to the witness on the stand, when he gave no intimation of any want of memory, it would be liable to great abuse, and deprive the adverse party of important means of affecting his credibility. And, although it may be very proper to show such a paper to a witness, for the purpose of enabling him to supply deficiencies in his testimony, or, perhaps, even to correct inaccuracies into which he has fallen, yet, where there was, as in this case, no pretense of either, in respect to any matter to which the memorandum related, we think the ruling does not call for any interference with the judgment.

“To permit the examining party to place a paper in the hands of a witness, under the circumstances stated, in anticipation of the contemplated questions, is to suggest to him the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions. When the witness does not suggest any want of recollection, nor express any desire to refresh his memory, nor manifest by the answers he gives any lack of ability to answer fully and specifically, we cannot think it is error not to permit him to look at a paper, at the solicitation of the counsel.”

There are three classes of cases in which it is permitted to refresh the recollection of a witness by memoranda. First, when the writing serves merely to revive or assist the memory of the witness, and to bring to his mind a recollection of the facts. *Golden v. Pierson*, 42 Ala. 370; *Hill v. State*, 17 Wis. 675; *Williams v. Miller*, 1 Wash. Ter. 105; *Marclay v. Shults*, 29 N. Y. 346. Secondly, where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw it, he knew the contents to be correct. *McCausland v. Ralston*, 12 Nev. 195; *Lewis v. Ingersoll*, 1 Keyes, 347; *Cowles v. State*, 50 Ala. 454; *Mims v. Sturdevant*, 36 id. 636; *Guy v. Mead*, 22 N. Y. 462; *Halsey v. Sinsabaugh*, 15 id. 485; *McCormick v. Pennsylvania Central R. R. Co.*, 49 id. 303. Thirdly, when it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction on his mind on seeing a writing which he knows to be genuine; *Martin v. Good*, 14 Md. 398; as, for instance,

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where a banker's clerk is shown a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor his writing any thing upon the bill.

In the first class of cases, where the memory has been revived by the previous inspection of a writing, it is not necessary, as a condition of the admission of his oral testimony, that the writing should be produced in court. *Peck v. Lake*, 3 Lans. 136. The case seems to differ only in degree from many others in which the memory is revived by reference in the mind of a witness to any circumstance to which his attention may have been drawn with a peculiar degree of force. The absence, however, of the writing might afford matter of observation. If it is produced, the counsel of the other party has a right to see it, and cross-examine from it. *Peck v. Lake*, 3 Lans. 136. See *Adae v. Langs*, 41 Iowa, 536; *Chute v. State*, 19 Minn. 271; *McKivitt v. Cone*, 30 Iowa, 455; *Commonwealth v. Haley*, 13 Allen (Mass.), 587.

Where the writing has not the effect of reviving the memory of the witness, but it yet enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced, and on proper proof that the witness knows that the statements in the paper were true at the time it was made, the paper itself is received in evidence.

According to Mr. Phillips' view of the English rule, such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates.

A different rule prevails in this State; and if a witness swears that at the time a memorandum was made, he knew that the facts stated in it were true, whether he made the writing himself, or saw one written by another, and he does not recollect the facts stated after refreshing his memory, by reading the writing, such writing may be read in evidence in connection with the oral testimony of the witness. *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Marchy v. Shults*, 29 id. 346.

In *Russell v. Hudson River Railroad Co.*, 17 N. Y. 134, 140, the court, in speaking of this rule, said: "Here, a witness who says that after refreshing his memory by a written memorandum, made by himself at or about the time of the occurrence, he cannot recollect the facts but that he is confident that he knew the memorandum to be correct when it was made, is not required to swear to the fact in positive

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terms, but the memorandum itself is received in connection with, and as auxiliary to the oral testimony. I confess my decided preference for the American practice, since it is obvious that nothing whatever is added to the force of the evidence by the positive oath of the witness, after he has stated that he has no recollection of the facts aside from the memorandum. It is, however, an indispensable preliminary to the introduction of such a memorandum in evidence, that it should appear that the witness is unable, with the aid of the memorandum, to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness, that the writing is admissible. It is the duty of the court, in all such cases, to see, before receiving the memorandum in evidence, that it was made at or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witness; and that there is a necessity for its introduction, on account of the inability of the witness to recollect the facts." If the witness recollects the facts independently of the paper, such paper is not admissible in evidence. *Ib.*

The rule that the memorandum must be one which is made in the ordinary course of business, and as a part of the business of the witness, is not in force in this State; and every species of memorandum is admissible here, provided it is brought within the rules relating to the admission of any memoranda. *Guy v. Mead*, 22 N. Y. 462. In the last case cited, the question was as to the time the later of two indorsements was made upon a promissory note. A witness testified that he made a computation of interest upon the note; and that at the time he made it there was but one indorsement upon the note. He also swore, on his direct examination, that the computation was made on the 1st day of April, 1848; but on his cross-examination, he stated that he had no recollection as to the time when it was made, independently of the writing; but that he had no doubt that the computation was accurate, and that the last indorsement was not on the note at the time when the written computation was made. This memorandum or computation was held to be competent evidence in connection with the oral evidence of the witness who made it.

A witness may look at a memorandum for the purpose of refreshing his recollection, and if, after reading it, his memory is so much revived that he can speak accurately and confidently of the fact to which such memorandum relates, his evidence will be competent. And the witness may, in such a case, refresh his recollection by looking at an unstamped writing, even though the paper itself may be inadmissible for want of a proper stamp. *Maugham v. Hubbard*, 8 Barn. & Cres. 14.

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It is competent to read an entry, made by a witness, of any fact material to the issue, if made at or near the time when the fact occurred, and he can swear that it was made correctly. *Marchly v. Shults*, 29 N. Y. 346; affirming S. C., 39 Barb. 600. So, the witness may use an entry made by himself, or any other person, or a copy of an entry, if, on reading it, he can testify that he then recollects the fact to which the entry relates. *Ib.*; *Sturm v. Atlantic Mut. Ins. Co.*, 6 Jones & Sp. 281. A witness testified that he had measured the flush-board on a dam in 1852 or 1853, and had made a memorandum of the width on a piece of paper, and that he had a correct copy of it, then in court; that he first made the memorandum on paper, then marked it on the shop or work-house, and that he made the copy, then in his possession, from the marks in the building. The plaintiff's counsel then told the witness to look at the paper and state the width of the flush-boards. The witness had previously stated the width of the flush-boards, from the memorandum, without objection, but it was held that it was not competent for the witness to read the memorandum, because it was not an original entry, and, therefore, not evidence of its contents, and it was not used or offered to refresh the recollection of the witness. *Ib.*

§ 32. **Criminating answers.** The privilege of witnesses in not being compellable to answer those questions which may affect their own personal rights is a matter of frequent occurrence, and of considerable importance. The cases which will be here considered are those where the witness may, by answering, subject himself, first to a criminal prosecution, to a penalty, or forfeiture; or, secondly, to an action commenced by civil process.

In the first place, then, it is clear that a witness cannot be compelled to answer any question, the answering of which may expose or tend to expose him to a criminal charge, or to any kind of punishment. *Rutherford v. Commonwealth*, 2 Metc. (Ky.) 387; *Fellows v. Wilson*, 31 Barb. 162; *Eaton v. Farmer*, 46 N. H. 200; *State v. Marshall*, 36 Mo. 400; *Wilkins v. Malone*, 14 Ind. 153. He is exempted by his privilege from answering not merely what will criminate him directly, but also from what has any tendency to criminate him; and the reason is, because otherwise question might be put after question, and though no single question might be asked which directly criminales, yet enough might be got from him by successive questions whereon to found a criminal charge against him. *Henry v. Bank of Salina*, 1 N. Y. 83. See *Printz v. Cheeney*, 11 Iowa, 469.

It is the province of the court to decide whether a proposed question has a tendency to criminate a witness; *State v. Duffy*, 15 Iowa, 425;

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and it is the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretense of defending himself, secure others from justice, or withhold evidence which he might safely give. The court will require to be satisfied that the witness is acting an honest part, and that he may incur danger by answering. When satisfied of this, it will allow the privilege. To force him to reveal particulars might lead to a prosecution, against which he has a right to protect himself. *Eaton v. Farmer*, 46 N. H. 400.

The privilege of refusing to answer a question is the privilege of the witness, and not of the party by whom he is called, and for that reason the court will not allow counsel to argue in support of the privilege as belonging to the party whom he represents. *Thomas v. Newton*, Mood. & Malk. 48, note *a*; *Clark v. Reese*, 35 Cal. 89.

The counsel of the parties have no right to interrupt an examination, by advising a witness that he is not bound to answer the question. *Taylor v. Wood*, 2 Edw. Ch. 94. It is the duty of the court to inform the witness of his legal rights, and to say to him that he is not bound to answer questions which will criminate him or subject him to a penalty. *Ib.* The court will, therefore, always apprise a witness of his privilege as soon as a question is asked which may place him in danger.

Such is the rule as to a witness who is not himself a party. *Cloyes v. Thayer*, 3 Hill, 564; *Southard v. Rexford*, 6 Cow. 254; *People v. Brown*, 72 N. Y. 571.

But when the witness is also a party there is no reason for the application of the rule. By taking the stand as a witness, while he may subject himself to the rules applicable to either witnesses, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. *People v. Brown*, 72 N. Y. 571.

On the trial of an indictment, the public prosecutor has no right to object that a question put to a witness will subject him to a criminal punishment. It is the personal privilege of the witness alone: *Ward v. People*, 6 Hill, 144.

So, in a civil action, the privilege is exclusively that of the witness; and if he asserts it, but is notwithstanding compelled to answer, the party cannot allege this as a ground of error. *Cloyes v. Thayer*, 3 Hill, 564. But if the court improperly allows the

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privilege, and excludes the evidence when it ought to have been admitted, this will be error. *Ib.*

If the witness is willing to criminate himself the party cannot object. *Newcomb v. State*, 37 Miss. 383. And if the witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the subject, even though his answers may criminate or disgrace him. *Norfolk v. Graylord*, 28 Conn. 309.

The same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor undoubtedly excuses him from producing books or papers, the contents of which may be used against him, and tend to the same result. *Byass v. Sullivan*, 21 How. 50, 53.

When the court can see that the statute of limitations has barred a prosecution for the offense, and all suits to enforce the penalty, the court must see that the witness cannot be prejudiced, and in such a case he is not left to judge whether he can safely testify or not, but the court is bound to pronounce against his exemption. *Close v. Olney*, 1 Denio, 319, 323.

Although it should be assumed that a defendant, who is called as a witness by the plaintiff, is privileged from answering a question put to him on the stand, by the plaintiff, his refusal to answer it, followed by the decision of the justice, that he is not bound to answer, furnishes no ground for reversing a judgment in favor of the plaintiff, on the mere conjecture that his refusal to answer may have created an impression in the minds of the jurors, that the answer, if given, would have tended to make out the plaintiff's case, provided the judgment is in all other respects unobjectionable. *Murphy v. Tripp*, 44 Barb. 189.

A pardon under the great seal takes away the privilege of a witness in not answering, so far as it regards any danger of prosecution by the sovereign power of the State. *Regina v. Boyes*, 1 Best & Smith, 311. A merely remote and naked possibility of legal peril to a witness, from answering a question, is not sufficient to entitle him to the privilege of not answering. To entitle him to the privilege of silence, the court must see, from the circumstances of the case, and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness, from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and hardly possible contingency,

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so improbable that no reasonable man would suffer it to influence his conduct. *Ib.*

But, before the privilege of the witness can be declared against and set aside, it must appear affirmatively that no legal prosecution or steps have been taken for the purpose of punishing the offense, or of collecting the penalty. *Bank of Salina v. Henry*, 2 Denio, 156 ; S. C., 1 N. Y. 83.

In an action at law, where the defendant pleads or gives notice of usury as a defense, and verifies his answer or notice by affidavit, the plaintiff may be called as a witness to prove the usury. 3 R. S. 74, § 11, 5th ed. But the evidence so given by the plaintiff cannot be used against him before a grand jury, nor on the trial of any indictment against him. 3 R. S. 74, § 17, 5th ed.

A witness cannot be asked on cross-examination whether he has not been convicted of petit larceny, although he does not object to answering the question, provided the objection is taken by the opposite party. *Newcomb v. Griswold*, 24 N. Y. 298. So a party may object to a question whether the witness had not made certain statements in an affidavit, which is not produced, although the witness does not object to answering. *Ib.*

If a witness claims the protection of the court, on the ground that his answer would tend to criminate himself, and there appears to be reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer, notwithstanding, what he says must be regarded to have been obtained by compulsion, and cannot be given afterward in evidence against him. *Regina v. Garbett*, 2 Car. & Kir. N. P. 474. It makes no difference to the right of the witness to protection, that he had before answered in part, as he is entitled to claim the privilege at any stage of the inquiry, and no answers forced from him by the court, after such claim, can be afterward given in evidence against him. *Ib.*

A witness is not bound to answer any question which will subject him to a penalty, or have a tendency to subject him thereto. The cases in which penalties are recoverable are so numerous that no attempt at illustration from the cases will be made.

“Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish or tend to establish that such witness owes a debt, or is otherwise subject to a civil suit. But this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or

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misdeemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses." 3 R. S. 690, § 102, 5th ed. ; Code of Civ. Pro., § 837.

A witness may waive his privilege, and answer any such questions, and his evidence will then be competent, however much it may affect the interest of the parties to the action. And in all cases counsel have a right to put questions which might call for a criminating answer. After the question is put, it is then for the witness to claim his exemption from answering, or to waive it and answer the question.

§ 33. **Degrading answers.** The English authorities are so contradictory on the question how far a witness may be compelled to answer questions which are degrading to his character, that but little assistance can be derived from a review of them. One point is clearly established in relation to the matter. Where the transaction as to which the witness is interrogated forms a part of the issue to be tried, he is bound to answer the questions, however strongly the evidence may reflect upon his character. But, when the question is asked for a mere collateral purpose, such, for instance, as the impeachment of the character of the witness, he is not bound to answer any question which will degrade or tend to degrade his character. *Lohman v. People*, 1 N. Y. 380.

A witness on his cross-examination may be asked for the purpose of affecting the weight of his testimony whether he has been convicted of a crime or misdemeanor, and may be compelled to answer the question. Code of Civil Pro., § 832.

Whether a *party* called as a witness has any right to refuse to answer which is not possessed by any other witness is not clear. See *People v. Brown*, 72 N. Y. 571; *Brandon v. People*, 42 id. 265; *Connors v. People*, 50 id. 240; *Real v. People*, 42 id. 270; *People v. Casey*, 72 id. 393.

The language of the Code is broad enough to include all persons offered as witnesses whether parties or otherwise.

The refusal of a witness to answer a question which imputes discredit generally has an effect unfavorable to character, and excites suspicion; whether reasonable or justly must depend upon the sort of person produced and the question put. A man of high honor and character may be disposed to refuse, with scorn and indignation, to answer a question as he feels as an insult; and to infer dishonor in such a case might be the height of injustice. A refusal to answer such a question is never to be taken as an admission of the truth of the imputation conveyed by asking the question. A refusal to answer leaves the matter just as it would have stood if no such question had been

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asked. But, if the witness chooses to answer the question, the answer will be conclusive, and not liable to contradiction, unless the answer is to a question asked the witness on cross-examination which seeks to discover whether he has been convicted of a crime or misdemeanor. The answer of a witness to such questions are not conclusive. Code of Civil Pro., § 832. There is another exception to this rule, perhaps, and that is, where a witness denies, on his cross-examination, that he has attempted to dissuade a witness of the opposite party from attending the trial. In such a case he may be contradicted. *Atwood v. Welton*, 7 Conn. 66, 70, 72. So it may be shown that a witness has attempted to suborn another witness to swear falsely, if he denies, on cross-examination, that he has done so. *Morgan v. Frees*, 15 Barb. 342; *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242, 250.

§ 34. **Confidential communications.** Communications, made on the faith of that professional confidence which a client reposes in his counsel, attorney or solicitor, are not allowed to be revealed in a court of justice, to the prejudice of the client. *Yates v. Olmsted*, 56 N. Y. 632; *Britton v. Lorenz*, 45 id. 51; *Whiting v. Burney*, 30 id. 303; *Coventry v. Tannahill*, 1 Hill, 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 533; *Kings v. Barrett*, 11 Ohio (N. S.), 261.

The Code declares that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment. Code, § 835. This prohibition applies to every examination of a person as a witness unless the client expressly waives the benefit. Code of Civil Pro., § 836.

The prohibition of the Code extends in terms to attorneys and counselors only; and it has been held in Massachusetts, that while the policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client, yet if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness and may be compelled to testify to what he said to his counsel. *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193; S. C., 3 Am. Rep. 333. See, also, *Commonwealth v. Mullen*, 97 Mass. 545. But *contra*, see *State v. White*, 19 Kans. 445; *Carnes v. Pratt*, 15 Abb. Pr. (N. S.) 337.

The expediency of the rule prohibiting counsel from disclosing confidential communications must depend, not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance

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of the failure of justice, resulting from the exclusion of evidence. If, in the cases within the operation of the rule, the only confidence reposed were a confession of guilt or dishonesty, the rule would be obviously detrimental to the interest of justice; but it is conceived that, in a multitude of instances, a person possessed of just rights would be materially impeded in vindicating them, if every communication, made to his professional adviser, might be used against him; if such were the law, it would be necessary, in self-defense, to accompany all communications made to a professional adviser, with a statement of the several circumstances and explanations, which, however unnecessary for the purpose of communication, would be requisite to prevent it from being unfairly used.

If, touching matters that came within the ordinary scope of professional employment, attorneys, counsel or solicitors receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, what amounts to the same thing, if they commit to paper, in the course of their employment in his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers, in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had been commenced, the rule would exclude the most confidential, and it may be the most important, of all communications — those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the court was issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defense against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications the protection would be insufficient if it only concluded communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. *Williams v. Fitch*, 18 N. Y. 546; *Greenough v. Gaskell*, 1 Mylne & Keene, 102, 103; *Root v. Wright*, 84 N. Y. 72.

It would be most mischievous if it could be doubted whether or not

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an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw. The reason of the rule is obvious. It is out of regard to the interests of justice which cannot be upheld, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous.

The rule deducible from the authorities is that all communications made by a client to his counsel for the purposes of professional advice or assistance are privileged from disclosure by the counsel, whether such advice relates to a suit pending, one contemplated or any other matter proper for such advice or aid ; that when the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties. *Britton v. Lorenz*, 45 N.Y. 51; *Whiting v. Barney*, 30 id. 330. See *Carr v. Weld*, 4 Green (N. J.), 319; *Prouty v. Eaton*, 41 Barb. 409; *Gallagher v. Williamson*, 23 Cal. 331. Thus an attorney employed to draw a complaint in an action pending in favor of his client would not be permitted to disclose the communications made to him by the client in relation to the subject-matter of the suit. *Sibley v. Waffle*, 16 N. Y. 180, 183. But an attorney employed to draw a deed is competent to testify as to directions received by him from the parties as to the transaction between them at the time. Knowledge acquired under such circumstances is not within the class of privileged communications. *Hebbard v. Haughian*, 70 N. Y. 54.

The privilege is that of the client and not of the professional adviser and an attorney or counsel will not be allowed, against his client's will, to disclose matters of professional confidence, although he himself is willing to do so. The client, however, may waive his privilege; in which case the court will compel the legal adviser to discover what he knows, even though the interest in the subject-matter, respecting which the confidential communication was made, has passed to a third person, and he objects to the disclosure. *Benjamin v. Coventry*, 19 Wend. 353. But he is not to be considered as waiving it, by calling his attorney or counsel as a witness, unless he examines him as to confidential communications. But, where the privilege belongs to several clients, it cannot be waived by one only, nor even by a majority, con-

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trary to the expressed wish of the others. *Bank of Utica v. Mersereau*, 3 Barb. Ch. 533, 596.

The privilege endures forever, unless removed by the client. *Ib.* But it extends only to information derived from the client, as such, either by oral communications, or books or papers shown to him, or put in his hands by his client, and not to information derived from other persons or sources, while acting as such attorney or counsel. *Spenceley v. Schulenburg*, 7 East, 357; *Crosby v. Berger*, 11 Paige, 377.

The seal of professional confidence will not cover a communication made to an attorney or counsel to obtain professional advice or assistance as to the commission of a felony or other crime which is *malum in se*. *Bank of Utica v. Mersereau*, 3 Barb. Ch. 534, 598, 599, 600. But when the communication merely relates to a fraud which is not punishable criminally, the communication is protected. *Ib.*

A communication made to a clerk of the plaintiff's attorney for the purpose of enabling such clerk to draw a complaint in an action pending in favor of the person making such communication is protected. *Sibley v. Waffle*, 16 N. Y. 180, 183.

When a client makes communications to his counsel in the presence of a third person, not connected with the latter, the privilege does not extend to such third person, and he may be compelled to testify what he has heard upon the subject. *Jackson v. French*, 3 Wend. 337. An attorney or counsel cannot, after he ceases to act in that capacity, disclose what was communicated to him professionally. *Yordan v. Hess*, 13 Johns. 492. But if the client, after the professional relation ceases, chooses to repeat to such attorney any such communication, it will not then be privileged. *Ib.*

The same principle which protects oral communications to counsel also extends to papers or writings in the hands of an attorney or counsel, if placed there for professional purposes. *People v. Benjamin*, 9 How. 419; *Jackson v. Burtis*, 14 Johns. 392; *Jackson v. Denison*, 4 Wend. 558. And he will not be permitted to testify as to their appearance at the time they were exhibited to him. *Gray v. Fox*, 43 Mo. 570. Nor whether a certain writing was indorsed thereon at that time. *Dietrich v. Mitchell*, 43 Ill. 40.

The court will not, in any case, compel an attorney or counselor to disclose a confidential communication made to him by a client. *People, ex rel. Mitchell, v. Sheriff of N. Y.*, 29 Barb. 622; S. C., 7 Abb. 96. So, on the other hand, the court will not tolerate a combination between attorney and client, where the object is to prevent the court

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from compelling the production of important papers which ought to be produced as evidence. *Ib.*

Thus where an attempt is made to establish a will claimed to have been lost or destroyed after the death of the testator, and its execution, and its existence at the time of such death has been shown, and also its delivery to one of the heirs, the attorney who drew the will, and who has subsequently been retained by the heirs to oppose its probate, will not be allowed to cause a failure of justice by refusing to answer proper questions put to him in regard to the will, upon the pretext that he is not at liberty, having been counsel for the testator, to disclose what he chooses to consider confidential communications. *Sheridan v. Houghton*, 16 Hun, 628.

But the court has no power to compel the counsel for one of the parties to testify in spite of his claim of privilege, whether he has in court one of his client's title papers, and on obtaining an affirmative answer, to order it to be produced, to be used as evidence for the adverse party, especially where no previous notice to produce it has been given. *Dover v. Harnell*, 58 Ga. 572. But see *People v. Sheriff of N. Y.*, 29 Barb. 622. It has been held that communications made to an attorney in the course of a professional consultation, but not relating to the subject-matter of the consultation, are not privileged. *State v. Mewherter*, 46 Iowa, 88.

On the other hand it has been held that the privilege extends to all that passes between client and attorney in the cause and for the purpose of the business. *Lengsfeld v. Richardson*, 55 Miss. 443.

An attorney may be compelled to disclose the name of the party by whom he is employed. *Satterlee v. Bliss*, 36 Cal. 489. And the manner and time of his retainer. *Shaughnessy v. Fogg*, 15 La. Ann. 330.

An attorney is a competent witness against his client in matters not professionally confidential between them. *Milan v. State*, 24 Ark. 346.

The rule of professional sanctity being for the benefit of the client who may waive the objection, the heir of the client is entitled to the same privilege. *Fossler v. Schriber*, 38 Ill. 172.

A clergyman, or other minister of any religion, is not allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practices of the religious body to which he belongs. Code Civ. Pro., § 833. And a person duly authorized to practice physic or surgery is not allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. *Id.*, § 834.

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A person who consults a physician as to the means of procuring an abortion, and who gives the name of the female who is pregnant, does it at the risk of an exposure of the information given, for such communication is not privileged within this statute. *Hewit v. Prime*, 21 Wend. 79.

In an action by a physician to recover for his professional services, he may prove the nature of the disease, and the character of the treatment adopted, for the purpose of determining the value of the services rendered. *Kendall v. Grey*, 2 Hilt. 300.

The privilege extends only to physicians and surgeons, and the information given to enable them to act or prescribe professionally; and it does not extend to communications which may be made to a person who may be in charge of the office of such physician in his absence, when it is not shown that such communication was made as the basis of a prescription. *Ib.*

Where an action is brought on a life insurance policy a physician cannot disclose, as a witness, information as to the condition of the insured, acquired while attending upon him and which was necessary to enable him to prescribe. *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Edington v. Mutual Life Ins. Co.*, 67 id. 185.

The right of objecting to the disclosures of such privileged communications is not limited to the patient and his personal representatives, but this right may be exercised by an assignee, and his right is not affected by the decease of the patient. *Ib.*

Admissions made to a clergyman, but not in the course of discipline of his church, are not protected by the statute, even when the confessions relate to a criminal offense. *People v. Gates*, 13 Wend. 312.

A conversation, between a person who had been tried upon an indictment and acquitted, and one who was his counsel at the trial, and which was had after the relation of counsel and client had ceased, no further proceedings being contemplated, upon a subject not connected with that to which the employment of the witness as counsel related, is not a privileged communication. *Mandeville v. Guernsey*, 38 Barb. 225.

If the communication is a privileged one, and it was made by two or more clients, jointly, to their mutual legal adviser, the seal of confidence cannot be removed unless by the consent of all the clients. *Whiting v. Barney*, 38 Barb. 393. The consent of even a majority is not sufficient; and one or more of the clients cannot require a disclosure of the communication as evidence against the others, without their consent. *Ib.*

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§ 35. **Impeaching credit of witnesses.** There are several modes of impeaching witnesses, each of which will be briefly noticed in its order. And first, it may be premised generally, that the credit of a witness may be impeached either by cross-examination, or by general evidence affecting his credit, or by evidence that he has before said or done that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves.

There are numerous matters as to which a witness may be cross-examined, for the purpose of impeaching his credit. But there are limits beyond which a party is not permitted to go; and, therefore, on cross-examination, a witness cannot be examined as to what he has said at other times in relation to a fact at issue in the action, where he has not been examined as to such fact by the party calling him; and the matters inquired about are not such as could legally affect his credibility. *Bearss v. Copley*, 10 N. Y. 93.

In cross-examining a witness, for the purpose of affecting his credit, courts are usually quite liberal toward the cross-examining counsel. But where the sole object of the cross-examination is the impeachment of the witness, and the matters inquired about are collateral and not pertinent to the matters in issue, the extent to which such cross-examination shall extend is entirely discretionary with the court. *Allen v. Bodine*, 6 Barb. 383; *LaBeau v. People*, 34 N. Y. 223; *Real v. People*, 42 id. 270. And it is in the discretion of the court to interpose and protect a witness against any inquiries not relevant to the issues to be tried, and having no object in view but the impeachment of the witness. *Varona v. Socarras*, 8 Abb. 302; *Great W. Turnpike Co. v. Loomis*, 32 N. Y. 127.

And the rule is conclusively settled, that a witness cannot be cross-examined as to any fact or matter which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, with intent thereby to discredit his testimony. *Plato v. Reynolds*, 27 N. Y. 586; *Gandolfo v. Appleton*, 40 id. 533; *Nation v. People*, 6 Park. Cr. 258; *Kaler v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 333; *Carpenter v. Ward*, 30 N. Y. 243. Such cross-examination would be idle, for if the witness should answer in the negative, the court would not permit the cross-examining counsel to contradict the witness. *Stokes v. People*, 53 N. Y. 164; *Lawrence v. Barker*, 5 Wend. 301; *Howard v. City Fire Ins. Co.*, 4 Denio, 502; *Hester v. Commonwealth*, 85 Penn. St. 139; *Henderson v. State*, 1 Texas App. 432; *Davis v. Roby*, 64 Me. 427; *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

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It is also perfectly well settled that the credit of a witness can be impeached by evidence as to general character only, and not by evidence as to particular facts not relevant to the issue, for this would cause the inquiry, which ought to be simple and confined to the matters in issue, to branch out into an indefinite number of issues. *Newcomb v. Griswold*, 24 N. Y. 298; *Corning v. Corning*, 6 id. 97; *Jackson v. Lewis*, 13 Johns. 504; *McDonald v. Garrison*, 2 A. Hilt. 510; *Boon v. Weatherhead*, 23 Texas, 675; *Crabtree v. Kill*, 21 Ill. 180; *Dimick v. Downs*, 82 id. 570; *Moreland v. Lawrence*, 23 Minn. 84; *Leverich v. Frank*, 7 Oregon, 212.

The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burden of collateral proof, that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges which might thus be brought against him, without previous notice; and though every man may be supposed to be capable of defending his general character, he cannot be prepared to defend himself against particular charges of which he has had no previous notice. But it must not be forgotten that, under the Code, the fact that a witness has been convicted of a crime or misdemeanor may be shown for the purpose of affecting the weight of his testimony either by the record or by his cross-examination; and that the cross-examining party is not concluded by the answers of the witness on this question. Code of Civil Pro., § 832.

Before one witness is permitted to speak of the general character of another, it must be proved that the former has had a proper knowledge of that character.

In one case, *Curtis v. Fay*, 37 Barb. 64, 69, 70, the plaintiff called a witness named Pritchard to speak as to the character of a witness named Jones. Pritchard did not, of himself, know any thing about Jones' reputation. All he could testify on the subject of his reputation was what some person at Genoa, whom he did not know, told him it was. This was held to be insufficient, and the court said: "An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time — sufficient, at least, to enable him to gather the general estimation in which he is held in the community where he resides."

The character of a witness may be impeached by persons in whose

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neighborhood the attacked witness had resided until within four years prior to the trial, notwithstanding such witness had then removed to a place fourteen miles distant from that neighborhood, where he had since resided, and the impeaching witness did not know the character borne by the attacked witness at the latter place. *Sleeper v. Van Middleworth*, 4 Denio, 431. But when the acquaintance with the witness is limited, and its existence was at a remote period, a different rule prevails. See *Keator v. People*, 32 Mich. 484; *Teese v. Huntingdon*, 23 How. (U. S.) 2.

It has been held in the Court of Appeals that to impeach a witness' testimony as to his character eight or ten years previous to the trial is competent, though there has been no knowledge of his character by the impeaching witness since that time; and that the presumption of the continued bad character, thus raised, must be met by testimony tending to establish the fact of a change of character. *Graham v. Chrystal*, 2 Keyes, 21; S. C., 2 Abb. App. Dec. 263. See *Dolliner v. Lintz*, 84 N. Y. 669; *Willard v. Goodnough*, 30 Vt. 397; *People v. Haynes*, 55 Barb. 450; *Rucker v. Beaty*, 3 Ind. 70; *Rogers v. Lewis*, 19 id. 405; *Arnold v. Cobb*, 21 id. 492.

The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has so reformed as to have acquired an unimpeachable reputation since that time. Reformation may be shown in answer to the attack, but the law will not presume it in advance. *Rathbun v. Ross*, 46 Barb. 127. A party who desires to impeach the general character of his adversary's witness may prove his general character five years previous to the trial, although the witness sought to be impeached had resided at a fixed residence for the last three or four years, at a place different from that of the impeaching witness; and if such evidence is excluded, it will be error. *Ib.*

In one case, *Wilmot v. Richardson*, 6 Duer, 328, 340, the character of a witness on the part of the plaintiff had been thoroughly impeached. A supporting witness was then called, who had seen the impeached witness for some six months, at a period twelve years before the trial, and who had not seen the impeached witness since then until within six months of the time of the trial; and he further testified that he had never heard the other witness spoken of one way or the other. The court below permitted him to testify as to the character of the impeached witness, which was held to be wrong, and the court said: "This decision cannot be sustained, unless it be a sound rule that a witness whose character is impeached may counteract the effect of the impeach-

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ing evidence by proof that, in the opinion of others who have but a slight acquaintance with him, and never heard him spoken of one way or the other, and who know nothing of his general character, he is a credible witness. I presume no one holds the opinion that a witness can be impeached by the testimony of persons who really know nothing of his general character, and never heard him spoken of, that they do not consider him a credible witness. If such evidence is incompetent for the purpose of impeaching a witness, I think it is equally so to sustain one who has been effectually impeached."

But where a witness called to sustain the character of an impeached witness testifies that he does not know the general character of such witness for truth and veracity, but gives evidence importing an acquaintance with his associates and a knowledge of his character, and testifies that he has heard his character questioned, it is competent for him to testify that he would believe the witness under oath. *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *People v. Davis*, 21 Wend. 309.

It is within the discretion of the court to determine whether the time to which the question put to the impeaching witness relates is so remote as to make the answer immaterial and inadmissible. *Teese v. Huntingdon*, 23 How. (U. S.) 2; *Snow v. Grace*, 29 Ark. 131.

A witness who has never heard about the character of another witness until after the controversy arose is nevertheless competent to state what he knows about it. *Mask v. State*, 36 Miss. 77.

A witness is not incompetent as an impeaching witness merely because he has not heard the character of the witness sought to be impeached canvassed, if he knows the character of such witness. *Childs v. State*, 55 Ala. 28. But it would be otherwise if the witness only knows the individual and does not know his character. *Hoadley v. State*, 55 Ala. 31.

The proper inquiry as to the character of the witness must be as to his general reputation where he is best known. It is not enough that the impeaching or the sustaining witnesses can state what "others say," for those others may be few in number, and their acquaintance with the witness may be extremely limited. Ordinarily, the impeaching or sustaining witness ought to come from the neighborhood of the person whose character is in question.

A person is not permitted to manufacture evidence for the purpose of impeaching witnesses. And where a person went a distance to a strange place, for the purpose of ascertaining the character of a witness, and for the purpose of subpoenaing impeaching witnesses against him, he was not permitted to testify as to the result of his inquiries,

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nor to give his views as to the character of the witness whose credit was in question. *Douglass v. Tousey*, 2 Wend. 352.

In the impeachment of witnesses, it is general character alone that is in question; and, therefore, specific acts of immorality on the part of a witness cannot be given in evidence to impair his credibility. *Corning v. Corning*, 6 N. Y. 97; *Varona v. Socarras*, 8 Abb. 302; *Greaton v. Smith*, 1 Daly, 330; *Lee v. Chadsey*, 2 Keyes, 543; *LaBeau v. People*, 34 N. Y. 223; *Wehrkamp v. Willett*, 1 Keyes, 250; S. C., 4 Abb. Ct. App. Dec. 548; *McDonald v. Garrison*, 2 Hilt. 510; S. C., 9 Abb. 178; *Boon v. Weatherhead*, 23 Texas, 675; *Crabtree v. Kile*, 21 Ill. 180; *Dimick v. Downs*, 82 Ill. 570; *Moreland v. Lawrence*, 23 Minn. 84; *Leverich v. Frank*, 6 Oregon, 212; *Conley v. Meeker*, 85 N. Y. 618; *Bakeman v. Rose*, 18 Wend. 146. As was said in the case last cited you cannot inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like, although each and every of such offenses to a greater or less degree impairs the moral character of the witness and tends to impeach his or her veracity. The inquiry must be general in its scope and tendency.

Petit larceny is not a felony, and a conviction for that offense does not destroy the competency of a witness, but the record of conviction may be introduced for the purpose of affecting the credit of the witness. *Carpenter v. Nixon*, 5 Hill, 260. Interest does not render a witness incompetent, but it may affect his credit, and, therefore, it may be shown by a witness, on cross-examination, that he is the real party in interest, and that a transfer of his interest to the plaintiff was a mere sham. *Hoyt v. Lynch*, 2 Sandf. 328. When a party to the action is a witness, he may be impeached in the same manner as any other witness. *Varona v. Socarras*, Abb. 302.

What should be the question put to an impeaching witness, both as regards substance and form, has often been matter of grave discussion.

It has been held, that merely proving that the general character of a witness is bad is not enough to effectually impeach him, when the impeaching witness is not asked whether he would believe the other witness on oath. *Gilbert v. Sheldon*, 13 Barb. 623. To show general bad character is immaterial; the party must go further, and prove that the character of the witness is bad as to truth and veracity, or must show, by the impeaching witness, that he would not believe the other on oath. *Ib.* In the case last cited, it was not even shown that the general moral character of the witness was bad.

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But, in a later case, it has been held, that, after impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it to be bad, the question of credit is then for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath. *Wright v. Paige*, 36 Barb. 438, 446; S. C., 3 Keyes, 581.

In the case just cited, the court said: "In the case at bar, a female witness is shown to be of bad moral character — reputed to be dishonest, unchaste, wanting integrity, untruthful, thievish, and a keeper of a resort for vile characters; and the court is asked to charge the jury that she stands before them, as regards the question of general impeachment, a perfectly fair witness; in the exact language of the request, 'that the impeaching testimony in that behalf was of no force;' and for the reason simply that the witnesses were not asked whether they would believe her under oath. The proposition is contrary to the dictates of reason and propriety — simply absurd." Per BOOKES, J. See *Allis v. Leonard*, 58 N. Y. 288.

The almost invariable practice, however, of asking the impeaching witness whether he would believe the other on oath is not to be disregarded in practice. And a neglect or refusal to put the question implies a doubt whether the impeaching witness would declare against the credit of the witness, so far as to swear that he was not to be believed under oath. In these cases, "the true object to be effected is, to prove the witness' general character *for truth* to be bad. His general character, in other respects, is of no consequence. All experience shows that the general characters of many men are bad, in the common acceptance of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad, who has some one cardinal vice, although in other respects he may be irreproachable. In short, I hold, that proof of general bad character, as that term is generally understood and used in society, does not, *necessarily* and legally, prove the fact that the witness' character for veracity is bad; and, therefore, I consider it to be immaterial evidence, where the party avows his intention to stop with that question. All the elementary writers, in their formula of queries to the impeaching witness, indicate, most clearly and decidedly, that further questions must be put, in order to render the impeachment effectual." Per SHANKLAND, J., in *Gilbert v. Sheldon*, 13 Barb. 626, 627. And it is proper to remark here, that where a witness is sought to be impeached, on account of his bad character, and witnesses are called for that purpose, who testify that they

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are acquainted with the *general character* of the witness whose credit is in question, they may be asked whether they would believe him on oath, notwithstanding they disclaim all knowledge of the witness' *character for truth and veracity*. *Johnson v. People*, 3 Hill, 178. See *Hunt v. Scott*, 3 A. K. Marsh. 260.

Various methods of examining an impeaching witness have been suggested by the text-books, some authorizing an inquiry as to the general character of the witness sought to be impeached, without limiting the inquiry as to the character of the witness for truth, and without adding the further question as to whether the witness would believe the other under oath; others limiting the question to general reputation for truth; others adding an inquiry as to the moral character of the witness sought to be impeached; while others again limit the inquiry to the point whether the impeaching witness would believe the other under oath. On looking into the reports it will be found that the courts have first and last given sanction to questions in each and every form above suggested. Nor are these the only questions which may be asked of the impeaching witness. In addition to any or all of them the witness may be asked whether he would believe the witness sought to be impeached on oath, but in this State at least it is not *necessary* to do so. *Wright v. Paige*, 3 Keyes, 581; *Allis v. Leonard*, 58 N. Y. 288.

Where it is sought to impeach a witness, on the ground that he has made statements, out of court, which are contrary to what he has sworn on the trial, such proof may be made by any competent witness who heard his previous statements. And, where such previous statements were made on oath as a witness, any person who was present in court, and heard the testimony of the witness, is as competent to testify what he swore to as the judge who presided at the trial, or as counsel who took minutes of the evidence. *Grimm v. Hamel*, 2 Hilt. 434; *Tooker v. Gormer*, id. 71. Written notes or minutes of the evidence may be more reliable, and therefore a jury or court might attach more credit to them than to a statement from mere memory, if any conflict existed between them.

On the subject of relevancy, it has been long settled, that a witness may be asked whether, on some former occasions, he has not given a different and contradictory representation of the same subject.

If the witness answers in the affirmative, the question and its answer of course affects his credit, whether the subject-matter of the answer be relevant or irrelevant to the matters in issue; if he answers in the negative, and the subject of the answer be irrelevant to the matters in issue, the answer is conclusive, and evidence cannot be given to con-

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tradict the witness ; but if the subject of the answer be relevant to the matters in issue, then evidence may be given, to show that the witness has, on a former occasion, given a different representation of the subject ; and the inquiry is made, in order to lay a foundation for proof of contradictory statements. *Carpenter v. Ward*, 30 N. Y. 243 ; *Sloan v. New York Central R. R. Co.*, 45 id. 125 ; *Patchin v. Astor Mut. Ins. Co.*, 13 id. 268 ; *Gandolfo v. Appleton*, 40 id. 533.

It is competent to inquire of a witness what he has testified to on a former trial as to matters involved in the trial then before the court ; and in case the witness is unable to state what he did testify, to ask hypothetically, if he testified in a given way, was that testimony true. This the witness may answer or not, as he chooses. If he answers that he does not recollect, he cannot be compelled to answer the hypothetical question. If he answers that he does not recollect how he testified, but if he did testify as supposed, it was true, evidence cannot then be received that he did so testify, as proof of the fact, for this would be substituting evidence given on a former trial for evidence in the case at bar. Evidence of what a witness testified to on a former trial is admissible only on the question of credibility, and not as proof of the fact. *McCabe v. Brayton*, 38 N. Y. 196.

But a witness, or a party who is a witness, is not bound to state what he swore to on the former trial, since his statements might be used against him in a prosecution for perjury if there was a contradiction between the two statements. *Pickard v. Collins*, 23 Barb. 444.

Although it appears that a witness has sworn differently upon the same point on a former occasion, he is not to be pronounced incompetent by the judge, and his evidence stricken out and wholly excluded from consideration, as though he had been convicted of a crime, rendering him incompetent to testify as a witness ; but his testimony must remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence. *Dunn v. People*, 29 N. Y. 523 ; *Warren v. Haight*, 62 Barb. 490.

To entitle the examining counsel to show a discrepancy between a statement made on a former trial and that made by the witness on the present trial, for the purpose of impeaching his credibility, it must appear that the testimony related to a point *material* to the issue on trial or to a fact brought out on the examination of the *adverse counsel*. *Carpenter v. Ward*, 30 N. Y. 243 ; *Henderson v. State*, 1 Texas App. 432.

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A party has the right, for the purpose of discrediting the testimony of an adverse witness, to prove statements made by him contradicting the testimony given after the requisite examination of the witness in regard to such statement, but he cannot be cross-examined upon a point not material to the issue, and his testimony in respect thereto shown to be untrue by other evidence. *Schell v. Plumb*, 55 N. Y. 592. See *ante*, p. 563.

If a party desires to discredit a witness by showing that he has made statements out of court in conflict with his evidence in court upon a material question in the case, the examining counsel should first lay the foundation for contradiction by asking the witness specifically whether he has made such statements; *Sloan v. New York Central R. R. Co.*, 45 N. Y. 125; *Budlong v. Van Nostrand*, 24 Barb. 25; *People v. Devine*, 44 Cal. 452; *Spannhorst v. Link*, 46 Mo. 197; and should so frame his question as to direct his attention to the particular time, place, subject or circumstance to which it relates. *State v. McLaughlin*, 44 Iowa, 82; *Gafney v. People*, 50 N. Y. 416; *Pendleton v. Empire Stone Dressing Co.*, 19 id. 13; *Sprague v. Cadwell*, 12 Barb. 516; *Hill v. Gust*, 55 Ind. 45.

The witness sought to be impeached should have an opportunity of making explanation in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misapprehension. *Sloan v. New York Central R. R. Co.*, 45 N. Y. 125; *Gafney v. People*, 50 id. 416.

For in every such case there are two questions; first, whether the witness ever did the act or used the expressions alleged; secondly, whether his having done so impeaches his credit, or is capable of explanation. It would be manifestly unjust to receive the testimony of the adversary's witness to prove the fact, without also admitting the party's witness to deny; and assuming the act to have been done, or the expression to have been used, it would also be unjust to deny to the party, or the witness who admits the act or expression, the best, or, it may be, the only means of explanation.

If the witness admits the words, declarations or acts, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the court at once, which is the most convenient course.

If the witness denies the words, declarations or acts imputed to him, then the foundation having been thus laid for contradiction, the party

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seeking to discredit, the witness may, on reaching his part of the case, call witnesses for the purpose of showing that the statements embraced in the questions asked the adverse witness were in fact made by him. The usual and most accurate mode of examining the contradicting witness is to ask the precise questions put to the principal witness. Otherwise, hearsay evidence not strictly contradictory might be introduced, to the injury of the parties, and in violation of legal rules. But this is a matter to some extent under the control and discretion of the court. *Sloan v. New York Central R. R. Co.*, 45 N. Y. 125. See *Hotchkiss v. Germania Ins. Co.*, 5 Hun, 91.

If the witness neither directly admits nor denies the act or declaration, as when he merely^a says that he does not recollect; or, if he gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had said or done, by answering that he did not remember. *Jones v. People*, 2 Col. T. 351; *Nute v. Nute*, 41 N. H. 60; *Ray v. Bell*, 24 Ill. 444; *Gregg v. Jamison*, 55 Penn. St. 458.

If the witness declines to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof. And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances and to exculpate himself.

So strict is the rule in relation to the examination of a witness as to contradictory statements, that a witness whose testimony has been taken conditionally (*de bene esse*), cannot be impeached on the trial, by proving that subsequent to such conditional examination he had made statements inconsistent with his testimony, or had said that what he had sworn to was false. Before such evidence can be given, the witness must be interrogated in relation to it. *Stacy v. Graham*, 14 N. Y. 492; *S. C.*, 3 Duer, 444.

And if a court allows a witness to be impeached by such a contradiction before the witness has been interrogated, it will be error, and the error will not be cured by afterward recalling the witness and permitting him to explain his testimony. *Sprague v. Cadwell*, 12 Barb. 516. Such an explanation would not, or at least might not, in all cases, reinstate the witness to the same standing with the jury, as he would have, in case he had been permitted to make the explanation before being contradicted. An explanation made afterward might be

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said to be forced from the witness, which otherwise would appear to be frank and ingenuous.

The reason of the foregoing rules apply as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. But as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible. *Gafney v. People*, 50 N. Y. 416.

It is sufficient to show the paper to the witness or read it to him, and if its genuineness is admitted, the party can introduce it in evidence when he has the case and the right to put in evidence. Neither the other party nor the witness have a legal right to enter into any explanation of the contents of the paper until after it has been introduced in evidence. The court may, however, in its discretion, vary the order of proof. *Romertze v. East River Nat. Bank*, 49 N. Y. 577. See *Clapp v. Wilson*, 5 Denio, 285.

It is only when a witness has stated *facts* differently from what he swears, that he can be contradicted; and, therefore, it is not competent to show that a witness has previously expressed an *opinion* contradictory to his present opinion or statement. *Holmes v. Anderson*, 18 Barb. 420; *Elton v. Larkins*, 5 Carr. & Payne, 385. This rule, however, does not seem to be without exceptions. In one case, *Patchin v. Astor Mutual Ins. Co.*, 13 N. Y. 268, the question was, whether a certain steamer was seaworthy or unseaworthy, on account of an alleged defect in the fire jackets, and whether the vessel took fire from this cause. A witness for the plaintiff, named Stebbins, was on board at the time of the fire, as chief engineer, and he was competent to give an opinion upon the subject. He testified that the vessel was seaworthy, and his evidence tended to show that the fire did not originate from such defect. On his cross-examination he was asked whether he did not say on the day of the loss, "My God! is it possible that so many lives should be lost, when \$500 expended on those water jackets would have saved the whole;" and he denied any recollection of using that expression, and stated that he had no such idea. It was held that the defendant might contradict this witness, by showing that he made such statement, for the purpose of discrediting him. The question put, for the purpose of contradiction, was in this form: "Did Stebbins say, My God! is it possible that boat has burned, when \$500 laid out on the water jackets would have saved her?" And it was

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held that the slight discrepancy between the expression about which he was examined and the one offered to be proved was not material.

But, where a party calls a witness and has him sworn and examined, he cannot, for the purpose of impeaching the witness, give evidence to show that he has at other times made declarations or statements which are contradictory of those sworn to on the trial. *Thompson v. Blanchard*, 4 N. Y. 303; *People v. Safford*, 5 Denio, 112.

The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer required by law to make a record of the facts in question; and that such record, as originally made by him, did not include a statement contained in his oral testimony; and, therefore, proof of the alteration of the record by a subsequent insertion of such statement is not admissible to contradict his oral testimony. *Mallory v. Perkins*, 9 Bosw. 572.

It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. *Newton v. Harris*, 6 N. Y. 345; *Chelton v. State*, 45 Md. 564. The fact itself is all that the law will permit to be shown. *Boynnton v. Boynnton*, 43 How. 380. A jury would scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or a friendly witness. Hence it is always competent to show the relations which exist between the party against as well as the one for whom he was called. *Starks v. People*, 5 Denio, 106, 108.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness by general evidence of good conduct.

It is a general rule that a party will not be permitted to give evidence of his witness' good character until it has been attacked on the other side, either by the evidence of witnesses called for such purpose, or by the evidence of the witness on cross-examination going to impeach his general character. *People v. Gay*, 7 N. Y. 378; *Bracy v. Kibbe*, 31 Barb. 273; *Frost v. McCargar*, 29 id. 617; *Hannah v. McKellip*, 49 id. 342; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166, 170.

In the case of *People v. Gay*, above cited, the witness had stated, on cross-examination, that he had been committed for trial upon a charge of perjury, but this was held not to be a sufficient impeachment to authorize evidence in his behalf of general good character, on the

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ground that it is a legal presumption that the witness is innocent of the charge made against him.

Evidence which merely goes to show that the account given by a witness is improbable, to show that the facts were different from the account he has given, or to show that the witness had made declarations hostile to the party against whom he was called, does not amount to an attack upon general character, which will authorize the party to call witnesses, to show the general character of the attacked witness to be good. *Starks v. People*, 5 Denio, 106. And see *People v. Hulse*, 3 Hill, 309; *Leonori v. Bishop*, 4 Duer, 420.

Where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself, on his examination, evidence of his general good character, or of good character for truth and veracity, is incompetent for the purpose of supporting the witness. *Frost v. McCargar*, 29 Barb. 617; *Webb v. State*, 29 Ohio St. 351; *Hannah v. McKellip*, 49 Barb. 342.

If a witness is impeached by showing that he has made statements at other times inconsistent with his testimony he may be corroborated by proving other declarations in harmony with it, whether they were made before or after the impeaching declarations. *Brookbank v. State*, 55 Ind. 169. See also, *Adams v. Germania Ins. Co.*, 70 N. Y. 166, 170; *Hotchkiss v. Germania Ins. Co.*, 5 Hun, 91; *People v. Doyell*, 48 Cal. 85; *Dailey v. State*, 28 Ind. 285. But see *Butler v. Truslow*, 55 Barb. 293; *Queener v. Morrow*, 1 Cold. (Tenn.) 123; *Dudley v. Bolles*, 24 Wend. 465; *Smith v. Stickney*, 17 Barb. 489.

Where the cross-examination of a witness is conducted in a manner which tends to impair his credibility, by showing that a certain prosecution was the result of a conspiracy in which the witness was concerned, it is competent for the party to sustain his witness by evidence corroborating his statements and vindicating his motives. *Lohman v. People*, 1 N. Y. 380.

Evidence which is given for the purpose of sustaining the character of a witness should be as to his character for truth and veracity, and not to his honesty. *Gurney v. Kenny*, 2 E. D. Smith, 132. And an opinion that a witness is honest can have little weight against his own testimony that he had committed numberless larcenies. *Ib.* And it has been held that after the credit of a witness has been impeached by the production of a record of his conviction for the crime of larceny, it is not competent for the party calling him to give evidence

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explanatory of the conviction, and in favor of the innocence of the witness, notwithstanding the conviction. *Gardner v. Bartholomew*, 40 Barb. 325. But in a late case it was held that where a party had testified as a witness in his own behalf, and the adverse party had put in evidence a record of the conviction of the witness in another State for a felony, the counsel for the party thus impeached should be allowed to ask his client whether he was guilty of the offense for which he was convicted, and that to exclude such testimony was error. *Sims v. Sims*, 75 N. Y. 466.

Where the cross-examination of a witness tends to impeach his credibility, it is competent for the party calling him to sustain him by giving in evidence letters of the adverse party which tend to show that the witness is worthy of credit. *Stacey v. Graham*, 14 N. Y. 492; *S. C.*, 3 Duer, 444.

When an attempt is made to impeach a witness by showing a bias, on his part, toward the party calling him, on account of relationship, it is competent for such party to show that he and the witness are at variance, and not on good terms. *Clapp v. Wilson*, 5 Denio, 285.

When the character of a witness is impeached by general evidence, the party who called the witness is at liberty to examine the impeaching witnesses as to the grounds of their belief. And the impeaching witnesses may themselves be impeached in the same manner as any other witnesses.

It would seem that there is no particular stage in the trial of a cause, at which a party must produce his evidence to impeach the character of a witness for truth and veracity. Thus, after the plaintiff has been sworn as a witness in chief, and the defendant has put in his defense, and the plaintiff has again testified in reply, the defendant may put in evidence in rebuttal, impeaching the character of the plaintiff for truth and veracity. *Foster v. Newbrough*, 58 N. Y. 481.

The effect of an impeachment on the testimony given by the witness will be noticed hereafter.

§ 36. **Impeaching a party's own witness.** It is now proposed to inquire whether a party can be allowed to produce evidence for the purpose of disproving or impeaching the testimony of his own witness, although such evidence should have the effect of throwing discredit upon the witness.

It is clear that a party is not to be sacrificed to his witness; he is not represented by him, nor ought he to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or

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dishonest practice. If a party produces a witness, knowing him, at the time, to be a man of infamous character, and that witness, in giving evidence, disappoints or deceives him, he ought not to be allowed to prove his infamy, for the purpose of destroying the effect of his evidence. Knowing the infamy of his character, he had more reason to suspect and disbelieve than to trust him; nor has he any just ground to complain that his cause is prejudiced by false evidence, as he could expect nothing less from such a witness; and he suffers not unjustly for using a witness whom he knew to be infamous.

But, if a party, not acting himself a dishonest part, is deceived by his witness — or, if a witness, professing himself a friend, turns out an enemy, and, after promising proof of one kind, gives evidence directly contrary — is the party to be restrained from laying the true state of the case before the court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known. Further, if a witness, whether from mistake, from ignorance, or from design, gives evidence unfavorable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts different from those which he has represented? All must agree that such proof of a different state of facts ought to be allowed.

But, in the first place, it is to be remembered that it is an established rule that a party shall never be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him. The meaning of the rule is that a party, after producing a witness, cannot prove him to be of such general bad character as would render him unworthy of credit. *Thompson v. Blanchard*, 4 N. Y. 303, 311; *Williams v. Sargeant*, 46 id. 481; *Pollock v. Pollock*, 71 id. 137. And see *Griffin v. Wall*, 32 Ala. 149; *Brolley v. Lapham*, 13 Gray (Mass.), 294; *Rockwood v. Poundstone*, 38 Ill. 199; *Thorn v. Moore*, 21 Iowa, 285; *People v. Sheehan*, 49 Barb. 217.

Nor can the party producing a witness be permitted to prove that such witness has, at another time, made declarations or statements contradictory to the statements to which he testified, for the purpose of affecting his credibility as a witness. *Hunt v. Fish*, 4 Barb. 324; *Thompson v. Blanchard*, 4 N. Y. 303; *Coulter v. American Merchants' Union Express Co.*, 56 id. 585; *People v. Safford*, 5

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Denio, 112; *Sanchez v. People*, 20 N. Y. 147; *Adams v. Wheeler*, 97 Mass. 67; *Stearns v. Merchants' Bank*, 53 Penn. St. 490.

Whatever may be the rule of evidence elsewhere, it is settled in this State that a party may not impeach, either by general evidence or by proof of contradictory statements out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact material in the cause, although the effect of that proof may be to discredit him, but he cannot adduce such a contradiction when it is only material as it bears upon his credibility. *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; *Williams v. Sargeant*, 46 id. 481; *Hunter v. Wetsell*, 84 id. 549, 556. See *Warren v. Gabriel*, 51 Ala. 235; *Whitney v. Eastern R. R. Co.*, 9 Allen (Mass.), 364; *Olmstead v. Winsted Bank*, 32 Conn. 278; *Norwood v. Kenfield*, 30 Cal. 393; *Rockwood v. Poundstone*, 38 Ill. 199; *Thorn v. Moore*, 21 Iowa, 285. For example, in an action to recover damages for injuries received by the plaintiff in attempting to avoid danger of being run over by an express wagon belonging to the defendant, which was being rapidly driven on the sidewalk behind the plaintiff, if the plaintiff calls the driver as a witness to prove his employment by the defendant, and the defendant afterward calls the driver as a witness to prove that he did not drive upon the sidewalk, the plaintiff will be at liberty to contradict the witness as to his not having driven on the sidewalk, because that fact is generally material in the cause, but will not be at liberty to show that after the affair was over the witness made a statement which conceded that he had driven on the walk, because that statement does not bear upon the question whether he did or did not drive upon the walk, but only upon the question whether his testimony that he did not so drive was worthy of belief. *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585. But where a party calling a witness is surprised by testimony contrary to his expectations, he may be permitted to interrogate the witness in respect to previous declarations made by him inconsistent with his testimony, for the purpose of probing his recollection, and by showing the witness that he is mistaken, inducing him to correct his evidence, or by recalling to his mind the statements previously made drawing out an explanation of his apparent inconsistency, and also for the purpose of showing the circumstances which induced the party to call him. Such inquiries will not be excluded simply because they may result unfavorably to the witness. But when the sole effect of an affirmative answer to a question asked by a party to his own witness will be to discredit the witness, it must be excluded. *Bullard v. Pearsall*, 53 N. Y. 230.

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The declarations and admissions of a party to the record, of any fact material to the issue, are always competent evidence against him. *Marvin v. Richmond*, 3 Denio, 58.

And a party may prove the declarations of an adverse party, as to a fact material to the issue, although such declarations are inconsistent with and tend to contradict the testimony of a witness previously called by the party offering to prove such declarations. *Williams v. Sargeant*, 46 N. Y. 481.

So while a party cannot cross-examine his own witness, and is in general bound by the answers made, it is not objectionable, after the witness has given an ambiguous answer, to inquire as to any facts or circumstances tending to enable him to recollect the fact sought to be proved more clearly or certainly. *O'Hagan v. Dillon*, 76 N. Y. 170.

And when a witness by surprise gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. When a party is thus surprised by the statements of his own witness, and he calls other witnesses to contradict him as to particular facts, it does not follow from necessity that the whole of the evidence of the contradicted witness is to be rejected. The whole matter is a question for the jury. *Bradley v. Ricardo*, 8 Bing. 57.

A party is not precluded from giving evidence to matters in issue between the parties in any case merely because it contradicts his own witness. If the testimony offered is material, and goes to the very facts in issue, it is competent, although it should contradict every other witness whom the party has examined. The rule prohibits a contradiction which is attempted for the mere purpose of impeachment of the party's own witness, or where the matter sought to be contradicted is collateral only, and not going to the issue. *Parsons v. Suydam*, 3 E. D. Smith, 276, 282, 283; *Pickard v. Collins*, 23 Barb. 444.

A party calling a witness is not bound by his testimony in all its parts. He may, if he is able, satisfy the court or jury, from the facts and circumstances stated by the witness himself, that the witness is mistaken in some of his statements or conclusions, while he is correct in the others. *Keutgen v. Parks*, 2 Sandf. 60, 67.

When a witness is cross-examined as to collateral matters, for the purpose of affecting his credit, his answers in relation to such matters are conclusive. *Ante*, 564, 618. But, when the questions relate to

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matters which are material to the issues, his answers are not conclusive, even though the evidence came out on cross-examination, and he may be contradicted by other witnesses. *Mills v. Carnly*, 1 Bosw. 160.

If either party to an action calls his adversary as a witness, he will be bound by the same rules which apply to other witnesses; and he cannot impeach the general character of such witness, nor show that he has made contradictory statements. *Pickard v. Collins*, 23 Barb. 444. The cross-examination of a witness does not, as a general rule, make him the witness of the cross-examining party, so as to prevent him from impeaching the witness. And where a witness for the plaintiff was cross-examined by the defendant, and the cross-examination suspended and then renewed after the plaintiff had rested, and he was then re-examined by the plaintiff, and again cross-examined by the defendant, this was held not to preclude the defendant from impeaching the general character of the witness, and from showing that he had made contradictory statements. *Matice v. Allen*, 33 Barb. 543. And see *People v. Moore*, 15 Wend. 419. But, if the cross-examination relates to entirely new matter; or if the party entitled to cross-examine a witness calls him subsequently to prove new matter on his own side, it may be that he will so far make the witness his own as not to be permitted to impeach his general character. *Ib.* See *Craig v. Grant*, 6 Mich. 447; *Fairchild v. Bascomb*, 35 Vt. 398.

When, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law in some cases requires, he is not precluded from impeaching such a witness. And, for that reason, a party may impeach a subscribing witness, whom he has been compelled to introduce as a witness. *Dennett v. Dow*, 5 Shepley, 19; *Shorey v. Hussey*, 32 Me. 579. And see *Greenough v. Eccles*, 5 J. Scott (N. S.), 807, note, and cases cited. But see *Brown v. Buckley*, 1 McCarter (N. J.), 294.

A party, after cross-examining a witness of the adverse party, may, by permission of the court, recall and question him for the purpose of impeaching him, and afterward introduce other testimony to that end. He does not, by so recalling him, make the witness his own. *State v. Jones*, 64 Mo. 391.

The justice has a discretion as to the number of witnesses to be called for the purpose of impeaching a witness. *Green v. Brown*, 2 Barb. 120; *Nolton v. Moses*, 3 id. 31, 35. A reasonable number ought to be allowed on each side; and five or six witnesses on each side would ordinarily be a reasonable number. *Ib.* If the circumstances of

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the case require it, the court will of course allow the examination of a larger number. *Ib.*

§ 37. **Duty of jury in weighing evidence.** A jury taken from the body of the community may well be presumed to be possessed of such knowledge and experience, derived from their intercourse with society, as will peculiarly fit them for the determination of all disputed facts arising out of the ordinary transactions of life.

It must, however, be recollected, that jurors, unaccustomed as they usually are to judicial investigations, require, in complicated cases, all the aid which can be derived from the arguments of counsel, and from the experience and penetration of the court, to direct their attention to the essential points, and enable them to arrive at a just conclusion. When a jury is called, the law, in its wisdom, ultimately relies upon their integrity and understanding, but it, nevertheless, anxiously prepares the way for a correct conclusion, by excluding from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of their inquiry. So far the law proceeds by certain and definite rules. Much yet remains to be done of a nature which cannot be defined.

The law, to use an ordinary phrase, has no scales wherein to weigh the different degrees of probability, still less to ascertain what weight of evidence shall amount to absolute proof of any disputed fact. Its business is to define, to distinguish, and to apply legal consequences to ascertained facts; but whether a fact is probable or improbable, true or false, admits of no legal definition or test. The principles on which the investigation or ascertainment of truth depend are fixed and invariable, however the particular process prescribed by different systems of law, for the purpose of investigation, may vary.

As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced and intelligent mind than upon the application of artificial and technical rules, the law has delegated this important office to a jury of the country, whenever either of the parties choose to call one. If no jury is called, the justice takes the place of a jury, and he is governed by the same legal rules which apply to a jury trial.

Although all questions of pure fact belong peculiarly to the province of a jury, who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the case of legal presumptions resulting in particular facts.

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Juries are bound by all the rules and presumptions of law, as far as they apply; they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon the record, and by all estoppels which in point of law conclude the parties. They are also bound to give proper legal effect to all instruments established by competent evidence, and to notice all matters which are judicially noticed by the court. They are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause. It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge, for it could not be known, in that case, whether the verdict was according to the evidence, or against it; and besides, it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror knows any fact material to the issues, he ought to be sworn as a witness, and he is then liable to a cross-examination like other witnesses; and if he privately states such facts to the other jurors, it will be a good ground for a new trial.

It sometimes happens that evidence is admitted for one purpose, while it is not competent evidence for another purpose. Or it is sometimes admitted as against one party, while it is not competent evidence against the other parties. In all such cases the jury is bound to apply the evidence so far only as it is legally applicable.

Suppose the case of an action against two defendants for the recovery of a demand which, it is claimed, is barred by the statute of limitations. If there is evidence of a new promise, or of a payment by one, such promise or payment is no evidence as against the other. So, if two persons are tried together for a criminal offense, a confession made by one which criminales the other is not evidence except as against the party confessing.

Previous to the remarks which will be made on the force and weight of evidence, whether direct or circumstantial, it is to be observed that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact. Absolute, mathematical, or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

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Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of a particular fact.

The distinction between full proof and mere preponderance of evidence is, in its application, very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generates full belief of the fact, to the exclusion of all reasonable doubt.

But, in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. But, even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than to the other, is frequently insufficient. And it is so in all cases in which it falls short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law.

One who seeks to charge another with a debt must do so by full and satisfactory proof; and, on the other hand, when a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of its satisfaction.

Again, where the law raises a presumption in favor of the fact, the contrary must be fully proved, or at least such facts must be proved as are sufficient to raise a contrary and stronger presumption.

Another distinction which requires notice is that between *prima facie* and *conclusive* evidence. *Prima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor, that it must prevail, if it is accredited by the jury, unless it is rebutted or the contrary proved.

Conclusive evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. All evidence is weak or strong, by comparison. In civil actions, slight evidence of right or title is sufficient, as against a stranger who possesses no color of title. Thus, the mere possession of goods by one who has found them is evidence of property, as against a wrong-doer, in an action for their

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conversion, and so the mere occupation of land, however recent, will enable the occupier to maintain trespass against a stranger.

The evidence to be weighed by a jury, or by a court sitting in their place, consists either in : First, the direct testimony of witnesses ; or, secondly, indirect or circumstantial evidence ; or thirdly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict.

First, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon : 1st, their integrity and honesty ; 2d, their ability ; 3d, their number, and the consistency of their testimony ; 4th, the conformity of their testimony with experience ; and, 5th, the coincidence of their testimony with collateral circumstances.

1st. Their *integrity*. A witness, to be trustworthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath, and under the peril of the temporal punishments due to perjury, will speak the truth.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation ; for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds ; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher character or nature are entirely wanting.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind ; and hence it is for the jury to consider whether the apparent want of motive to deceive is sufficient to give credit to an exceptionable witness, and whether some assurance of the actual absence of such a motive is not necessary to warrant them in placing confidence in such a witness.

It frequently happens that a witness labors under some influence, arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a strong temptation to perjury. In these, as in so many other cases, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he is the witness of truth.

In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and of the manner of giving his evidence,

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both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An over-forward and hasty zeal, on the part of the witness, in giving testimony which will benefit the party whose witness he is; his exaggerations of circumstances; his reluctance in giving adverse evidence; his slowness in answering; his evasive replies; his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction; of his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all, to a greater or less extent, obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions, without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony is false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *viva voce* examination, of judging of the credit due to witnesses, especially where their statements are in conflict, are of incalculable advantage in the investigation of truth, and they not unfrequently supply the only true test by which the real character of the witnesses can be appreciated.

2d. Their *ability*. The ability of a witness to speak the truth must of course depend on the opportunities which he has had of observing the facts, the accuracy of his powers of discerning, and the faithfulness of his memory in retaining the facts once observed and known.

Where a witness testifies to a fact, which is wholly or partially the result of reason upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance, for the purpose of ascertaining whether his conclusion was a correct one, although it should be borne in mind that the reasons which a witness gives for his belief are those which occur to him upon his examination, and are frequently different from those which actually produced his belief or conviction.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact; thus where a witness is called to state that another witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject-matter of frequent experience, his

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reasons are of little weight ; for he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the facts and their circumstances is strengthened and confirmed by the consideration, that they were of such a nature as were likely to attract his attention.

On the other hand, it is diminished by the consideration, that the transaction was remote, and such as was not likely to excite notice or observation. Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time.

Of all kinds of evidence, that of extra-judicial and casual declarations is the weakest and most unsatisfactory. Such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered ; and their meaning is liable to be misrepresented and exaggerated.

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in the evidence, which were used at a remote period of time, or to which the attention of the witness was not particularly called ; or where misconception was likely to arise from their situation and the circumstances under which they were placed ; or from the prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause. Such evidence is fabricated easily and contradicted with difficulty.

In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. And evidence of this kind is of the very weakest kind where it is doubtful whether the party making the admission knew his legal rights and situation.

3d. *Their number and consistency.* The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief. That it is strong enough to produce actual belief, every man's experience will vouch.

Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or the probabilities of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken or willfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly

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increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses.

Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances and the order in which they occur, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions—either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established. So far does this principle extend, that in many cases, except for the purpose of repelling suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then although individually they should be unworthy of credit, yet if the coincidences in their testimony are too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

The considerations which tend to negative any suspicion of concert or collusion between the witnesses are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject-matter of the litigation; or they arise internally from a minute and critical examination and comparison of the testimony itself.

The *nature* of such coincidences is most important as an aid in determining whether they are of artificial creation or the natural result of a truthful statement of actual events.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate or counsel a topic for copious observation, are of little importance, unless they are of too prominent and striking a nature to be ascribed to mere inadvertence, inattention or defect of memory. It has been well remarked by a great observer, that “the usual character of human testimony is substantial truth under

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circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy are of so strong and decisive a nature as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention, or want of memory. It would, theoretically speaking, be improper to omit the observation, that the weight and force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere numbers of such witnesses.

Such considerations, however, are of little practical importance. The maxim of the law is *ponderantur testes, non numerantur*; or, in other words, witnesses are weighed, not counted; that is, they are estimated by the weight and value of their testimony, and not by their number.

No definite degrees of probability can, in practice, be assigned to the testimony of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

4th. The *conformity* of their testimony with experience. As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or its inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; and he may still believe, although he should not have had actual experience of similar facts; but where that is asserted which is not only unsupported by common experience, but contrary to it, belief is slow and difficult. Mr. Locke gives an amusing instance: "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather that it would bear an elephant if he were there." The king replied: "Hitherto I have believed the strange things you told me, because I looked upon you as a sober, fair man, but now I am sure you lie."

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In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, or even with the operation of the common principles by which the conduct of mankind is usually governed, he would probably be disbelieved ; for it might be more probable in the particular instance, that the witness was mistaken, or meant to deceive, than that such an anomaly had really occurred. But although the improbability of testimony, with reference to experience, affords a just and rational ground for doubt, the very illustration cited by Locke shows that mere improbability is by no means a certain test for trying the credibility of testimony, without regard to the number, consistency, character, independence, and situation of the witnesses, and the collateral circumstances which tend to confirm their statement.

In ordinary cases where a witness stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his testimony, unless it is so grossly improbable as to satisfy the jury that he is not to be trusted.

5th. *Conformity* with collateral circumstances. Direct testimony is not only capable of being strengthened or weakened, to an indefinite extent, by its conformity, on the one hand, or its inconsistency on the other, with circumstances which are collateral to the disputed fact, or the main fact in question in the case. The value of these collateral circumstances, as evidence, is determined by the rules applicable to circumstantial evidence. Any evidence which is not direct and positive is of this class.

An inference or conclusion from circumstantial or presumptive evidence may be either the pure result of previous experience of the ordinary or the necessary connection between the known or admitted facts and the fact inferred ; or, of both reason and experience conjointly. And hence such an inference or conclusion differs from presumption, although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense ; for a presumption, in strictness, is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known and the inferred facts, and independently of any process of reason in the particular instance.

By circumstantial or presumptive proof is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury of the fact in question.

To the validity of every such proof, it is essential, *first*, that a basis of facts be established by sufficient evidence ; and, in the next place,

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that the proper conclusion should be deduced by the aid of reason and experience from those facts and circumstances so established. The force and tendency of circumstantial evidence to produce conviction and belief depend upon a consideration of the coincidence of circumstances with the fact to be inferred; that is, with the hypothesis, and the adequacy of such coincidences to exclude every other hypothesis.

No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened were perfectly consistent with each other, for they did so actually consist. It is, therefore, a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and those so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and reasonably, though not absolutely and metaphysically, impossible, the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for, if that fact really existed, it was necessarily consistent with all the circumstances.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as absolutely and demonstratively to exclude any other. If, for instance, it were to be proved that A. entered a room containing a watch, and that the watch was gone on his departure, and it were also proved that no agent but A. in the interval had had access to the room, the proof that A. took the watch would be conclusive and complete, for the supposition that it had been removed by any other agent would be entirely excluded.

In the next place, the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it is not, as in the former case, of an absolute and demonstra-

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tive nature. The probability of a hypothesis must always be proportioned to the *nature*, *extent* and *number* of its coincidences with the circumstances proved.

Connections and coincidences between circumstances and the hypothesis which they tend to prove are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of burglary, robbery or larceny, and stain of blood upon the person, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent.

There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence. Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are.

That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not in a state of sanity commit a crime or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it, are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

In estimating the force of a number of circumstances tending to the proof of a disputed fact, it is of essential importance to consider whether they are dependent or independent. If the facts A, B, C, and D, are so essential to the particular influences to be derived from them, when established, that the failure in the proof of any one of them would destroy the inference altogether, they are *dependent* facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest of them would still afford the same inference or probability as to the contested fact which they did before, they would be properly termed *independent* facts.

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The force of a particular inference, drawn from a number of *dependent* facts, is not augmented, neither is it diminished, in respect of the number of such independent facts, provided they are established; but the probability that the inference itself rests upon sure grounds is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception.

On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances.

In concluding the subject of circumstantial evidence, a few of the general rules will be noticed. And these rules are always essential in the application of circumstantial proof.

First. The circumstances from which the conclusion is drawn must be fully established. If the basis be unsound, the superstructure cannot be secure. The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. *Black v. State*, 1 Texas App. 368; *People v. Kennedy*, 32 N. Y. 141; *Douglass v. Mitchell*, 35 Penn. St. 440.

Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious, if the circumstances from which we seek to deduce the conclusion depends itself upon conjecture. *Ib.*

It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are few, and depend on the credit and testimony of one or two witnesses. Where all the circumstances rest on the testimony of a single witness, the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it; for, in addition to the question, whether the witness was trustworthy, another question would arise, that is, whether the inference was correctly drawn from the facts which he was supposed to prove.

A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all, is the true one.

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Secondly. It is essential that all the facts should be consistent with the hypothesis. For, as all things which have happened were necessarily congruous and consistent, it follows that if any one established fact is wholly irreconcilable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincides and agrees with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution; yet, if the incongruity could not eventually be removed, the hypothesis would fall, although no other could be suggested.

Thirdly. It is essential that the circumstances should be of a conclusive nature and tendency. Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favor of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is, on the other hand, of a conclusive nature and tendency, where the probability in favor of the hypothesis exceeds all arithmetical or definite limits.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests the circumstances with the force of proof.

Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.

Fourthly. It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved. *Stephens v. People*, 4 Park. 396; *Williams v. State*, 41 Tex. 209; *Barnes v. State*, id. 342; *Jefferds v. People*, 5 Park. 522; *People v. Cunningham*, 6 id. 398. Hence results the rule in criminal cases, that the coincidence of circumstances to indicate guilt, however numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent.

Hence, in charges of homicide, it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by an inspection of the body.

So a prisoner cannot be convicted of larceny in stealing the goods of

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a person unknown, unless the fact of the larceny or robbery be previously proved.

Lastly. Mere circumstantial evidence ought in no case to be relied on when direct and positive evidence, which might have been given, is willfully withheld by the prosecutor, or the person attempting to establish the issue in his favor by the introduction of evidence. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; and besides this, the great excellence of indirect evidence is its freedom from suspicion, and no greater discredit can be thrown upon it than by the withholding of direct evidence.

Weighing conflicting evidence. Where the evidence is conflicting, the first step in the process of inquiry must naturally and obviously be, to ascertain whether the apparent inconsistencies and incongruities which such evidence presents may not, without violence, be reconciled; and if not, to what extent, and in what particulars, the adverse evidence is irreconcilable; and then, by careful investigation and comparison, to reject that which is vicious; and thus, if it is practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Where the testimony of direct witnesses is found to be irreconcilable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and willful and corrupt misrepresentations, which destroy his credit altogether. The presumption of reason as well as of law, in favor of innocence, will attribute a variance in testimony to the former rather than to the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are to be expected; and it is for a jury to determine whether they are of such a nature and character that they may be, or cannot be, attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances, in a medical or surgical case, and to form from them correct conclusions, than an unskillful and inexperienced person would be likely to do. Much also must depend upon a comparison of the means and opportunity which the witnesses had for making observations of the circumstances which were likely to excite and engage their attention, and of their reasons and

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motives for attending ; and here it is to be observed that there is an important distinction between positive and negative testimony.

If one witness were to swear positively that he saw or heard a fact, and another were to swear that he was present, but did not see or hear it, and the witnesses were equally trustworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative ; for it would usually happen that a witness who swore positively, minutely and circumstantially to a fact which was untrue, would be guilty of perjury ; but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true ; because the falsity of the testimony might arise from inattention, mistake, or defect of memory ; and, therefore, even independently of the usual presumption in favor of innocence, the probability would be in favor of the affirmative.

When the evidence in a case is of both an affirmative and negative character, the affirmative evidence is entitled to the greater weight. *Frantz v. Lenhart*, 56 Penn. St. 365 ; *Pool v. Devers*, 30 Ala. 672 ; *Stitt v. Huidekopers*, 17 Wall. 384. See *McKeever v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 667 ; *Culhane v. N. Y. C. & H. R. R. Co.*, 60 id. 133. But it is not true as a matter of law that negative evidence may not be sufficient, in fact, to counterbalance the positive testimony of a single witness. *Campbell v. New England Ins. Co.*, 98 Mass. 381. Where there is no conflict, negative testimony may have all the force of positive evidence. *Rennick v. N. Y. C. R. R. Co.*, 36 N. Y. 132. An issue of fact may be proved by either affirmative or negative evidence. *Duffield v. Delancy*, 36 Ill. 258.

If two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true that the clock did strike, and yet each might swear truly. It is not only possible but it is probable that the latter witness, though in the same room, through inattention, might be unconscious of the fact, or being conscious of it at the time, that the recollection had afterward faded or escaped from his memory. It follows, therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appears, the presumption in favor of human veracity operates to support the affirmative. See *Chicago & Rock Island R. R. Co. v. Stitt*, 19 Ill. 499.

And further, when, in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity

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which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other; or that, under the circumstances, the attention of the latter was not so likely to be fully excited and particularly directed to the facts, this principle co-operates with the weight of evidence in favor of the former, in all cases where there is room for error or mistake. See *Durham v. Holeman*, 30 Ga. 619.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error or defect of memory. If, in the instance already supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining, by their senses, whether it would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

The negative testimony of witnesses familiar with a certain commodity, and who have long dealt in it, that they never saw any of a specified brand, may be weighed against the testimony of another witness that he had seen it, in determining the existence of such a brand, and whether it was known in the market. *Pollen v. Leroy*, 10 Bosw. 38.

If a witness swears that three persons had an important conversation together, and one of these persons swears that no such conversation ever took place, the rule giving affirmative testimony preference over negative will not apply and the jury must be guided by other tests in determining the truth. *Reeves v. Poindexter*, 8 Jones' L. (N. C.) 308.

It will be seen from the cases that no general and universal rule can be laid down, respecting the comparative value of positive and negative testimony. *Denham v. Holman*, 26 Ga. 182. But when positive testimony on the one side is met by belief or impressions on the other, and there are no means of determining the truth other than by the testimony itself, there is in fact no conflict of evidence, and a finding which rejects the positive testimony and adopts the mere impression is not only not conclusive, but is against evidence. *Dresser v. Van Pelt*, 1 Hilt. 316. But it must be remembered that circumstances may outweigh direct evidence. *Bowie v. Madox*, 29 Ga. 285. An inherent

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improbability in a statement may deny all its claims to belief. *Blankman v. Vallejo*, 15 Cal. 638; *Stilwell v. Carpenter*, 2 Abb. N. C. 238.

Where the testimony of conflicting witnesses is irreconcilable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict in their evidence. The first point of comparison is their character for integrity.

This may either depend on positive evidence as to their previous situation, conduct and character, or may be a matter of inference and presumption from their relative situation as to the parties or the subject-matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biased. Where the testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. In such cases, also, any variance in the testimony of witness from a former statement relating to the same transaction, if it is established and not explained, necessarily tends to impeach either his integrity or his ability.

All those circumstances which were likely to influence and bias a witness in favor of the party are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration. Not only may the stronger motives arising from the ties of consanguinity, affinity, friendship or expectation of future gain cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also in cases where, in other respects, the weight of testimony is nicely balanced, many considerations of an inferior and weaker description, such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favor of a party from connection in the way of trade, profession or membership of any description which would afford not the slightest ground for questioning the credit of an unimpeached witness, may become of essential importance.

Such considerations become still more important where any suspicion arises from the manner and demeanor of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent.

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But, above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is a great test of credibility.

The relative consistency of testimony is a most important test of comparison. If a witness testifies to facts incoherently or inconsistently, that circumstance goes to the credibility of the witness; and if his manner is very inconsistent or incoherent, his testimony should be received with great caution. *Evans v. Lipscomb*, 31 Ga. 71.

In cases of conflicting testimony, and particularly where the subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written instruments or documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance.

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to be *viva voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect.

As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *falsus in uno, falsus in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional. Where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.

Where a witness has testified to matters which were material to the issues on trial, and as to which deliberate false swearing would be perjury, and he is contradicted by other witnesses, it is not erroneous for the court to instruct the jury that they are the judges of the credibility of the witnesses, and that if they believe the witness has knowingly testified falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him. *Roth v. Wells*, 29 N. Y. 471.

How far the maxim *falsus in uno, falsus in omnibus* is to be relied upon as a test in weighing evidence, is an open question. The fact that the testimony of a witness has been shown to be untrue in some particular does not as a matter of law require that his testimony,

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as to other matters in which he is not contradicted, shall be disregarded, where it is not clear that the testimony was corruptly given. *Derring v. Metcalf*, 74 N. Y. 501. It has been repeatedly held that the maxim applies only to cases of willfully false testimony, *Chicago, etc., R. R. Co. v. Berger*, 1 Ill. App. 472; *The Santissima Trinidad*, 4 Wheat. (U. S.) 338, 339; *Wilkins v. Earl*, 44 N. Y. 172; *Callanan v. Shaw*, 24 Iowa, 441, and does not apply in cases of mere contradiction. *Galliher v. People*, 82 Ill. 145; *Wilkins v. Earl*, 44 N. Y. 172. If the jury find that the witness has sworn corruptly false in one material thing, they should pronounce him false in his whole testimony, and utterly disregard it, *People v. Evans*, 40 N. Y. 1. See *State v. Schænwald*, 31 Mo. 147, except so far as his testimony is supported by corroborating proof. *Crabtree v. Hagenbaugh*, 25 Ill. 233. But the credibility of witnesses is altogether a question for the jury. *Bowers v. People*, 74 Ill. 418; *Stampofski v. Steffens*, 79 id. 303; *Wallace v. State*, 28 Ark. 531; *Schillabarger v. Norfue*, 15 Kans. 547. And while the jury in weighing evidence should be governed by legal rules, the court cannot compel them to disregard the evidence of any witness on the ground that the witness is wholly unworthy of belief, though it may caution them to weigh his testimony with care and close scrutiny. *Pease v. Smith*, 61 N. Y. 474.

All testimony when once admitted in the cause is in general for the jury to consider, whether it be that of an accomplice in crime, or of a person discredited as to his general character, or not strictly regardful of the truth. *Pease v. Smith*, 61 N. Y. 474; *White v. McLean*, 57 id. 670; *Merritt v. Lyon*, 3 Barb. 110; *Dunn v. People*, 29 N. Y. 523; *Warren v. Haight*, 62 Barb. 490. There may be an exception to this rule where the witness is shown to be guilty of perjury, though not convicted of the offense. *Pease v. Smith*, 61 N. Y. 474, 484. See *Derring v. Metcalf*, 74 id. 501; *Stofer v. State*, 15 Ohio St. 47.

It is scarcely necessary to observe that this, the maxim *falsus in uno falsus in omnibus*, does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remains unimpeached, this is a consideration which necessarily affects his character for accuracy. *State v. Elkins*, 63 Mo. 159. See *Koehucke v. Ross*, 16 Abb. Pr. (N. S.) 345.

Neither does the principle apply to the testimony given in favor of the adversary. Such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of a corrupt witness to conceal it. Hence it is a general principle that

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a jury may believe that which makes against his point who swears, although they do not believe that which makes for it.

The presumption is always *prima facie*, and, in the absence of circumstances which generate suspicion, in favor of the veracity of a witness; but, where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid to the satisfaction of the jury.

From the cases cited it will be seen that the jury are not bound to disbelieve an impeached witness, and upon the same principle they are not bound to believe a witness who has not been impeached by direct testimony, if from the circumstances of the case the testimony of the witness seems to them improbable. *Blankman v. Vallejo*, 15 Cal. 638; *Stilwell v. Carpenter*, 2 Abb. N. C. 238. So, a justice in the trial of a cause is authorized to disregard the testimony of a witness, if from his appearance, character and other circumstances he disbelieves him. *Donohoe v. Henry*, 4 E. D. Smith, 162. But it is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. *Elwood v. Union Telegraph Co.*, 45 N. Y. 548; *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 361; *Conrad v. Williams*, 6 Hill, 444.

But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made; the witnesses though unimpeached may have such an interest in the question at issue as to affect their credibility; and furthermore it is often a difficult question to decide when a witness is in a legal sense uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment and blindly adopt the statement of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached. *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549. See *Kavanah v. Wilson*, 70 id. 177.

A few words more in relation to the excuses which jurors sometimes offer for the rendering of a verdict which is not in accordance with either law or justice, nor even with fair preponderance of evidence, when that is properly weighed and applied.

What circumstances will amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the judgment and the conscience of the jury. Sometimes evi-

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dence is given by a witness which is so improbable as to amount to a moral certainty that it is false, or at least unreliable, and yet effect is given to it by jurors who found their verdict upon it. In such cases the excuse is made by jurors that the facts were sworn to, and they could not do otherwise than to act upon them. If the jurors did not credit the evidence, they had no right, under their oath, to give it any such effect. It is true that jurors cannot arbitrarily disregard the evidence in a cause; but, as we have already seen, the law gives them a large latitude in judging of the credit of witnesses, and of the effect to be given to their evidence. If, on a full and careful examination of the evidence of a witness, the jury are satisfied that it cannot be true, they ought not to give effect to it in rendering a verdict.

There are in many cases difficulties enough as to the proper disposition of some portions of the evidence, and the general rules which have been given were intended to aid the proper solution of the difficulty. No cases of conflicting evidence are more difficult of solution than those where facts, apparently well established, lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. But it rarely happens where there are such conflicting probabilities, so nicely balanced, that some rule of legal policy does not intervene to turn the scale. And in all such cases in which the evidence leaves the matter so doubtful, the true rule is to decide it against the party who holds the affirmative of the issue, whether that party be plaintiff or defendant. *Long v. Hitchcock*, 9 Carr. & Payne, 619; *Fox v. Decker*, 3 E. D. Smith, 150; *Cotton v. Wood*, 8 J. Scott (N. S.), 568.

Where there is a general denial of all the allegations in the complaint, the plaintiff will be required to satisfy the court or jury that there is preponderance of evidence in his favor, or he will fail to recover. So, where the defendant does not interpose a denial, or where he concedes that the plaintiff's cause of action is established, but he relies upon some affirmative defense, such as a set-off, recoupment, tender, payment and the like, the burden of proof is on the defendant to establish these issues, and if he does not satisfy the court or jury that the preponderance of evidence is in his favor on these issues, his defense will fail.

PART VII.

TRIAL.

CHAPTER I.

PREPARATION FOR TRIAL.

SECTION 1. Subpoena. After an issue has been joined, and the cause adjourned to a day for trial, the next important matter which requires attention is to make a careful preparation for such trial. This preparation relates to two different subjects. The first is to examine the law in relation to the action upon its merits, and also as to the admissibility of any evidence which is not clearly admissible within the general rules of evidence. So, it is also proper to examine such legal questions as may be properly raised by the matters disclosed by answer. The duty of investigating all legal questions will, of course, devolve upon the attorney or counsel who is to try the cause. And to a young lawyer nothing can be of greater service than to make a full and careful brief for the trial of every cause of any importance. No point of law and no class of evidence need be overlooked in the hurry of a trial if this is properly done. It is not necessary to make a formal brief in every case, but a methodical and diligent examination of the points of law, and of the details of the evidence in a cause, are nearly indispensable to a certainty of success, or to a thorough and exhaustive trial on the merits. It may be convenient to state those points, upon which a brief should be explicit. A brief usually consists of three parts: 1st. An abstract of the pleadings; 2d. A statement of the case; and, 3d. A statement of the proofs. A more particular and formal brief may contain an enumeration of several important matters: 1st. The names of the parties, their residence and occupation, the character in which they sue or defend, and the reason why they prosecute or resist the action. 2d. An abridgment of the pleadings, showing what facts are in issue, and what facts are admitted. 3d. A regular chronological and methodical statement of all material facts. 4th. A summary of the points or questions in issue and of the proof which is to support such issues, mentioning specially the names of the witnesses by whom the facts are to

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be proved, or, if it is to be established by written evidence, an abstract of such evidence. 5th. The personal character of the witnesses should be mentioned, whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering. 6th. If known, the evidence which will be introduced by the opposite party should be stated, and such facts or witnesses as are adapted to oppose, rebut, explain or answer it by new matter, should be mentioned. Let the facts be stated in such a manner that it will be convenient, at any moment, to find the desired information which has been noted. Brevity is desirable, but when the facts are material they cannot be too extended. 7th. A full and careful statement of the legal principles involved, with a reference to the authorities which sustain them, is always an indispensable part of a lawyer's duty in the preparation of a cause for trial or for argument. It is not to be understood that it is recommended that a very formal and particular brief should be made for the trial of every action, since, in some cases, the facts may be few and the legal rules undisputed. But an experienced lawyer is well aware of the numerous surprises which have been in reserve for him, in cases in which it was supposed that the matter was too plain to be doubted. And, when an inexperienced practitioner is required to meet counsel of long experience, the propriety of a thorough preparation will probably be fully appreciated, even by those who rely quite confidently upon fine natural abilities. And it may be stated as a rule, that in the practice of the law, thorough examination of the law, and a careful investigation of the evidence are indispensable prerequisites of professional success. Too many causes have been tried, and a just cause lost, or a meritorious defense has been disregarded for the want of due preparation for trial. And it is not a little annoying to find that a cause was lost in consequence of great negligence in not discovering and proving important facts which really existed, but which a want of proper attention has failed to elicit and prove on the trial. More has been said upon this point, perhaps, than might be deemed necessary, but it will be found, in practice, that far too many important causes are disposed of in such a hasty and unprepared manner, that justice fails and innocent parties unnecessarily and unjustly suffer loss. Causes are occasionally tried on the return day of the process, but this is so rarely the case that no particular remarks need be made in relation to the matter.

But when an issue has been joined, and the cause adjourned for trial, the first duty of the parties is to obtain a subpœna, and then immediately subpœna every material witness who may be needed at such

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trial. And, so far as it is practicable, the party ought to acquaint himself with the particulars of the evidence which each witness will give. An observance of this rule will avoid the subpœnaing of unnecessary witnesses, as well as with the too common occurrence of swearing a witness before it is known whether his evidence will not aid the opposite side of the case more than that of the party calling him. And it is quite too frequently the case that a witness is called and sworn, and then examined, merely to end in a disclosure that he knows nothing material in relation to the case. Every material witness ought to be duly subpœnaed. This course will compel his attendance, if he is unwilling to appear voluntarily. But it is always best to subpœna every witness, however willing he may be to attend. Some event may occur which prevents his attendance, and if an adjournment becomes necessary in consequence, it is important to show due diligence to entitle the party to such adjournment. *Deas v. Smith*, 1 Caines, 172. So, if an attachment is desired, it is important to show that the witness has been duly subpœnaed. The attendance of witnesses to give evidence orally is procured by the service of a subpœna, which is a process authorized by the statute for that purpose.

A subpœna is usually obtained from the justice before whom the cause is pending. This, however, is not indispensable, since any justice of the peace may issue a subpœna to compel the attendance of witnesses, either before himself or before any other justice. Vol. 1, p. 34, § 2969. But no justice has a right to issue a subpœna returnable before any justice other than himself, unless the party applying for it shall prove by his own oath, or that of some other person, that an action is actually pending before such other justice. *Ib.* The oath may be in the following form :

You do swear that you will true answers make to all such questions as may be put to you in relation to the propriety or necessity of issuing a subpœna in a cause said to be now depending before A. E., Esq., a justice of the peace of the town of New Scotland, in the county of Albany, in which action C. D. is plaintiff, and E. L. is defendant.

After administering the oath, the justice may examine the party sworn as to the pendency of the action, and when the actual pendency of such action is shown, he should issue the subpœna, making it returnable, of course, before the justice before whom the action is to be tried.

A justice's subpœna extends, territorially, farther than the limits of the county in which it is issued. And a subpœna is valid to compel the attendance of any witness in the county in which it is-

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sued, or from any adjoining county, but in no other case. Vol. 1, p. 34, § 2969.

When the subpœna merely requires the witness to attend and be sworn and examined orally, the process is called a *subpœna ad testificandum*. There are cases, however, in which it is desirable that the witness should *bring with him*, and produce at the trial, certain books, documents, instruments or papers, which are described in the process, and it is then called a *subpœna duces tecum*.

There is, however, but one subpœna, for when it is desirable that a witness should produce a paper, etc., it is merely necessary to add a clause to that effect, in the manner shown by the following form :

ALBANY COUNTY, }
Town of Watervliet, } ss. :

To JOHN SMITH, Greeting :

You are hereby commanded, in the name of the people of the State of New York, to appear before the undersigned, at his office in the said town, on the 20th day of June, 1882, at ten o'clock in the forenoon, to give evidence in a civil action then and there to be tried between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff (or defendant).*

Dated at the town aforesaid, the 14th day of June, 1882.

E. F., *Justice of the Peace*.

If either of the witnesses has a paper, etc., which is desired as evidence at the trial, then add the following clause to the original subpœna :

Duces tecum clause.

And you, John Smith, are also commanded to bring with you, and there produce as evidence a certain promissory note (*describe with particularity*) which is now in your possession, or under your control, together with all papers, documents, deeds, writings or instruments which you have in your custody and possession, or under your control, which relate to the said action.

This clause should be inserted immediately after the * in the foregoing form, and then conclude as in that precedent.

The particular paper must be described accurately in the subpœna, or the witness will not be compelled to produce it. The description, however, will be sufficient if it fully apprises the witness what paper, instrument, etc., he is required to produce. He is entitled to fair notice of the paper required, so that he may comply with the process ; so, on the other hand, he will not be permitted to evade the process under the pretense that the notice was not sufficiently explicit, if it is such that the court can say is reasonably particular.

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A witness, or a party who is subpœnaed with a subpœna *duces tecum*, is as much bound to produce the papers or documents required, as he is to appear and give evidence. His mere appearance, without producing them, will not be a compliance with the requirements of the subpœna; and he will be liable to the party subpœnaing him, to all damages which he may sustain in consequence of his disobedience of the process, as well as to all the consequences of a contempt of court. *Lane v. Cole*, 12 Barb. 680; *Bonesteel v. Lynde*, 8 How. 226, 352; *Mitchell's Case*, 12 Abb. 249. But it does not follow that the court will always order the paper to be introduced as evidence, merely because the witness was bound to produce it at the trial.

There are some cases in which counsel will not be compelled to produce a paper as evidence, if it was put into his hands as a professional man, *Mallory v. Benjamin*, 9 How. 419; *Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Denison*, 4 Wend. 558; *Coveney v. Tannahill*, 1 Hill, 33, and will not be compelled to disclose its contents as a witness. *Ib.* But he may be compelled to prove the existence of the paper, that it is in his possession, and that it was deposited with him by his client. This is done for the purpose of authorizing secondary evidence of the contents of the paper sought.

The right to refuse to produce a paper does not seem to be favored by some of the earlier cases. *Peck v. Williams*, 13 Abb. 68; *Mitchell's Case*, 12 Abb. 249. It is for the court and not for the witness to decide whether the disclosure will be a violation of professional confidence. *Ib.* Since the Code an attorney or counselor at law is not allowed to disclose any communication made by his client to him, or his advice given thereon, in the course of his professional employment. This has been sufficiently discussed elsewhere. *Ante*, 393, 612.

A witness is bound to produce a paper for the purpose of identification, if duly subpœnaed for that purpose. *People v. Sheriff of N. Y.*, 29 Barb. 622; S. C., 7 Abb. 96. No collusion or combination between a party and his counsel will be tolerated, where the object is to defeat the operation of the process of the court. *Ib.* See *Shelp v. Morrison*, 13 Hun, 110. A person cannot be compelled to produce a book of account upon a trial or hearing otherwise than by an order requiring him to produce it, or by a subpœna *duces tecum*, and the witness may, in a proper case, procure such a modification of the terms of the order as justice requires. A justice of the peace may make an order requiring the production of a book of account, or modifying an order for such production at any time after the commencement of the action before him. Vol. 1, p. 41, § 867. A subpœna *duces tecum*, requiring the pro-

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duction of a book of account, may be issued by the justice and modified by him after service, in the same manner as the order before mentioned. Ib. Such subpœna must be procured from the justice and served at least five days before the day when the witness is required to attend. Ib. If a subpœna *duces tecum* is too broad in its terms and will require the witness to produce an unreasonable number of books, the witness should move, upon such notice as the justice prescribes, for an order relieving him wholly or partially from the obligations imposed upon him. The justice should not make an order merely relieving the party from the obligation of the subpœna, but should direct the witness to allow an inspection of the books, or should compel the witness to produce copies of such portions of the books as are material to the issues. *Clyde v. Rodgers*, 24 Hun, 145. It was formerly held that an officer of a corporation was not bound to produce the corporate books and papers under a subpœna *duces tecum*, for the reason that he has no such control over them, or any such property in them, as makes it his right or his duty to produce them. *La Farge v. La Farge Fire Ins. Co.*, 14 How. 26 ; S. C., 6 Duer, 680. But the Code has swept away this distinction and permits a party to compel the production of a book or paper belonging to or under the control of a corporation, by a subpœna or order directed to the president or head of the corporation, or to the officer having custody of the book or paper, in the same manner as if it were in the hands or under the control of a natural person. Vol. 1, p. 183, § 868.

This process does not require a party to produce any thing but papers, documents, etc., and, therefore, a party cannot be required to produce a chattel in relation to which an action is pending. And where an action was brought upon a warranty made on the sale of a watch, it was held that the plaintiff, though a witness on the stand, was not compellable to produce it for inspection, although he had it in his pocket at the time. *Hunter v. Allen*, 35 Barb. 42. But a witness being sworn, and having then a document in his possession, is bound to produce it, if required, though he has not received any notice to produce it, nor been served with a subpœna *duces tecum*. *Snelgrove v. Stevens*, 1 Carr. & Marsh. 508 ; *Boynton v. Boynton*, 25 How. 490 ; S. C., 16 Abb. 87 ; 41 N. Y. 619, *n*. And see *ante*, 452, 454.

This subpœna is intended to secure the production of the paper desired. But a mere notice to produce a paper will be sufficient to authorize the introduction of parol evidence as to its contents, if such notice is served on a party to the action, and he has the paper in his

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possession, or under his control. This subject has been discussed in a previous place. *Ante*, 452 to 458.

A party may take as many subpœnas as he chooses, or he may take a single subpœna and insert the names of as many witnesses as he deems proper. The justice sometimes inserts the name of one witness, and then the party subsequently inserts the names of such other witnesses as he deems material or useful. There is no law, however, which requires a justice to insert the names of any of the witnesses, since the statute relating to blank process does not include subpœnas. *Ante*, 101. The name of the witness may be inserted in the subpœna at any time, whether before or after its service. *Wakefield v. Gall*, Holt's N. P. 526. A subpœna may be served by a party to the action, or by an agent or third person, or by a constable. Proof of service is rarely required, unless for the purpose of obtaining an attachment or on the taxation of costs. When it is served by a constable, his return thereto, stating the manner of service and the sum paid to the witness, is presumptive evidence of the facts therein stated. Vol. 1, p. 34, § 2970.

Constable's Return.

I served the within subpœna on each of the undernamed witnesses, by stating to each the contents thereof, and tendering to each the sum of twenty-five cents, viz. : on John Smith at Northville, in the county of Fulton, on the 14th day of June, 1882; on Richard Roe, at Mayfield, in said county, on the 15th day of June, 1882; and on John Stiles, at Gloversville, in said county, on the 18th day of June, 1882.

G. H., *Constable*.

A subpœna must be served on the witness a reasonable time before the trial, or he will not be liable to an attachment for non-attendance. *Hammond v. Stewart*, 1 Strange, 510; *Chalmers v. Melville*, 1 E. D. Smith, 502. A witness is allowed a reasonable time to arrange his own affairs, so as to injure his interests as little as may be. And where a party delays subpœnaing a witness to a very late hour before the trial, he may be compelled to suffer such consequences as may result. An attachment was refused in one case where the witness was served with a subpœna about twelve o'clock at noon, to attend before a referee at half-past three of the same afternoon. At the time of the service of the process, the witness had closed his place of business on Saturday, and was about to go on board of a steamboat to go to a specified place, to remain over the Sabbath, and his family were then on board of the boat. The witness offered to attend as a witness on the Monday following, on his return, and the court held this sufficient and refused an

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attachment. *Ib.* And see *Home v. Smith*, 1 Marsh. 410. A reasonable time for travel is allowed to a witness, and he may avail himself of the ordinary modes of conveyance. *Wilkie v. Chadwick*, 13 Wend. 49. He cannot be required to travel on the Sabbath; nor can he limit his traveling to thirty miles a day. *Ib.* The service, to be valid, must be personal, and it must be made upon the witness himself. If the witness is a married woman, the service must be made upon her personally, and not upon her husband, and the fees must be paid to her, and not to him. *Goodwin v. West*, Cro. Car. 522; *W. Jon.* 430. The subpœna must be served at some place within the county in which the action is to be tried, or an adjoining county. See *ante*, 659.

A witness may be subpœnaed in his own house. And when the outer door of the house is open, the law authorizes the person having such subpœna to enter the house and to make due service of the process. And such person is not bound to leave the house before he can reasonably make the service, notwithstanding he may be ordered to leave. And if he entered the house peaceably, through an open door, or in any other legal manner, he may lawfully resist any person who attempts to prevent the service of the process. *Hager v. Danforth*, 20 Barb. 16. A subpœna may be served by reading it to the witness, or by stating its contents to him. Vol. 1, p. 34, § 2970. Where the service of a subpœna is commenced, either by reading, or by stating its contents to a witness, he cannot evade such service by running off so as not to hear it. The person making the service may continue reading or stating the contents of the process, and the service will be entirely valid, notwithstanding such witness failed to hear what was read or stated, because it was the fault of the witness himself that he did not hear it, and he will not be allowed to take any advantage of his own wrong.

As a part of the service of a subpœna, it is necessary to pay to the witness, or to tender to him, at the time of such service, the fees allowed by law for one day's attendance. Vol. 1, p. 34, § 2970. Since the enactment of the Code, which requires a party to appear as a witness, when subpœnaed by the opposite party, it is as necessary to pay fees to a party, when subpœnaed, as it is to pay them to any other witness. *Anderson v. Johnson*, 1 Sandf. 713; *Hewlett v. Brown*, 7 Abb. 74. No witness is bound to appear in obedience to the commands of a subpœna until his legal fees are paid or tendered to him. *Hurd v. Swan*, 4 Denio, 75; *Fuller v. Prentice*, 1 H. Bla. 49. Nor can a witness be compelled to be sworn as a witness until his fees are paid or tendered, although he may be actually present in court at the trial.

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Hurd v. Swan, 4 Denio, 75; *Bowles v. Johnson*, 1 W. Bla. 36. The same rule applies to a party when he is called as a witness by the opposite party. *Hewlett v. Brown*, 1 Bosw. 655; S. C., 7 Abb. 74.

When the trial of a cause will occupy more than one day, it is the duty of the plaintiff to seek for his witnesses, and to pay or to tender to them their fees for a second day's attendance. And this ought to be done on the first day, as the witness is under no legal obligation to remain any longer than the first day, unless the fees for the second day are paid or tendered. *Hurd v. Swan*, 4 Denio, 75. The witness is not bound to apply for his fees, nor to notify the party that he will leave if his fees are not paid. *Ib.* It is the duty of the plaintiff, too, to be certain that he has paid a sufficient sum as witnesses' fees; and if he pays too little, the witness will not be bound to appear, though he accepted the money, unless he expressly agreed to accept the sum paid as sufficient, and promised to attend court. *Ib.* A witness may waive the payment of fees, if he chooses to do so, by an express agreement to that effect. *Ib.*; *Goodwin v. West*, Cro. Car. 522, 540. So a witness may agree to attend as a witness, and accept of his board and traveling expenses in lieu of fees, and this will be a valid contract. When there are two causes adjourned for trial on the same day, and at the same place, the witness is entitled to fees in both suits, even though the parties are the same in both actions. *Vence v. Spier*, 18 How. 168; *Hicks v. Brennan*, 10 Abb. 305.

A party cannot charge fees as a witness unless he attended for that purpose, and not for the purpose of superintending the trial of the cause. *Logan v. Thomas*, 11 How. 160; *Case v. Price*, 17 id. 348; S. C., 9 Abb. 111; *Cornell v. Potter*, 15 How. 278. So one defendant cannot tax witnesses' fees for the attendance of a co-defendant, unless he attended expressly and solely as a witness. *Walker v. Russell*, 16 How. 91. It has been held that if proof is made that a party attended solely as a witness, his fees are taxable. *Ib.*; *Bronner v. Frauenthal*, 20 How. 355; S. C., 12 Abb. 183. See cases cited and reviewed; see, also, *Van Dunsen v. Bissell*, 29 How. 481. But the contrary doctrine has also been held in several reported cases. *Steere v. Miller*, 28 How. 266; S. C. affirmed, 30 id. 7; *Delcomyn v. Chamberlain*, 48 id. 409; S. C. affirmed, 7 Jones & Sp. 359. The fees of witnesses cannot be allowed unless they have been subpoenaed and paid, or unless they have actually attended at the trial. *Brown v. Bowen*, 16 How. 545; *Wheeler v. Lozee*, 12 id. 446.

The statute prescribes the amount of fees payable to witnesses.

Subpœna.

Each witness is entitled to twenty-five cents for each day's actual attendance. Vol. 1, p. 102, § 3327.

A witness who has been duly subpœnaed is bound to attend the trial in obedience to its command, and a refusal or an inexcusable neglect to do so will subject him to a liability to a fine, as well as to the payment of all damages which may be sustained by the party who subpœnaed him. Vol. 1, pp. 35, 36, §§ 2974, 2979; *Hasbrouck v. Baker*, 10 Johns. 248. And see *Heermans v. Williams*, 11 Wend. 636.

But before an action will lie, it must be made to appear that the witness was a material one, and that the failure to try the cause or the defeat of the party arose from the absence of such witness. *Hurd v. Swan*, 4 Denio, 75; *Courtney v. Baker*, 3 id. 27; vol. 1, pp. 35, 36. If the statute provides a mode of proof, by which the attendance of an officer may be dispensed with, by producing certified copies of such officer's proceedings, and the plaintiff neglects or refuses to procure such evidence, he cannot maintain an action against such officer for not attending with the original papers or records. This was so held, in an action against a justice of the peace, for not producing his docket. *Heermans v. Williams*, 11 Wend. 636. If the failure of the action arose in consequence of the absence of the witness, it is not necessary to show that a jury was impaneled in the cause in which such witness was subpœnaed. *Hurd v. Swan*, 4 Denio, 75. And it is not necessary to show that the plaintiff had a good cause of action, if he was nonsuited for the non-production of a book which the witness was subpœnaed to produce at the trial. *Lane v. Cole*, 12 Barb. 680. In an action against a witness for a penalty for non-attendance, he may prove, if he can, that the plaintiff declared that such witness knew nothing about the controversy in the former action, in which such witness was subpœnaed. *Courtney v. Baker*, 3 Denio, 27.

And a party who knowingly subpoenas a witness for the purpose of vexation, when such witness does not know any thing of the case, is guilty of a contempt of court. *Ib.*

A party who voluntarily submits to a nonsuit, when he could have avoided it, by obtaining and producing written or documentary evidence instead of calling such witness, cannot maintain an action against him for non-attendance. *Heermans v. Williams*, 11 Wend. 636. A witness who attends the trial at the request of a party, and is sworn, may recover his fees notwithstanding the fact that he was not subpœnaed. *Baker v. Brill*, 15 Johns. 260; *Wheeler v. Lozee*, 12 How. 446. Where the statute prescribes the amount of the fees which shall be paid, no more than that sum can be recovered, either by an officer or a

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witness, even upon an express promise to pay more, notwithstanding such promise is made before the service is rendered. *Fuller v. Mat-tice*, 14 Johns. 357. Nor can a witness recover for the loss of time while attending court, even upon an express promise to pay for it. *Willis v. Peckham*, 1 Brod. & Bing. 515; *Lopes v. De Tastet*, 3 id. 292. But a witness who is called to depose to a matter of opinion, depending upon his skill in a particular trade, has, before he is examined, a right to demand from the party calling him, a compensation for his loss of time; and there is a distinction between a witness thus called and a witness who is called to depose to facts which he saw. *Webb v. Page*, 1 Carr. & Kir. N. P. 23. The last case cited was in a court of record, and it is an English case, and how far it would be enforced in a justice's court is uncertain. But, if a witness of skill or science, or a professional man, is requested to examine any matter or question, in order to render him an important witness, there is no reason why he should not be paid for the services so rendered on request, and on a promise, express or implied, to pay him what his time is reasonably worth. A witness who is subpoenaed, but not paid his fees, may attend the trial and refuse to be sworn until his fees are paid, and if for that reason he is not called by the party subpoenaing him, such witness may nevertheless maintain an action to recover his fees for attendance. *Hallet v. Mears*, 13 East, 15. Though a witness, subpoenaed by both parties, obtains from each, without the knowledge of the other, full payment of his fees, the party succeeding is entitled to have his payment to the witness allowed him in his taxed costs of suit, and that, although he made his payment after the witness had been already paid by the other party. *Bensen v. Schneider*, 7 Taunt. 337; S. C., 1 Moore, 76. A witness who has been subpoenaed and paid, and has been sworn in chief, is bound to testify on his cross-examination, or to give affirmative evidence for the defendant, without further fees. *Edmonds v. Pierson*, 3 Carr. & Payne, 113. The privilege of a witness from arrest has been noticed in another chapter. See *ante*, 163.

Attachment against defaulting witness. When a material witness has been duly subpoenaed and has refused or neglected to attend as a witness in obedience to the subpoena, and no just cause for the neglect or refusal is shown to exist, a warrant of attachment may be issued by the justice to compel his attendance. Vol. 1, p. 34, § 2971. To authorize the justice to issue the attachment, it must be made to appear, to his satisfaction, by affidavit or other proof, that the witness has been duly subpoenaed; that he has neglected to attend in obedience to the subpoena, and that the testimony of the witness is material. The fact

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of materiality must be shown by the oath of the party in whose behalf the witness was subpoenaed, or, by the oath of his attorney. Ib. The fact that the witness was duly subpoenaed may be shown by the return of the constable who served the subpoena, if it was served by that officer, or by the affidavit of any person who made the service, or was present when the service was made. The form of the constable's return to a subpoena has been given. *Ante*, 663.

Before taking proceedings for the purpose of attaching a witness, he ought to be duly and publicly called in open court, after the cause has been properly called by the court. And if he does not then appear the proper steps may be taken for issuing an attachment.

Form of affidavit for an attachment.

ALBANY COUNTY, ss.: John Doe, the plaintiff named in the subpoena which is hereto annexed, being duly sworn, says, that on the 17th day of March, 1865, he did at the town of Watervliet, in said county, serve the said subpoena personally upon John Smith, a witness therein named, by reading said subpoena to him (or by stating its contents to him), and at the same time paid (or tendered) to him the sum of twenty-five cents. And this deponent further says, that such service of said subpoena was made on said witness in the county in which such action is to be tried (or a county adjoining thereto), and in which said witness resides. And this deponent further says that the testimony of the said John Smith, is material to this deponent, upon the trial of the action mentioned in the said subpoena, and that the said John Smith has neglected (or refused) to attend the trial of said action, as he was commanded to do in and by said subpoena.

Sworn before me, this 28th }
day of March, 1865, }

JOHN DOE.

A. B., *Justice*.

This affidavit should be annexed to the subpoena, by virtue of which the witness was subpoenaed, and this will be sufficient proof to authorize the issuing of an attachment against the witness named.

It is not necessary, however, that the proof for an attachment should be made by affidavit. If the party or any other competent person is sworn, and gives evidence of such facts as will authorize the issuing of an attachment, that will be sufficient. *Baker v. Williams*, 12 Barb. 527. And when this course is adopted the following form of oath may be administered.

Oath to prove service of a subpoena.

You do swear that you will true answers make to all such questions as shall be put to you in relation to the service of a subpoena, in an action now pending before me, in which A. B. is plaintiff, and C. D. is defendant.

Attachment against defaulting witness.

It will be necessary to swear the party, or his attorney, as to the materiality of the witness, since no other person may testify to that fact; and it may be necessary to swear another person in order to prove the service of the subpoena, which was made by him. In any event, there must be due proof made of the facts required by the statute, whether such proof is made by one person or by several. Vol. 1, p. 34, § 2971.

Where a cause is called for trial on an adjourned day, both parties should see that all their material witnesses are present, before the trial of the cause is commenced. If they are not present, and the motion to attach them is made before the trial is commenced, an attachment may be demanded as a matter of right, on making due proof, in pursuance of the statute. If the application is delayed until the cause is partially tried, that course may cause an unnecessary waste of time, which might have been avoided by an earlier application. And not only that, an application made at that late time may cause a loss of time to a jury, which would not have been impanned, had the application been made at the proper time. A justice might, perhaps, in his discretion, issue an attachment on an application made after the trial has commenced, although formerly he would not be authorized to adjourn it as he might have done had the motion been made at the proper time. *Aberhall v. Roach*, 11 How. 95; S. C., 3 E. D. Smith, 345; *Story v. Bishop*, 4 id. 423. But see vol. 1, p. 33, § 2967. But, if a witness has been regularly subpoenaed, and he attended court, and then left it after the trial commenced, the justice may, in his discretion, suspend the trial until the witness can be attached and brought in, if that can be done within a reasonable time. *Rapelye v. Prince*, 4 Hill, 119.

When the witness is near the place of trial, and it is probable that his attendance may be secured in a short time, it will sometimes be most convenient to hold the cause open for a short time, instead of adjourning it. But, if the witness is at a distance, and it is probable that some time will elapse before the attachment can be served and returned, the better course will be for the justice to adjourn the cause to some day on which the witness will be in court, not exceeding the statutory limit of five days, and make the attachment returnable at that time. If a single adjournment is not sufficient to enable the constable to serve the attachment on the witness, a further adjournment may be granted, though such a power ought to be cautiously exercised. This may be done in a court of record, and a justice has all necessary powers which courts of record have. Vol. 1, p. 3, § 2868.

Attachment against defaulting witness.

Attachment to compel attendance of witness.

ALBANY COUNTY, ss.:

The People of the State of New York, to any constable of said county, greeting:

WHEREAS it has been made to appear to the undersigned, a justice of the peace of the town of New Scotland, in the county of Albany, by due and legal proof made before him, that John Smith has been duly subpoenaed to attend on this day, at one o'clock in the afternoon, at the office of said justice in New Scotland, aforesaid, as a witness in behalf of John Doe, in an action now depending before said justice, and then and there appointed to be tried, wherein John Doe is plaintiff, and Richard Roe is defendant; and that the said John Smith has neglected or refused, without just cause, to attend as a witness in obedience to the command of said subpoena; and the said John Doe, having made due proof by his affidavit, or otherwise by competent testimony, to the satisfaction of the said justice, that the testimony of the said John Smith is material on the trial of said cause: We hereby command you to attach the body of the said John Smith, and to take him forthwith (or on some specified day) before the said justice, at his office in New Scotland aforesaid, to give evidence in said cause, and also to answer all such matters as shall then and there be objected against him for having neglected to attend the trial of the said action as a witness. And have you then and there this precept.

Given under the hand of the said justice, at New Scotland, aforesaid, this 28th day of March, 1865.

A. B., *Justice.*

After the attachment is made out it must be delivered to a constable to be executed. And the statute declares that it shall be executed in the same manner as an order of arrest. The constable may arrest the witness in a county adjoining his own, and bring him before the justice. While in the adjoining county for the purpose of executing the attachment, the constable has all the powers of a constable of that county with respect to the waraant issued to him. Vol. 1, p. 35, §§ 2972, 2973.

The constable should make a return of his proceedings upon the attachment. And if the witness has been attached, it may be in the following form:

Return of constable.

By virtue of the within attachment I have attached John Smith as I am herein commanded, and I have his body, together with said attachment, before the said justice as by said attachment directed and required.

Dated *March* 28, 1865. Fees \$1.00.

L. M., *Constable.*

The fees of the officer who issued and served the attachment must be

Imposing fine upon witness.

paid by the defaulting witness, unless he shows reasonable cause, to the satisfaction of the justice, why he omitted to attend. Vol. 1, p. 35, § 2972. In case the witness shows satisfactory cause for his non-attendance, the party who procured the attachment must pay all the costs of issuing and serving it, and if he recovers costs, the amount thereof must be allowed to him as a part of his costs. *Ib.*

Immediately on the return of an attachment, and the appearance of the attached witness, the justice should determine whether the witness or the party should pay the costs and expenses of issuing and serving such attachment. If the witness claims to have a legal and sufficient excuse for his non-attendance the justice should hear his proof of the facts. And, for that purpose, he may administer an oath to such witness, or to any other persons who may be offered as witnesses to establish such excuse. The oath may be in the following form :

Form of oath.

You do swear that you will true answers make to all such questions as may be put to you in relation to the omission of John Smith to attend as a witness on the part of the plaintiff, in an action appointed to be tried on the 28th day of March, 1865, before A. B., justice, at his office in New Scotland, wherein John Doe was plaintiff and Richard Roe defendant.

After swearing the party, he may be permitted to state the reasons why he did not attend as a witness, in obedience to the subpoena. And the justice or the person who procured the attachment may interrogate the witness as to any matter pertinent to the question. The burden of proof is on the witness to show satisfactory cause why he did not attend. And if he does not prove satisfactorily to the justice that he has a sufficient cause to excuse his non-attendance, such justice should order the witness to pay the costs and expenses incurred. The party who procured the attachment is primarily liable to the justice and constable for their fees. But, if the witness is ordered to pay the costs, and he neglects to do so, the party who procured the attachment may then pay the amount, and afterward bring an action against such witness to recover the amount so paid. If the justice decides that the party shall pay the costs, he will be liable to the justice and constable in the same manner that he would be for any similar service which might have been rendered at his request.

Imposing a fine upon a witness. The proceeding to attach a defaulting witness is designed merely to compel his attendance upon the trial, and not as a punishment for the default, although being compelled to pay the cost of the proceeding in case of failure to furnish a

Imposing fine upon witness.

reasonable and satisfactory excuse for the default, may be regarded by the witness in the nature of a punishment.

For the purpose of punishing a witness for a failure to attend or to testify, the statute furnishes an entirely independent and distinct proceeding.

The statute provides that a person duly subpoenaed as a witness, who without a reasonable excuse, proved by his oath, or the oath of another person, fails to attend, or attending, refuses to testify, must be fined by the justice before whom the action is pending, for each non-attendance or refusal, such sum, not less than one dollar, nor more than ten dollars, as the justice thinks reasonable to impose upon him, as a fine therefor. Vol. 1, p. 35, § 2974.

The fine may be summarily imposed by the justice upon the application of the party in whose behalf the witness was subpoenaed, at any time during the trial, when the defaulting witness is present and has an opportunity to be heard, or it may be imposed after judgment upon the return of a warrant issued, upon the application of the party, for the purpose of bringing the witness before the justice under arrest to show cause why the fine should not be imposed. *Id.*, § 2975.

The statute does not prescribe the mode of making the application for the summary imposition of the fine when the witness is present at the trial, nor the mode of applying for the warrant when the proceedings are after judgment in the action; nor does the statute in terms require that the party making the application shall furnish any proof of the materiality of the witness, or of his default or refusal to testify. But the statute does not authorize the justice to fine the witness unless he has been duly subpoenaed as a witness and fails to attend, or attending, refuses to testify, and, therefore, proof of some kind must be made of these facts before the justice will be authorized to act. If the witness has been brought before the court by attachment and has then refused to testify, all the facts necessary to authorize the justice to proceed to impose the fine upon the trial, or to issue the warrant after judgment, will be before him. In other cases, proof that the witness was duly subpoenaed may or may not be before the justice. It will be the better practice, in all cases, for the party applying to the justice for the punishment of a witness by fine, to base his application upon an affidavit setting forth the due service of the subpoena upon the witness; his failure to attend; or, if he attended, his refusal to testify; and also the further fact that the witness was material to the prosecution or defense of the action. If the subpoena was served by a constable his return thereto will be sufficient evidence of the facts therein stated, but will not show the failure of the witness to attend, or the refusal of the witness to testify. For all that the justice may know to the contrary

Imposing fine upon witness.

the witness may have been in court during the entire trial waiting to be sworn but was not called by either party. When the subpoena was served by a constable the party may state that fact in his affidavit, adding to the statement, "as appears by the return of said constable indorsed thereon."

The form of an affidavit to procure an attachment against a defaulting witness may be readily modified to serve as a precedent for an affidavit used upon an application of this nature. See *ante*, 668.

When the application is made upon the trial, it must be made within five days after judgment is rendered, and properly the affidavit should state that five days have not elapsed since judgment was rendered in the action. Upon an application so made the justice must issue a warrant directed generally to any constable of the county, commanding him to arrest the defaulting witness, and to bring him before the justice at a time and place therein specified to show cause why a fine should not be imposed upon him. The time fixed for showing cause must not be more than twelve days after the issuing of the warrant.

Warrant for arrest of witness.

COUNTY OF _____, }
Town of _____, } ss.:

The People of the State of New York, to any constable of said county, greeting:

WHEREAS an action was duly commenced and tried before the undersigned, a justice of the peace of said town and county, in which A. B. was plaintiff, and C. D. was defendant and judgment was rendered therein on the _____ day of _____, 1882, and five days not having elapsed since said judgment was rendered, and it appearing by the affidavit for said defendant that E. F. was duly subpoenaed to attend said trial to give evidence as a witness on behalf of said defendant; that the said E. F. was a material witness for the defense of such action, and that the said E. F. failed to attend said trial as a witness for the defendant in obedience to said subpoena, and no reasonable excuse for such failure to attend having been proved by the oath of said E. F. or any other person, and the said defendant having this day made application for the arrest of said defaulting witness pursuant to the provisions of section 2975 of the Code of Civil Procedure.

Now, therefore, we hereby command you to arrest the said E. F. if he can be found within your county, and to take him before said justice at his office in said town on the 24th day of June, 1882, at ten o'clock in the forenoon of that day to show cause why a fine should not be imposed upon him.

Dated this 14th day of June, 1882.

G. H., *Justice of the Peace.*

This warrant must be executed by the officer to whom it is directed

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custody of Y. Z., a constable of said town, under a warrant for the arrest of the said E. F., issued by me on the application of C. D., on the 14th day of June, 1882, pursuant to section 2975 of the Code of Civil Procedure, and that on the return of said warrant, the said E. F. was allowed an opportunity to be heard and to produce proof of a reasonable excuse for his default, and such proof not being produced the said E. F. was thereupon convicted before me and fined the sum of \$7, and \$2.50 costs for his failure to attend as a witness before me at my office on the 10th day of June, 1882, in obedience to a subpoena duly issued by me and served upon him, to give evidence on the part of the defendant, in an action pending before me, and then and there tried, in which A. B. was plaintiff, and C. D. defendant.

G. H., *Justice of the Peace.*

This minute of conviction is deemed a judgment against the defaulting witness in favor of the officer to whom fines are directed to be paid, by section 2875, of the Code of Civil Procedure. Vol 1, p. 35, § 2976. If the whole amount of the fine and cost are not forthwith paid to the justice, he is forthwith required to issue an execution for the collection of the sum unpaid. Vol. 1, p. 36, § 2977. If the whole amount is paid to the justice, he must pay it over within ten days thereafter, to the proper officer for the use of the poor. Id., § 2978.

The execution may be in the following form:

Execution to collect a fine.

COUNTY OF _____, }
Town of _____, } ss.:

The People of the State of New York, to any constable of said county, greeting:

WHEREAS E. F. was, on the 25th day of June, 1882, convicted before me, a justice of the peace, of said town and county, and fined the sum of \$7, besides \$2.50 costs for his failure to attend as a witness before me, at my office in said town, on the 10th day of June, 1882, in obedience to a subpoena duly issued by me, and served upon him, to give evidence, on the part of the defendant, in an action pending before me, and then and there to be tried, in which A. B. was plaintiff, and C. D. defendant; a minute of which conviction, the cause thereof, and the amount of the fine and costs imposed, have been duly entered in the docket-book of said justice; and, whereas the said E. F. has neglected to pay said fine and costs, you are, therefore, commanded to collect the sum of \$9.50, the sum of said fine and costs remaining unpaid, out of the goods and chattels of the said E. F., within your county, and for want thereof to take him and convey him to the jail of the said county, there to remain until he pays such sum, not exceeding thirty days.

Witness my hand this 24th day of June, 1882.

G. H., *Justice of the Peace.*

Proceedings against witness for refusal to be sworn.

The various precedents which have been previously given, are intended as a mere general guide, and whenever the circumstances of the case differ from those set out in such forms, the justice will make the necessary alterations, so as to make them correspond with the actual facts of the particular case.

The constable to whom the execution is delivered should levy, advertise, and sell the property in the same manner as upon any ordinary execution. And if he cannot find goods and chattels to satisfy the execution, the arrest of the defaulting witness is to be made as in other cases of arrest upon an execution. The proceedings of a justice in imposing a fine upon a witness or juror, are of a judicial nature, and, therefore, no civil action can be maintained against him to overhaul his acts, nor to recover the amount paid. See *Robbins v. Gorham*, 26 Barb. 586; S. C. affirmed, 25 N. Y. 588; *Moor v. Ames*, 3 Caines, 170; *Richmond v. Dayton*, 10 Johns. 393.

The only mode of redress is by a review of the matter by proceedings in the same cause or matter. The conviction will be valid, although it may not have been entered in the justice's docket, since the statute, in that respect, is merely directory.

The County Court may make an order, remitting the fine wholly or partly, and discharging the witness from imprisonment. Code of Civil Procedure, § 353.

Proceedings against witness for refusal to be sworn, etc. The proceedings to compel the attendance of a defaulting witness by attachment, and to punish a witness by fine for a failure to attend, or to testify, have been noticed. But merely compelling the attendance of a witness upon the trial is of little value to the party subpoenaing him, if the witness, on being brought before the justice, refuses to be sworn; and the remedy by fine for the refusal of the witness to be sworn offers but a poor substitute for material testimony which the witness has been subpoenaed to give. The witness may pay his fine and still remain silent.

To meet such a case the statute provides that where a witness attending before a justice in an action, refuses to be sworn or affirmed in the form prescribed by law; or to answer a pertinent and proper question; or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce as prescribed in section 2960 of this act, or duly required to produce by an order made as prescribed in section 867 of this act, and the party, at whose instance he attended, makes oath that the testimony of the witness, or that the book or paper is so far material that without it he cannot safely proceed with the trial

Proceedings against witness for refusal to be sworn.

of the action, the justice may, by warrant, commit the witness to the jail of the county. Vol. 1, p. 41, § 3001.

Before a person can be committed to the county jail for a refusal to testify, etc., proof must be made to the justice that the person was under some legal obligation to be sworn, to answer, or to produce books or papers; and it must also be shown by the oath of the party that the testimony of the witness, or that the book or paper is so far material that without it the party cannot safely proceed with the trial of the action.

If the justice dispenses with the oath of the party as to the materiality of the testimony, or of the book or paper, and commits the witness to jail, the imprisonment of the witness will be unlawful, and the justice will be liable in an action for false imprisonment for the damages sustained by the witness by reason of the unlawful imprisonment. *Rutherford v. Holmes*, 66 N. Y. 368.

The manner of proving due service of a subpoena will not be discussed. See *ante*, p. 663.

Oath of materiality of witness.

You do swear that you will truly answer all such questions as may be put to you in relation to the materiality of the testimony of Charles Jones, a witness in the action now on trial before me, in which A. B. is plaintiff, and C. D., defendant.

If the party then states, under his oath, that the witness is a material one, and that he cannot safely proceed to the trial of the cause without his testimony, the justice must require the witness to be sworn, or to answer the question proposed, if already sworn, or to produce the book or paper. If the witness refuses to comply with the requirement of the justice the latter must issue a warrant, specifying the cause for which it is issued, committing the witness to the jail of the county, there to remain in close confinement until he submits to be sworn or affirmed, or to answer, or to produce the book or paper required, as the case may be, or until he is otherwise discharged according to law. If the warrant is issued for refusing to answer a question, the question must be specified in the warrant; if for neglecting or refusing to produce a book or paper, the book or paper must be described with convenient certainty. Vol. 1, p. 42, § 3002.

Proceedings against witness for refusal to be sworn.

Warrant of commitment.

COUNTY OF , }
Town of , } ss.:

The People of the State of New York, to any constable of said county, and the keeper of the county jail of said county, greeting:

WHEREAS, on the trial of a civil action before me, the undersigned, a justice of the peace of said county, on this 3d day of June, 1882, wherein A. B. was plaintiff, and C. D. was defendant, Charles Jones, on being called as a witness on the part of the defendant and being present, refused to be sworn or affirmed as such witness in any form prescribed by law. And it appearing by the return of Arthur White, one of the constables of said county, that the said Charles Jones was duly subpoenaed as a witness on the part of the defendant on the first day of June, 1882, and the said defendant having made oath, before me, that the testimony of the said Charles Jones was so far material that without it he could not safely proceed with the trial of the said action, now, therefore, you, the said constable, are hereby commanded, forthwith, to convey and deliver the said Charles Jones into the custody of the said keeper of said jail, and you, the said keeper, are hereby required to receive the said Charles Jones into your custody in the said jail, and him there safely keep in close confinement until he shall submit to be sworn as such witness as aforesaid, or shall be otherwise discharged according to law; hereof fail not.

Given under my hand this 3d day of June, 1882.

J. WOOD, *Justice of the Peace.*

The foregoing form is applicable to a case in which the witness refuses to be sworn at all as a witness. But a witness is frequently sworn, and answers most of the questions put to him, though he may refuse to answer some of the questions propounded to him. In that case, the commitment ought to be similar in form to the one just given, with such a difference in the statement as will conform to the facts of the case. Instead of reciting that the witness refused to be sworn, the commitment ought to state that the witness was duly sworn, and that he refused to answer some specified question or questions, which statement may be in the following form:

"The said Charles Jones was called and duly sworn by me as a witness, on the part of the plaintiff (or defendant), and on his examination (or cross-examination) the said Charles Jones was asked by the said plaintiff (or defendant), the pertinent and proper question, 'Whether he had seen C. D., the defendant in the action, write?' to which question the said Charles Jones refused to make any answer."

The commitment must state the question precisely as it was put to the witness, which may readily be done by reducing the question to writing.

Commission to take testimony.

A witness cannot be committed to jail under this statute for refusing to answer where he obtained liquor, or as to the cause of his intoxication, when the proceeding is one instituted under the Excise Laws of 1857, chap. 628. *People v. Webster*, 14 How. 242. And if so committed, he will be relieved on *habeas corpus*, and discharged from imprisonment. *Ib.* In such a case the question is a jurisdictional one. On a *habeas corpus*, issued in a case of a commitment for contempt of court, two questions only are examined. One is, whether the court had jurisdiction to make the commitment, and the other, whether the commitment is regular and sufficient on its face. *People v. Sheriff of New York*, 29 Barb. 622; S. C., 7 Abb. 96; *People v. Kelly*, 21 How. 54; S. C., 12 Abb. 150. A justice should never require an answer to a question which might tend to criminate a witness, or subject him to an action for a penalty, if he claims his exemption. *Byass v. Sullivan*, 21 How. 50; 3 R. S., 690, § 102, 5th ed.

The recusant witness being thus committed to the county jail, the justice must, from time to time, at the request of the party in whose behalf the witness attended, adjourn the trial until the witness testifies, or produces the book or paper required, or dies, or becomes a lunatic, or is discharged according to law. Vol. 1, p. 42, § 3003.

§ 2. **Commission to take testimony.** When a defendant has neglected to appear upon the return of a summons, or has failed to answer the complaint, or where an issue of fact has been joined in an action, and it appears, by affidavit, upon the application of either party, that a witness not within the county where the action is pending, or an adjoining county, is material in the prosecution or defense of the action, the justice may award a commission to one or more competent persons, authorizing them, or either of them, to examine the witness under oath, in one of the modes prescribed by the statute. See vol. 1, p. 36, § 2980.

The commission may be granted at the time of joining issue, or at any time afterward, upon the application of either party. It may be granted upon the application of the plaintiff, at the return of the summons, although no issue is joined. *Id.*, p. 37, § 2982.

An application for a commission to take testimony may be granted by the justice without notice, when made by the plaintiff at the return of the summons, or by either party at the time of joining issue. After the joinder of issue the application must be made upon notice. This notice must be in writing, and must be served upon the adverse party, either personally, or by service upon the attorney who appeared for him before the justice. *Id.*, p. 37, § 2982.

Commission to take testimony.

Notice of application for a commission.

JUSTICE COURT.

John Doe
agst.
 Richard Doe.

Before A. B., a justice of the peace of Watervliet,
 in Albany county.

SIR: — Please to take notice, that on the 27th day of March, 1865, at ten o'clock, in the forenoon, at the office of the said justice, in the town of Watervliet, in said county, I shall make an application to the said justice, A. B., for a commission, to be directed to C. D., of the city of Buffalo, to examine E. F., of the same place, as a witness in the above-entitled action, upon interrogatories to be annexed to said commission. Dated March 17, 1865.

JOHN DOE, *Plaintiff*.

To RICHARD ROE, *Defendant*.

If the opposite party appears at the time and place mentioned in the notice, and he does not require proof of the service of the notice, or if the service is expressly admitted, no proof of service need be made. But if such party does not appear, either in person or by attorney, then due proof of the service must be made by the party who desires such commission. Such proof must be made by affidavit. The affidavit may be drawn upon the back of such notice, or at the bottom of it, in the following form:

ALBANY COUNTY, ss.: John Doe, being duly sworn, says that he is the plaintiff named in the within (or above) entitled action, and that, on the 17th day of March, 1865, at the town of Watervliet, in said county, he personally served said notice on the said defendant, by delivering to * him a true copy thereof, and leaving the same with him. Sworn to before me this 27th }
 day of March, 1865. }

JOHN DOE.

A. B., *Justice*.

When service is made upon the party by delivering a copy of the notice to the attorney who appeared for him before the justice, proceed as in the above form to the * and add, "Y. Z., the attorney who appeared for said defendant before the justice in the action, a true copy thereof, and leaving the same with him."

In all cases it is advisable to prepare an affidavit of service of the notice, as it will be filed among the papers of the case, and be always available to prove a strict compliance with the statute. A reliance upon the admissions or waivers of an adverse party is always dangerous, unless the admission or waiver is in writing and duly signed; and when a statute requires proof of a fact *by affidavit* in order to authorize the justice to issue any mandate, the substitution of any other form of proof is, at least, of doubtful propriety. The notice may be served

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by any person, and the proof of service may, of course, be made by the person who serves the notice. If the opposite party should not appear, and the commission should be issued without proof of the service of the notice, the issuing of the commission will be irregular, and unless the irregularity is subsequently waived, the evidence returned by the commissioner will not be legally admissible. If the notice is defective in form, or if it is not served in time, or personally, an objection may be taken by the opposite party. But these objections, and all others of a similar character, must be taken at the first opportunity, or they will be waived; and if a notice is defective, either in form or substance, the objection must be taken at the time when the commission is awarded. It will be too late to raise the objection, for the first time, at the trial, by objecting to the evidence. *Allen v. Edwards*, 3 Hill, 499. After proper notice has been given, the party should appear before the justice on the day and at the place mentioned in the notice, for the purpose of furnishing interrogatories and of obtaining the commission. As will appear hereafter, a commission may issue without written interrogatories, and the deposition may be taken upon oral questions, if both parties expressly consent. Vol. 1, p. 37, § 2981. But as the consent of the adverse party may be withheld, it will be prudent for the party applying for the commission to be prepared with at least an outline of the questions he wishes answered by the absent witness.

Before issuing a commission, the justice ought to be satisfied that the evidence of the witness is material in the prosecution or defense of the action, and that the witness is not within the county where the action is pending, nor within an adjoining county. This can be made to appear by affidavit only. Vol. 1, p. 36, § 2980. It is not necessary, under the Code, to show that the witness does not *reside* within the county where the action is pending, or within the adjoining county, as was required by the Revised Statutes. It is sufficient to establish that the witness is not in fact within either county. But the affidavit must show that fact or it will be fatally defective. See *Parmelee v. Thompson*, 7 Hill, 77. To state merely that the witness is in another county, is not sufficient since that is consistent with his being in an adjoining county. *Ib.* Under the Revised Statutes, the fact that the witness did not reside in the trial county, nor in an adjoining county might be sworn to upon information and belief. See *Euton v. North*, 7 Barb. 631. Probably a similar mode of proof of the absence of the witness from the trial county and the county ad-

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joining will be sufficient under the Code if the sources of the information are given, and the grounds of the belief. See *ante*, 114.

The proof of the materiality of a witness may be made by the agent or attorney of the party, if he is able to prove facts sufficient to make a case. *Beall v. Dey*, 7 Wend. 513; *Murray v. Kirkpatrick*, 1 Cow. 210; *Demar v. Van Zandt*, 2 Johns. Cas. 69. And this is especially the case when the party himself is absent from the county in which the action is to be tried. *Eaton v. North*, 7 Barb. 631. It will be sufficient if the materiality of the witness is sworn to positively, as it is not necessary to swear to the advice of counsel upon that point. *Beall v. Dey*, 7 Wend. 513; *Demar v. Van Zandt*, 2 Johns. Cas. 69.

If there are no circumstances of a suspicious nature, the justice has no right to require a party to state what he expects to prove by the witness, whose evidence is desired to be taken on such commission. *Eaton v. North*, 7 Barb. 631. But if the party applying for a commission states what he expects to prove by such witness, and the opposite party offers to admit the truth of the facts so stated, not merely that the witness would swear to them, the commission may be refused. *People v. Vermilyea*, 7 Cow. 369; *Bank of Commerce v. Michel*, 1 Sandf. 687. But an admission of that nature which is to be introduced in evidence on the trial, ought, in all cases, to be reduced to writing, and signed by the party making such admission, and the admission delivered to the party who applied for the commission. This course will obviate all question, on the trial, as to what facts were really admitted, and it will also be conclusive evidence of the truth of those facts.

Ordinarily a commission is granted when a *prima facie* case is made; but there may be suspicious circumstances shown which will authorize a justice to require the applicant to state what he expects to prove by his witness. *Rogers v. Rogers*, 7 Wend. 514. So, where a party offers to admit whatever the applicant will swear he expects to prove by the witness, the justice may require a statement of the facts expected to be proved. *Bank of Commerce v. Michel*, 1 Sandf. 687. The admission, however, must be that the facts so stated are true, not merely that such witness will swear to them. *Ib.* Such offers of admission, however, will not frequently be made, even to prevent the issuing of a commission. If a statement is made as to the facts which are to be proved by the absent witness, and those facts are not material or relevant, the commission may be denied. This power, however, should be exercised cautiously, since it is not always easy to determine in advance what facts may become material on the trial. The defendant is not com-

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pelled to take a commission, if he can procure the attendance of his witness within the ninety days allowed by law. He may take the chances of getting his witness if he prefers to do so, and may adjourn the cause in the usual manner. But, since a plaintiff is not entitled to such adjournments, he must take a commission if he would secure the evidence.

Affidavit for a commission.

(*Title of the cause.*)

(*Venue.*)

A. B., being duly sworn says, that he is the plaintiff in the above-entitled action; that issue has been joined in said action; that a notice of an application for a commission to take the testimony of Y. Z., was duly served upon the defendant herein, on the 15th day of June, 1882, as appears by the affidavit of G. H., hereto annexed; that the said Y. Z., is a material witness for the plaintiff in the prosecution of this action; that said witness resides at Watertown, in the county of Jefferson, in this State, and is not in the county where the action is pending or in an adjoining one.

(*Jurat.*)

(*Signature.*)

The form above given may be modified to meet the requirements of any case. If the application is made in the manner prescribed by the statute, and bears none of the ear marks of bad faith, a commission should be issued to some person or persons to take the testimony of the absent witness.

The commission ought to be directed to persons against whom neither party can raise a reasonable objection. In a court of record it is usual for the moving party to name the commissioners. *Harris v. Wilson*, 2 Wend. 627. But the court will not nominate any person as commissioner if a reasonable ground can be shown why he should not be appointed. Such objection must, in strictness, be proved on oath, if that is required, or the proof of the facts may be made by affidavit. *Biays v. Merrihew*, 3 Johns. 251. If the justice knows of any good reason why any particular person ought not to be appointed a commissioner, the appointment of such person ought not to be made. So, if it is shown by affidavit, or other satisfactory evidence, that a particular person named as commissioner is not a proper person to be appointed, the adverse party may object to him, and in that case he ought not to be appointed.

The names of the witnesses to be examined ought always to be inserted in the commission if possible. And when the names of the witnesses might have been ascertained by due diligence, but this was not done, the commission was refused. *Wright v. Jessup*, 3 Duer, 642.

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Where the names of the witnesses are not known, and they cannot reasonably be ascertained, the commission may describe them in such a manner as to be most likely to identify the witness, or the commission may be general to examine such witnesses as may be produced for examination. *McMahon v. Allen*, 18 Abb. 292; *Shaffer v. Wilcox*, 2 Hall, 502.

The commission, in the last case cited, authorized the examination of the *clerks* of a person who was named.

Where the application for the commission is opposed by the adverse party, the only commission which the justice has authority to issue, is one authorizing the commissioner to examine the witness under oath, upon interrogatories. But if both parties expressly consent, a commission may issue without written interrogatories, and the depositions may be taken upon oral questions. Vol. I, p. 37, § 2981.

Commission to examine witness upon interrogatories.

COUNTY OF ALBANY, } ss.:
Town of Watervliet, }

The People of the State of New York, to James Smith, of the city of Buffalo, in the county of Erie and State of New York:

WHEREAS it appears to me, the undersigned, a justice of the peace in the town of Watervliet, in the county of Albany, that A. B., of the town of _____, in the county of Erie, is a material witness in the prosecution (or defense) of a certain action now pending before me, in which John Doe is plaintiff and Richard Roe defendant. Now, therefore, confiding in your prudence and fidelity, and in pursuance of the statute, I have appointed, and by these presents do appoint you, commissioner to examine the said witness; and for that purpose do authorize you, at certain days and places, to be by you appointed, diligently to examine the said witness* on the interrogatories hereto annexed, on oath, to be taken before you*; and to cause such examination to be reduced to writing, and signed by such witness, and certified by yourself, and to return the same, annexed hereto, to me, by mail, inclosed under your seal, according to the directions herewith given you. Given under my hand, at Watervliet, aforesaid, this 27th day of March, 1865.

E. F., *Justice of the Peace.*

Directions indorsed upon commission.

The commissioner within named will return said commission to me, at West Troy, in the town of Watervliet, in Albany county, my place of residence, by mail.

E. F., *Justice of the Peace.*

A copy of section 901 of the Code of Civil Procedure, omitting the sixth subdivision, *must* be annexed to the commission (vol. 1, p. 37, §§ 901, 2984). And it will be the better practice to annex also a copy

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of section 902, of that act, referred to in section 901, although that is not expressly required by sections 2981, and 2984, of the statute. The statute does require that the commission shall be executed and returned as prescribed by section 901, of the Code; and that section requires that section 902, shall be annexed to the commission, and consequently requires that it shall be returned with it.

The interrogatories upon which the witness is to be examined must be settled by the justice, or by the written agreement of the parties, and indorsed upon or annexed to the commission. Id. 36, § 2980.

The interrogatories and cross-interrogatories must, necessarily, embrace every subject which is material to the prosecution or the defense of an action, and, therefore, no precedent will be of any use further than as an illustration of the manner in which they ought to be framed. The questions contained in the interrogatories ought to conform to the rules of evidence as much as though the witness were to be examined in court at the trial. Either party is permitted to insert any question which he may choose, if it is pertinent to any of the issues, or if the evidence which it will elicit will be admissible on the trial. It is not possible, in every case, to frame particular questions which shall be adapted to the purpose of eliciting all the information which a witness may possess, since the party may not be fully informed as to how much the witness knows upon the matters in litigation. And the witness may know material facts about which the party has no knowledge whatever. For this reason, the law permits either party to put a general interrogatory as in the precedents given. And any evidence which is given under such general interrogatory, is as competent as that which is given in response to a particular question. *Percival v. Hickey*, 18 Johns. 257, 289; *McCarty v. Edwards*, 24 How. 236. When the interrogatories are settled by the consent of the parties, they may agree to waive all objections as to the form of the questions, or as to the competency of witnesses, or of specified items or qualities of evidence. And if it is expressly stipulated that certain objections are reserved, and may be made at the trial, it will be presumed that all other objections were intended to be waived, and, therefore, no others can be raised on the trial. *Morse v. Cloyes*, 11 Barb. 100. What objections may be taken on the trial will be discussed in a subsequent place.

When the parties do not agree to the interrogatories, they must submit them to the justice for settlement. And any question pertinent to the cause may be inserted in the interrogatories.

When the commission had been made out and signed by the justice,

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and the interrogatories have been drawn and settled, either by agreement of parties, or by the decision of the justice, the interrogatories ought to be annexed to the commission, and the papers sent to the commissioner. The papers may be sent by mail or by express, or in any other manner which the parties may agree upon. But, the papers ought to be sent by mail, unless the parties agree to some other mode, and the person who applies for the commission is bound to pay the expense of mailing them.

Interrogatories and cross-interrogatories.

IN JUSTICE'S COURT.

John Doe
agst.
Richard Roe.

Before E. F., a justice of the peace of Watervliet,
in Albany county.

Interrogatories to be administered to A. B., a witness to be produced, sworn and examined under the annexed commission, on the part and behalf of John Doe, plaintiff in the above-entitled action, now pending before E. F., a justice of the peace of Watervliet, in Albany county:

First. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either of them and which of them, and how long have you known them, or either of them?

Second. Are you acquainted with the handwriting of the said Richard Roe?

Third. Look at and examine the paper writing now produced and shown to you at the time of your examination, and marked "A," and purporting to be a promissory note made by the said Richard Roe, and payable to the said John Doe or bearer, for \$200, and dated January 1, 1863. In whose handwriting is the signature to the said note?

Fourth. Do you know, and if so, what is the usual business followed by each of the parties; and do you know of the sale of any goods and chattels, wares and merchandise by the said plaintiff to the said defendant, and if so, when, where, what articles, and what was the value, if you are acquainted with the market value of such articles?

Lastly. Do you know any other matter or thing touching the matters in question, that may tend to the benefit of the plaintiff? If yea, declare as fully and at large as if you had been particularly interrogated thereto.

(Annex documents to be identified, if any.)

JOHN DOE, Plaintiff.

Cross-interrogatories.

Interrogatories to be administered to the said A. B., by way of cross-examination:

First. How frequently have you seen the said Richard Roe write, and under what circumstances?

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Second. Are you familiar with the usual market value of the articles mentioned in the fourth interrogatory of the plaintiff?

These interrogatories will be framed according to the circumstances of the case.

Assent of parties to interrogatories.

We, the undersigned, parties to the action named in the annexed commission, hereby consent and agree that the interrogatories hereto annexed may be propounded to the witness therein named, by the commissioner to whom the commission is directed.

JOHN DOE, *Plaintiff.*
RICHARD ROE, *Defendant.*

Settlement of interrogatories by justice.

I hereby certify that I have settled the within interrogatories and cross-interrogatories, and that I approve of the same.

E. F., *Justice of the Peace.*

When the parties expressly consent that the testimony of the witness may be taken upon oral questions, the preceding forms will of course be of no value. In such case the parties should draw up and sign a written consent to such examination which may be in the following form :

Consent.

(Title of the cause.)

We, the parties to the above entitled action, do hereby consent that a commission to examine A. B., as a witness in behalf of the plaintiff (or defendant) may issue without interrogatories, and that the deposition of said witness may be taken upon oral questions.

(Date.)

(Signature of parties.)

Commission to examine witness orally.

*(Proceed as in the form of commission on page 684, to the *, then substitute "under oath, upon oral questions," in the place of the matter included between the * *, and conclude as in the form given.)*

Of course no interrogatories will be annexed to the commission, but a copy of sections 900 and 901 of the Code of Civil Procedure must be annexed thereto; (vol. 1, p. 37, §§ 2981, 2984), and it will be advisable to also annex a copy of section 902 of that act. See *id.*, p. 38, § 902.

The precedents given are sufficient to assist in the duty of applying for and issuing the commission. The mode of executing and returning it will now be briefly considered.

Where the commission is executed within the State, the commissioner, or if there are two or more, a majority of them, have the same

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power to issue a subpoena, to swear a witness, and to compel his attendance that a justice of the peace has in an action pending before him. Vol. 1, p. 39, § 2987. Upon receiving the commission, the commissioner should fix upon a time of hearing and issue his subpoena to the witness or witnesses to be examined. The subpoena may be in the following form :

Commissioner's subpoena to witness.

ERIE COUNTY, ss.: To A. B. GREETING : In the name of the people of the State of New York, you are commanded to appear personally before the undersigned, a commissioner duly appointed and empowered to examine witnesses in a certain action now pending before E. F., a justice of the peace of the town of Watervliet, in Albany county, between John Doe, plaintiff, and Richard Roe, defendant, at my office, at No. , in street, in the city of Buffalo, on the tenth day of April, 1865, at ten o'clock in the forenoon, then and there to be examined as a witness in said action, and to testify the truth, according to your knowledge, for and on behalf of the plaintiff (or defendant), under and by virtue of a commission issued for that purpose. Hereof fail not. Given under my hand, at the city of Buffalo, this 30th day of March, 1865.

JAMES SMITH.

Notice of the time and place of the examination need not be given. Vol. 1, p. 37, § 2931.

Upon the appearance of the witness at the time and place specified in the subpoena, the commissioner should publicly administer to the witness an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is to be examined. Id., § 901.

Oath administered to witness.

You do solemnly swear (or affirm), that as to the matters respecting which you are to be examined, you will testify the truth, the whole truth, and nothing but the truth.

In the absence of any evidence as to the form of the oath administered by the commissioner to the witness, it will be presumed to be regular. But, where the form of the oath is returned, and it is clearly not such as the statute requires, the depositions cannot be received in evidence. This was so held, where the oath administered to the witness was "that he should true answers make to the interrogatories read to him;" instead of an oath to tell "the truth, the whole truth, and nothing but the truth." *Whitney v. Wynkoop*, 4 Abb. 370.

When the examination is not upon written interrogatories, the commissioner must take down, or cause to be taken down, the substance of the witness' testimony, unless he is directed in the commission, or

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required by the person attending for either party, to insert in the deposition any or all of the questions or answers, word for word. Unless the commission otherwise directs, the person appearing for either party may ask any questions which he deems proper, and the witness' answer must be taken accordingly, the objections thereto being reserved without being specified at the time of the examination. Vol. 1, p. 37, § 900. The testimony may be taken down either by the commissioner or by a disinterested person. Id., § 901. After it has been carefully read to or by the witness it must be subscribed by him. Ib. The mode of proceeding to execute the commission is clearly pointed out by the statute and need not be here repeated. See vol. 1, pp. 37, 38. As a copy of the sections of the statute, prescribing the mode of procedure in taking testimony upon commission, must accompany the commission, the commission itself will furnish ample instructions for the guidance of the commissioner.

Caption of deposition.

Deposition of A. B., a witness produced, sworn and examined on oath, on the 10th day of April, 1865, at my office in the city of Buffalo, by virtue of a commission issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, to me, James Smith, directed, for the examination of A. B., a witness in an action pending before the said justice, between John Doe, plaintiff, and Richard Roe, defendant.

The said A. B., being duly sworn, deposes as follows *: To the first interrogatory he says. (Give the answer of the witness fully.)

To the second interrogatory he says. (Give the answer.)
 Subscribed and sworn before me, this } A. B.
 10th day of April, 1865. }

JAMES SMITH, *Commissioner.*

If the examination is not upon interrogatories, proceed as in the above form to the *, and then give the substance of the witness' testimony in the narrative form, or the questions put to the witness and the answers given by him as the commissioner may direct or the parties require. See vol. 1, p. 37, §§ 900, 2981.

When exhibits are produced and proved before the commissioner, they must be annexed to the deposition to which they relate, and they must be subscribed by the witness, and certified by the commissioner. When the certificate clearly identifies the exhibit referred to, the courts will not permit a technical objection to prevent its introduction in evidence.

The exhibit in one case was a bill of sale, and the witness duly sworn and examined, and the commissioner certified upon it, that on

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the day of the execution of the commission, the exhibit "was produced and shown to the said James Meighan (the witness), a witness sworn and examined, and by him deposed unto at the time of his examination as a witness under such commission," and this was held to be a sufficient certificate. *Hall v. Barton*, 25 Barb. 274, 277. In another case the exhibits were two notes which were respectively marked A, and B. They were referred to by the witnesses as being thus marked; a copy of each was also given, with a statement that the witnesses had written their names upon each note, and all this appeared in the depositions.

The return of the commissioners, among other things, stated "that the witnesses Clark and Lee, testified as above written; that such testimony was subscribed by the witnesses, who, also, in the presence of the commissioners, signed their names on the back of the notes attached to their testimony, which notes were produced and shown to them." This was held to be sufficient. *Brumskill v. James*, 11 N. Y. 294.

Indorsement of an exhibit.

On the tenth day of April, 1865, at the execution of a commission issued by E. F., a justice of the peace of the town of Watervliet, in Albany county, for the examination of A. B., a witness in a certain action pending before the said justice, between John Doe, plaintiff, and Richard Roe, defendant, the within paper writing, marked "A," was produced and shown to the said A. B., a witness sworn and examined, and by him deposed unto at the time of his examination as a witness under such commission.

JAMES SMITH, *Commissioner*.

The parties have a right to appear by counsel on the execution of a commission. *Union Bank of Sandusky v. Torrey*, 2 Abb. 269. Neither party can withdraw cross-interrogatories on the execution of the commission, unless by mutual consent. *Ib.* A witness who is examined on commission is bound to answer every interrogatory and cross-interrogatory; and he will not be permitted to shield himself from a cross-interrogatory by a reference to an answer given to a direct interrogatory. *Ib.*; *Willis v. Welch*, 2 Code Rep. 64; *Union Bank of Sandusky v. Torrey*, 5 Duer, 626; S. C., 2 Abb. 269. A party has the same right to an answer to a cross-interrogatory on a commission that he has to have an answer to a question put on cross-examination, when the examination is an oral one. But it has since been held at general term that it is not a valid objection that cross-interrogatories in a commission offered in evidence, are not all answered, where it appears that some of them, in whole or in part, are answered by a

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reference to previous answers, where the latter are full and explicit. *McCarty v. Edwards*, 24 How. 237. When the witness to be examined, cannot speak English, the depositions must be taken and returned in English, by means of an interpreter. *Belmore v. Anderson*, 2 Cox's Ch. Cases, 288. The signature of the commissioner will be judicially noticed, whether the name is written in full or is abbreviated. *Williams v. Eldridge*, 1 Hill, 249.

After the testimony of a witness has been taken down, read, and subscribed as required by the statute, and the exhibits, if any, have been duly subscribed and identified, the commissioner must subscribe and annex to the deposition a certificate substantially in the form prescribed by section 902 of the Code. See vol. 1, p. 38. This certificate is a sufficient return to the commission. Id., § 903.

The commission, with all the depositions, exhibits and certificates attached, should be immediately sealed up by the commissioner, under his seal, and addressed to the justice who issued it. The commissioner should immediately deposit the package in the post-office and pay the postage thereon. Id., § 901.

Where a commission is duly received by mail, by the justice who issued it, the legal presumption will be that the commissioner deposited it in the post-office, as required by the statute, although there is nothing on the envelope, or elsewhere, showing such fact. *Hall v. Barton*, 25 Barb. 274. The correct practice, however, will be to indorse a certificate of the mailing upon the envelope. And it may be in the following form :

Certificate of mailing.

Deposited in the post-office at Buffalo, and the postage thereon paid by me, on the 10th day of April, 1865.

JAMES SMITH, *Commissioner*.

The justice to whom the package containing the commission is transmitted by mail, must receive it from the post office and open and file it. He must also indorse upon it the date of its receipt and of opening and filing it. Vol. 1, p. 38, § 2985.

Indorsement by justice.

Received from the post-office, opened and filed, this first day of July, 1882.

C. D., *Justice of the Peace*.

The package must remain on file with the justice, but may be inspected by either party.

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The amount of fees and disbursements which are allowed on issuing a commission, and for its execution and return, will be found in the statute. If a commission issued by a court of record is defectively executed, the court may order it to be returned to the commissioner so that he amend it. *Keeler v. Vanderpoel*, 1 Code Rep. N. S. 289. In the case just cited, the names of the witnesses were incorrectly stated, and the commission was returned for correction. This power is as important in a justice's court as in any other, and in a proper case it may be exercised, if the granting of such a motion does not extend the time beyond the limits of the justice's power of adjournment. Either party may take as many commissions as may be necessary, as, for instance, where he has witnesses in two different places which are at a distance from each other. And the commissions may be all taken out at the same time, or at separate times. If a commission is issued, and before its return, it is discovered that the evidence of another witness is material, a commission may be taken for the purpose of obtaining his evidence. Such an application, however, will not be looked upon with favor, if the party was aware of the importance of such evidence and of its existence at the time when the application for the first commission was made. And so when the commissioner has refused to require an answer to cross-interrogatories because the party who framed them desires to withdraw them without the consent of the other party, the commission will be returned for the purpose of taking such answers. *The Union Bank of Sandusky v. Torrey*, 2 Abb. 269. Where a commission has been executed and returned, the courts will not order a returning of it to the commissioner for the purpose of enabling a witness to modify his testimony, especially when the change will be to contradict a witness who has died since the execution of the commission. *Raney v. Weed*, 1 Barb. 220.

A deposition, taken as prescribed by the Code, may be read in evidence by either party; and has the same effect, and no other, as the oral testimony of the witness would have. An objection to the competency or credibility of the witness, or to the relevancy or substantial competency of the question put to him, or of an answer given by him, may be made as if the witness was there personally examined, and without being noted upon the deposition. Vol. 1, p. 38, §§ 911, 2986.

An objection that interrogatories are leading, is an application to the discretion of the court, and the ruling of the justice will be conclusive upon the question. *Ante*, 602. And it is now well settled that leading questions may be put to a witness on the trial, in the discretion of the court. See Leading questions, *ante*, 598. The depositions must be

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read in evidence before they constitute a part of the testimony in the cause. If there is any objection to the competency of the witness examined on such commission, the objection must be made when the deposition is offered as evidence, and before it is so received. If any question is improper as it is framed in the interrogatory, or if any answer is incompetent, improper, irrelevant, or illegal evidence, an objection must be taken to it at the time of reading the depositions in evidence. *Ocean Insurance Company v. Francis*, 2 Wend. 65, 71; *Fleming v. Hollenback*, 7 Barb. 271; *Williams v. Eldridge*, 1 Hill, 249; and see *Morse v. Cloyes*, 11 Barb. 100.

A whole deposition will not be suppressed because a portion of the answers are objectionable. And when an objection is made to a deposition, such objection must be confined to the objectionable portions of it, for if it is made to the whole deposition, when a portion of it is proper, the objection will fail because it is too extensive. *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 203; S. C., 19 Barb. 391. The witness must answer the interrogatories himself, and he will not be permitted to read his answers from a written statement made by his counsel, for the alleged reason that owing to a dizziness of the head of the witness, he could not intelligently answer the interrogatories otherwise. *Creamer v. Jackson*, 4 Abb. 413. Answers which have been taken in that manner cannot be given in evidence. *Ib.* A party is not compelled to introduce a deposition in evidence; and if, after a witness has been examined on commission, and its return to the justice, the witness should return so that his attendance can be procured at the trial, he may be sworn and examined orally on the trial instead of introducing his deposition as evidence. *Fisher v. Dale*, 17 Johns. 343, 345. A party may waive a commission by going to trial before its return, without any objection, or any motion to adjourn for that purpose. *Brain v. Rodelicks*, 1 Caines, 73. A party who has caused a deposition to be taken, does not necessarily, by offering parts of it in evidence, bind himself to read it all, or make answers which are irrelevant or incompetent, admissible. *Gellatly v. Lowery*, 6 Bosw. 113, 122. The opposite party may, however, read the entire deposition as evidence if he chooses. *Ib.* Taking the evidence on commission reduces the statements of the witness to writing, and a party may introduce as much of it as he chooses, precisely as he may elect what questions he will ask on an oral examination of a witness. And the opposite party may introduce the balance of the deposition upon the same principle that he may cross-examine a witness in relation to statements made by him on direct-examination. If a party

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is examined as a witness on commission, his statements may be read as admissions, even if his answers would not be admissible, by way of cross-examination, if he were an ordinary witness. *Gellatly v. Lowery*, 6 Bosw. 113, 122; *Forrest v. Forrest*, 6 Duer, 102. An answer which is not responsive to an interrogatory may be objected to on the trial by either party and the answer must be struck out. *Lansing v. Coley*, 13 Abb. 272.

It was held under the Revised Statutes, that in every case in which a justice issued a commission to examine a witness, he must direct the manner in which the commission should be returned; and that if he failed to do so the deposition could not be read in evidence. *Smith v. Randall*, 3 Hill, 495. But it was sufficient if the direction as to the returning of the commission was indorsed upon the interrogatories instead of the commission, or if the body of the commission contained an explicit direction as to its return, although there was no direction indorsed on the back of it. See *Hurd v. Pendrigh*, 2 Hill, 502; *Hall v. Barton*, 25 Barb. 274. See, also, *Crawford v. Loper*, id. 449.

A neglect by the commissioners to deposit the commission and depositions in the post-office immediately, as required by the statute, will not prevent the depositions from being read. The statute is merely directory to the commissioner upon this point. *Halleran v. Field*, 23 Wend. 38. So, the sending of a copy of the section of the statute with the commission is a matter merely directory, and if the commission is properly executed, the omission will do no harm, and the depositions will be admissible. *Hall v. Barton*, 25 Barb. 274; *Williams v. Eldridge*, 1 Hill, 249. If the commission and depositions are received by mail, the presumption will be that they were properly mailed as required by the statute, although there is no indorsement on the envelope showing that fact. *Ib.* *Brumskill v. James*, 11 N. Y. 294.

Where the commission is executed by the proper person, a mistake in the name of the commissioner, as stated in the caption to the depositions, will not vitiate. A plaintiff in an action in a justice's court gave notice of an application for a commission to take the testimony of a witness. The commissioner was to have been directed to one C.; but on settling the interrogatories, the parties agreed to substitute one K. as a commissioner, in the place of C.; and the justice inserted the name of K., in the commission, and the commission was, in fact, executed and returned by K., but the justice inadvertently omitted to strike the name of C. out of the caption to the interrogatories where it had been inserted pursuant to the notice. This was held not to invalidate the commission, and that the depositions were admissible in evidence.

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Hall v. Barton, 25 Barb. 274. The commissioner ought to be careful to require the witness to answer all of the interrogatories, either on the direct or on the cross-examination. And if the last general interrogatory is not answered the depositions will not be admissible in evidence, unless the objection is in some manner waived. *Brown v. Kimball*, 25 Wend. 259.

CHAPTER II.

GENERAL RULES RELATING TO TRIALS.

In ordinary cases the place for the trial is specified in the process, or is fixed by the justice at the time of granting an adjournment. If the trial takes place on the return day of the process, and in the absence of the defendant, the cause must be tried at the place specified in the process, or the judgment will be erroneous. *Stewart v. Meigs*, 12 Johns. 417; *Case v. Van Ness*, 1 Johns. Cas. 243. So, if issue is joined, and the cause is adjourned for trial, and the defendant does not appear on the adjourned day, the cause must be tried at the place specified. But when both parties appear, either on the return of process or at an adjourned day, the justice may adjourn the cause to a more convenient place of trial, if it is within reasonable distance and within the same town. *Morrell v. Near*, 1 Cow. 112. This may be done by the justice whether the parties assent or dissent; and if they accompany him to the place of trial without objection, consent will be presumed. *Ib.* It has been seen that on the return of the summons *in an action*, the justice must wait one hour for the appearance of the parties, unless they sooner appear. *Ante*, 232. The same rule applies to the adjourned day; and a justice must, in all cases, wait one hour before proceeding to trial on an adjourned day, unless the parties sooner appear. *Sherwood v. Saratoga & Washington Railroad Co.*, 15 Barb. 650; *Stafford v. Williams*, 4 Denio, 182; *Shufelt v. Cramer*, 20 Johns. 309. So where a cause is held open to a particular time for some reasonable cause, as for the return of an attachment issued against defaulting witnesses, the justice must wait one hour for the parties before proceeding with the trial. *Clark v. Garrison*, 3 Barb. 372. And in such a case, if the justice proceeds with the trial in the absence of either party, before the expiration of the hour, his judgment will be erroneous, and will be reversed on an appeal. *Ib.* The justice must be careful to give correct information to parties in relation to proceedings pending before him. In one case a defendant appeared before a justice at the proper hour and at the proper place, on the return day of process. The defendant asked the justice to call the cause in which he was sued, but the justice informed him that no such cause was pending, and he then left the court with his witnesses. The justice afterward found the papers in the cause, and adjourned it to another day for trial,

when the action was tried, but the defendant did not appear. This was held erroneous notwithstanding the plaintiff claimed that he had given the defendant notice of the trial, which the defendant denied. *Murling v. Grote*, 1 Hilt. 116 ; S. C., 3 Abb. 109. So where the defendant appeared at the proper time and place for the return of process, and the justice informed him that the action was discontinued, and the defendant thereupon left court, it was held that the justice could not afterward proceed with the cause in the absence of such defendant, on the ground that the constable had made a mistake in informing the justice that the cause was discontinued. *Tyler v. Olney*, 12 Johns. 378. A justice has no right to proceed before the expiration of the hour, upon the ground that he is informed by the plaintiff that the defendant does not intend to appear ; and if he does so proceed and render a judgment, it will be error. *Beach v. McCann*, 1 Hilt. 256. The justice may hold open a cause on the adjourned day, when a reasonable cause exists therefor. This subject has been already discussed. *Ante*, 367. The witnesses ought to be sworn by the justice before whom the trial is pending, and the justice cannot be sworn as a witness by another justice, who administers an oath for that purpose. *Perry v. Weyman*, 1 Johns. 520 ; *Morss v. Morss*, 11 Barb. 510 ; S. C., 1 Code Rep. (N. S.) 374. But the parties may waive any such objection, and if they consent that the justice shall be sworn as a witness by some other justice ; or that he may give his statements without being sworn at all ; or if this is done without objection, the irregularity will be waived, and it cannot be reviewed on an appeal. *Reed v. Gillett*, 12 Johns. 296 ; *Blanchard v. Richly*, 7 id. 198 ; *Morss v. Morss*, 11 Barb. 510 ; S. C., 1 Code Rep. (N. S.) 374.

A plaintiff may discontinue his action at any time before the cause has been committed to the jury, but not afterward. Vol. 1, p. 43, § 3007. If the trial is before the justice without a jury, he may discontinue at any time before the cause is finally submitted to the justice for judgment. There may be many reasons why a plaintiff should prefer to withdraw his action. He may be disappointed by the non-appearance of his witnesses ; the evidence may differ from what it was expected or represented to be ; he may discover during the trial that important evidence exists which was unknown to him before the trial commenced ; he may wish to impeach or contradict witnesses on the other side, who have surprised him by untrue or unexpected statements ; he may discover that he has omitted to perform some act which is important for the purpose of giving him a right of action ; and when from any of these reasons or others of a similar nature, it is

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evident that a fair trial cannot be had it is the right of the plaintiff to discontinue his action. By so doing he will of course subject himself to the costs of the action, and the payment of his own expenses. The right of the plaintiff to withdraw his action is not affected by the nature of the defense interposed. And though a defendant may interpose the defense of a set-off and establish its truth so as to entitle him to a judgment in his favor if the cause were actually decided, this will not prevent the plaintiff from discontinuing his action if he elects to do so, and makes known his election before the actual submission of the cause to the justice or jury. *Bidwell v. Weeks*, 2 Hilt. 106. And where a plaintiff fails to appear on the adjourned day, the justice must render a judgment of nonsuit; he has no right to hear the evidence of the defendant proving a set-off, and then render a judgment in his favor against the plaintiff. *Norris v. Bleukley*, 3 Abb. 107; S. C., 1 Hilt. 90. The non-appearance of the plaintiff on the return day of the process, or on the adjourned day, is equivalent to a withdrawal of the action. And the statute so treats it by requiring the justice to render a judgment of nonsuit against a plaintiff who fails to appear. Vol. 1, p. 44, § 3013. Nonsuits are either voluntary or compulsory. They are voluntary where a plaintiff intentionally withdraws his action when he is present in court; or where he intentionally omits to be present and answer to his action when it is called. A nonsuit is compulsory when it is granted against the wishes and consent of the plaintiff, and on motion of the defendant. The subject of voluntary nonsuits has been already sufficiently noticed; and the following cases will relate to compulsory nonsuits.

The motion must, in all cases, be made by the defendant, before the cause is finally submitted to the justice or jury for a final decision. After a cause has been actually submitted to a jury for their decision upon a question of fact, the justice has no right to take the cause from them, and nonsuit the plaintiff. *Young v. Hubbell*, 3 Johns. 430; *Gillilan v. Spratt*, 3 Daly, 440; S. C., 41 How. 27; 8 Abb. N. S. 14. And since the jury are made judges of questions of law, as well as fact, there is no reason why the same rule ought not to be applied when a question of law has been finally submitted to the jury. After a cause has been completely tried, and submitted to a justice for his adjudication upon the merits, it is too late to move for a nonsuit. *Elwell v. McQueen*, 10 Wend. 519; *Peters v. Dorsey*, 3 E. D. Smith, 115. See *Gillilan v. Spratt*, 3 Daly, 440; S. C., 41 How. 27; 8 Abb. N. S. 14.

A motion for a nonsuit is usually decided at once on the trial. This, however, is not the invariable rule. If the cause is tried before

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a justice, without a jury, and a motion for a nonsuit is made before the final submission of the cause to the justice, and the decision of the motion is reversed, he may subsequently render a judgment of nonsuit, which will be as valid as though rendered on the trial at the time of making such motion. *Seaman v. Ward*, 1 Hilt. 25.

When a motion is made for a nonsuit, the defendant should state fully and distinctly the grounds of his motion. In one case the grounds were stated thus, "that the plaintiff had shown no right to recover;" and also, "that the evidence did not entitle the plaintiff to recover under the complaint in this cause." The motion was denied, and on an application for a new trial the court said: "The motion for a nonsuit was properly denied. The first ground upon which the defendants relied was, that the plaintiff had shown no right to recover. This was entirely too general and indefinite. The ground relied upon should have been so specifically stated that the court and the opposite counsel might understand the real point which the party intended to raise. This is due to the court, to enable it to determine the question intelligently. It is also due to the opposite party, that he may, if he can, obviate the objection by further evidence." *Trustees of St. Mary's Church v. Cagger*, 6 Barb. 576, 581; *Castle v. Duryea*, 32 id. 480; and see *Underhill v. Pomeroy*, 2 Hill, 603; 7 id. 388; *Ansonia Brass and Copper Co. v. Pratt*, 10 Hun, 443.

This rule, however, applies to those cases only in which a defendant wishes to raise a question as to some particular defect in the proofs of plaintiff; which defect the plaintiff might perhaps be able to supply if the precise objection or defect were specified. But when the defendant relies upon the ground that the plaintiff cannot recover upon the whole case, because the entire evidence and the law applicable thereto will not authorize a recovery, no other objection than a general one need be taken. *Ansonia Brass and Copper Co. v. Pratt*, 10 Hun, 443. In such a case the objection is specific, for it apprises the plaintiff that the defendant will insist that upon the whole merits of the case there is no legal right of action. A defendant ought to be careful to ascertain that a general objection is sufficient, before he rests his cause upon it. And in every case in which he relies upon the ground that some particular fact or state of facts has not been proved, which ought to be proved to make a case, the particular defects ought to be specifically stated.

A nonsuit ought not to be granted on the ground that the plaintiff's counsel has not, in his opening address, stated facts sufficient to constitute a cause of action. *Stewart v. Hamilton*, 28 How. 265; S. C.,

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18 Abb. 298. If, however, he should make an admission in his opening, which is fatal to the plaintiff's case, and which renders the taking of evidence a useless formality, a nonsuit may be granted. *Ib.*

A motion for a nonsuit is generally made at the close of the plaintiff's evidence in chief, and after he has rested his cause. This is the proper time to make the motion, when it is founded upon defects in the proofs on the plaintiff's part. But this is not the only time when the motion can be properly made; for a nonsuit may be granted on the whole case after the entire evidence is closed. *Rudd v. Davis*, 7 Hill, 529; S. C., 3 id. 287; *Fort v. Collins*, 21 Wend. 109; *Jansen v. Acker*, 23 id. 480. It is very rarely the case, however, that a nonsuit can be granted upon the whole evidence in the case. There will almost always be some conflict in the evidence upon some question of fact and in that case the question must be submitted to the jury, if one is impaneled to try the action. Justices are frequently in great doubt whether a nonsuit ought to be granted; and in all cases of doubt it is best to err on the safe side by denying the motion. The test whether or not a nonsuit should be granted is easily stated, but sometimes difficult to apply. If the evidence, viewed in the most favorable light, will warrant the jury in finding a verdict in favor of the plaintiff, a nonsuit cannot properly be granted. *Clemence v. City of Auburn*, 66 N. Y. 334; *Thompson v. Lumley*, 50 How. 105; *Carl v. Ayers*, 53 N. Y. 140. In considering the propriety of a nonsuit the plaintiff is entitled to the concession that the facts existed as they appear in the evidence on his part, and upon these facts, aided by any fact favorable to the plaintiff proved by the defendant, the right of the court to nonsuit is to be determined. *Ib.* If any defect in the plaintiff's testimony is supplied by the evidence of the defendant's witnesses, the plaintiff is entitled to the benefit of that evidence in support of a denial of the nonsuit. *Painton v. Northern Central R. R. Co.*, 83 N. Y. 7. And whenever there is any conflict in the evidence, upon a question of fact, the cause must be submitted to the jury, if there is one impaneled, instead of granting a nonsuit. *Thompson v. Dickerson*, 12 Barb. 108; *Ernst v. Hudson River R. R.*, 32 id. 159; *McGrath v. Same*, id. 144; *Russell v. Cronkhite*, id. 282; *Smith v. Tiffany*, 36 id. 23.

If, however, there is a material defect in the proof on the part of the plaintiff, so that he is not entitled to recover, or if, on the whole evidence in the case, the plaintiff cannot recover, and there is no conflict in the evidence, so that the question can be disposed of upon undisputed facts, a nonsuit may properly be granted. *Carpenter v.*

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Smith, 10 Barb. 663; *Haring v. N. Y. & Erie R. R.*, 13 id. 9; *Fox v. Decker*, 3 E. D. Smith, 150; *Beirne v. Dord*, 4 Duer, 69; *Morrison v. N. Y. & N. H. R. R. Co.*, 32 Barb. 568; *Sheldon v. Hudson River R. R.*, 29 id. 227; *Stuart v. Simpson*, 1 Wend. 376; *Demyer v. Souzer*, 6 id. 436; *Rudd v. Davis*, 3 Hill, 287.

Whenever the case is such that a court would set a verdict aside, on the ground that it was unsupported by evidence, or was contrary to it, a nonsuit may be granted. *Ib.*; *Thompson v. Lumley*, 50 How. 105; *Carl v. Ayers*, 53 N. Y. 14. And whenever a nonsuit may be demanded, as a matter of right, it is error to refuse it if a motion is properly made for that purpose. *Lomer v. Meeker*, 25 N. Y. 361. Where the uncontradicted evidence in a case establishes the defense of usury, it will be error to refuse a nonsuit if it is demanded. *Ib.* That the jury might choose to discredit unimpeached evidence, which is not incredible on its face, is no reason for submitting it to their consideration. *Ib.* But if a nonsuit is asked, at the close of the plaintiff's evidence, on the ground of a defect in the proofs, the court ought to permit the defect to be supplied, if the plaintiff offers to give the necessary evidence. *Lewis v. Rider*, 13 Abb. 1. A refusal to receive the evidence will be sufficient ground for reversing the judgment. *Ib.* And where the evidence has been closed, and the cause summed up on the part of the defendant, a new trial has been granted because of a refusal to receive material evidence at that stage of the cause. *Mercer v. Sayre*, 7 Johns. 306.

When a motion is made for a nonsuit at the close of the plaintiff's case, on account of a defect in his proofs, the defendant must be careful that he does not subsequently supply the defect; for if he does, the error in refusing the nonsuit will be waived. *Colegrove v. Harlem and New Haven Railroad*, 6 Duer, 383; *Mayor of New York v. Mason*, 1 Abb. 344; *Hyland v. Sherman*, 2 E. D. Smith, 235; *Schenectady and Saratoga Plankroad Co. v. Thatcher*, 11 N. Y. 102; *Ballard v. Lockwood*, 1 Daly, 158; *Carl v. Ayers*, 53 N. Y. 14; *Painton v. Northern Central R. R. Co.*, 83 id. 7. If the defect in the proof is supplied by either party during the trial, that will be sufficient. *Ib.* A nonsuit may be granted as to some of the defendants, and refused as to the others. The application is in the nature of a nonsuit, although it is, in form, a motion by some of the defendants to be discharged. In an action for a tort where there are several defendants, if there are some of the defendants against whom no evidence is given, they are entitled to be discharged at the close of the plaintiff's case, and this is a matter of right, not a mere discretionary power of

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the justice. *McMartin v. Taylor*, 2 Barb. 356; *Dominick v. Eacker*, 3 id. 18. The same rule applies when the action is joint and several, so that there may be a recovery against some of the parties even if no cause of action is proved against the others, as in the case of an action against the makers and indorsers of a note, etc. But when the cause of action is joint, and not several nor joint and several, the recovery must be sustained against all of the parties, or it cannot be maintained against any. In the case of joint debtors there is not usually much difficulty. How far a misjoinder or nonjoinder of parties may be deemed a ground for nonsuit has been considered elsewhere. See *ante*, 78, 80, 94.

A nonsuit may be granted in an action of replevin in the same manner as in other actions. *Woodburn v. Chamberlin*, 17 Barb. 446; *Gale v. Hoystradt*, 7 Hill, 179. Where a plaintiff is nonsuited and he brings an appeal, the defendant may rely upon any fact which appears in the case, to show that the action was not maintainable. *Newcomb v. Clark*, 1 Denio, 226. If the decision is correct upon any ground, it is of no consequence that the justice put the decision upon untenable grounds. *Ib.*; *Munro v. Potter*, 34 Barb. 358. And see *Pepper v. Haight*, 20 id. 429. A mere nonsuit is not a bar to a new action. *Coit v. Beard*, 33 Barb. 357; *Elwell v. McQueen*, 10 Wend. 519; *Seaman v. Ward*, 1 Hilt. 52; *Wheeler v. Ruckman*, 51 N. Y. 391; *People v. Vilas*, 3 Abb. (N. S.) 252; S. C., 36 N. Y. 459; 1 Trans. App. 209; *Dexter v. Clark*, 22 How. 289; S. C., 35 Barb. 271; *Mechanics' Banking Association v. Mariposa Co.*, 7 Rob. 225.

In a court of record, a dismissal of the complaint, with a judgment thereon, in an action between the same parties where the merits were inquired into, will be a bar to a subsequent action for the same cause, especially if the action is such a one as would have been tried in a court of equity under the former practice. *Bostwick v. Abbott*, 40 Barb. 331. And see vol. 2, p. 749.

Where the action is founded upon a tort for the wrongful taking and conversion of the plaintiff's property, and there is an entire failure to prove that the taking was wrongful, or that there was any fraudulent intent on the part of the defendant, the plaintiff ought to be nonsuited if a proper motion is made for that purpose. *Ransom v. Wetmore*, 39 Barb. 104. In such a case, the plaintiff cannot, at the close of the case, elect to waive the tort and recover as upon a contract. *Ib.* The court will not grant an amendment which will change the entire nature and form of the action, as by changing the complaint from tort

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to contract, when the motion is not made until after the entire case is closed. *Ib.*

There are several matters relating to the discretion of the justice which will be noticed elsewhere. The recalling of witnesses, the adjournment of the cause, and numerous other similar matters are matters of common occurrence, whether the trial is with a jury or without one. If any matter of defense has arisen since the last adjournment, the defendant may interpose it by way of answer. And such answer may be put in at any time before the verdict is rendered or before the cause has been submitted finally to the justice. *Broome v. Beardsley*, 3 Caines, 172. This answer is as applicable to a justice's court as to a court of record. *Resseguie v. Brownson*, 4 Barb. 541; *West v. Stanley*, 1 Hill, 69.

CHAPTER III.

TRIAL WITHOUT A JURY.

A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact. *Vermilyea v. Palmer*, 52 N. Y. 471, 474; *Third Nat. Bank of Syracuse v. McKinstry*, 2 Hun, 443.

After the service and return of process, an issue is usually joined by the parties. And after both parties have appeared, an issue must be joined before an adjournment can be had, unless the defendant neglects or refuses to plead, by putting in a demurrer or an answer. *Ante*, 281. In case the defendant does not appear and join issue, the plaintiff must still put in his complaint in the action, the truth of which must be proved in the same manner as though a denial had been interposed by an answer. *Blair v. Bartlett*, 75 N. Y. 150. There is an exception to the rule where a verified complaint was served with the summons in a case authorized by law. In the latter case all the facts alleged in the complaint are to be taken as true without further proof.

So if the defendant does appear and joins issue, and the trial is adjourned to a future day, at which time the defendant does not appear, there will be an issue to try. Where no answer is put in by the defendant, there is, technically speaking, no issue to try. But except in case of a failure to answer a verified complaint, the law does not recognize a default in an action in justice's court, and, although no answer is interposed, the plaintiff is required to substantiate his case by competent evidence or he cannot recover a valid judgment. Vol. 1, p. 9, § 2891; *id.*, p. 39, § 2988; *Armstrong v. Smith*, 44 Barb. 120; *Perkins v. Stebbins*, 29 *id.* 523. The evidence must also be sufficient to warrant the judgment, and if there is a total want of evidence, or a material defect in the proofs, the judgment will be reversed on an appeal. *Carter v. Dallimore*, 2 Sandf. 222; *Swift v. Falconer*, *id.* 640; *Alburtis v. McCready*, 2 E. D. Smith, 39; *Howard v. Brown*, *id.* 247; *Jones v. Pridham*, 3 *id.* 155; *McCollum v. McClave*, 1 Hilt. 141; *Perkins v. Stebbins*, 29 Barb. 523. But this rule does not extend further than to require a plaintiff to prove his case, in the same manner as though a general denial had been interposed. The plaintiff is not bound, therefore, to negative any affirmative defense which a defendant might have set up by answer; and for that reason, no proof need be given to avoid the statute of limitations, or to show that payment has

Proof of the issues.

not been made, or to establish any other fact which would be sufficient to answer an affirmative defense, had one been interposed. *Humphrey v. Persons*, 23 Barb. 313.

The rule is the same when the defendant has appeared and answered at the return of process, by putting in a general denial, and also setting up an affirmative defense. If he does not appear at the trial, and prove the truth of his affirmative defense, the plaintiff will not be required to prove any thing more than is put in issue by the general denial. As to the affirmative defense, the burden of proof is on the defendant, and until he gives some evidence of its truth the plaintiff is not required to negative such defense by proofs. *Humphrey v. Persons*, 23 Barb. 314; *Lefferts v. Hollister*, 10 How. 383. There are instances, however, in which the defense may be established by the plaintiff's evidence. For instance, an action is brought upon a promissory note which is barred by the statute of limitations, and this appears from the note itself. In such a case, if the defendant appears and pleads the statute as a defense, no proof of the truth of the defense need be given. And although the defendant does not appear at the trial, the defense, if pleaded, must be allowed, unless some proof is given by the plaintiff to show that the demand has been continued in force, or that it has been revived or renewed in some legal manner. *Penfield v. Jacobs*, 21 Barb. 335; *Walrod v. Bennett*, 6 id. 144.

The rules in relation to the trial of issues of law have been noticed when treating of demurrers. *Ante*, 338 to 344. When no defense is interposed by the defendant, or when a defense is interposed, the action must be tried if the plaintiff requires it. When no issue is joined, the cause must be tried by the justice without a jury. But if an issue has been joined, either party may demand that the cause be tried by a jury. Vol. 1, p. 40, § 2990. If neither party demands a trial by jury, the justice must try the issue, hear the allegations and proofs of the parties, and render judgment according to law and equity, as the very right of the case appears. Vol. 1, p. 39, § 2989. In such a case the justice performs the functions of both court and jury. As a court he determines the competency of witnesses, and of the evidence offered, and he also determines all the other questions which arise in relation to the conduct of the trial. And all such matters are to be decided in the same manner as though a jury had been impaneled. Acting in the capacity of a juror, he is required to decide all questions of fact which may arise upon the pleadings and the evidence.

This mode of trial has some advantages over a trial by jury. If the justice is careful to take full notes of the evidence, which, as a matter

of duty he ought to do, he will be able to know with certainty what the evidence is which was given on the trial. He also has another important advantage in the discharge of his duty; he has four days for deliberation, during which time he can carefully weigh and compare the entire evidence. And in cases of doubt he can advise with some able and impartial legal adviser who can render valuable assistance.

The first point which a justice should clearly understand is that in relation to the issues which he is called upon to try. An examination of the pleadings will generally determine this question. After ascertaining what issues are to be tried the evidence ought to be confined to the proof or the disproof of those issues, or of such matter as answers or qualifies them. The plaintiff is entitled, on introducing his evidence in chief, to prove such facts as establish the truth of the allegations in the complaint. After he rests his cause the defendant is entitled to prove such matters as disprove the plaintiff's case; and also to prove such other matters as legally tend to establish the defense set up in the answer. After the defendant has rested his case the plaintiff is entitled to introduce evidence to disprove the defense, or to explain and qualify it.

What facts and circumstances are relevant and competent evidence frequently perplex the most skillful, and a justice must exercise his best judgment upon such questions as arise for his decision. When it is doubtful whether evidence is admissible, it is the usual practice to receive it, if the party offering it insists upon its reception. This, of course, is understood to apply to those cases in which the justice has real and sincere doubts upon the question. For a justice is not by any means authorized to admit evidence which he is satisfied is inadmissible, however much its reception may be urged by the party offering it. When evidence is offered and its admission is objected to, the justice ought carefully and fully to write out in his minutes both the offer and the objection. He will thus see clearly what is offered and what is objected, and can then decide intelligently; and if a return is required of him, he can return truly and clearly the offer and the objections, with his ruling thereon.

A justice cannot, like a juror, be challenged and set aside by a defendant. And although a justice may be related to the plaintiff, or may be interested in the result of the action, or may be unduly partial to the plaintiff, he cannot be prevented from trying the cause. But the rights of a defendant are not lost or jeopardized in consequence. An appeal from the judgment rendered will correct all such improprieties. And when the facts do not appear in the return, the proof may

Objections, when taken. —Nonsuit.

be made upon affidavits, or by oral evidence, when error in fact is assigned. Any objection which exists why the justice ought not to try the cause should be made before the trial is commenced, or before it is closed, if the party knows of the objection. So, when a defendant desires to make an objection to a recovery, on the part of the plaintiff, because of a defect in the proofs, or because of the illegality of the evidence, the objection must be taken on the trial, if the objecting party is present at the trial. *Westbrook v. Douglass*, 21 Barb. 602; *Jencks v. Smith*, 1 N. Y. 90, and cases cited; *Austin v. Burns*, 16 Barb. 643. But, if the defendant does not appear at the trial, he may urge objections to the legality of the evidence, upon an appeal taken from the judgment. *Northrup v. Jackson*, 13 Wend. 85; *Squier v. Gould*, 14 id. 159; *Finch v. McDowall*, 7 Cow. 537; *Clark v. Van Vrancken*, 20 Barb. 278; *Perkins v. Stebbins*, 29 id. 523; *Davidson v. Hutchins*, 1 Hilt. 123; *Armstrong v. Smith*, 44 Barb. 120; *Everett v. Parks*, 62 id. 9; *Pultz v. Diossy*, 53 How. 270.

On the other hand, any objection to the competency of a juror must be taken in the court below, and a failure to appear and take the objection will be a waiver of it. *Clark v. Van Vranken*, 20 Barb. 278. And see *Eggleston v. Smiley*, 17 Johns. 133. So objections to the form of pleadings will be waived by non-appearance in the court below. *Stafford v. Williams*, 4 Denio, 182.

If a plaintiff intends to submit to a voluntary nonsuit, it must be done before the cause is finally submitted to the justice. If it is not done before that time, and the cause is submitted to the justice for his decision upon the merits, he is bound to render a judgment upon the merits; and he is not authorized to grant a nonsuit at a subsequent time, on the ground of a defect in the proofs. An intentional omission to render a judgment in such a case would be indictable as a misdemeanor, since a justice is always indictable for an intentional omission of any of the duties of his office. *People v. Coon*, 15 Wend. 277; *People v. Brooks*, 1 Denio, 457.

If a justice should render a judgment of nonsuit, instead of a final judgment upon the merits, that would not change the legal rights of the parties, because the law will construe the judgment of nonsuit as a final judgment, and will bar any subsequent action upon the original cause of action. *Elwell v. McQueen*, 10 Wend. 519; *Hess v. Beekman*, 11 Johns. 457. If the justice's docket shows a judgment of nonsuit, it will be conclusive upon that point, because parol evidence is not admissible to show that the cause was submitted to him on the merits, and the judgment would not be a bar to another action. *Brintnall v.*

Decision of questions of fact.—Summing up.

Foster, 7 Wend. 103. So if a justice should omit to render any judgment whatever, the mere submission of the cause to him would not bar a subsequent action for the same cause. *Young v. Rummell*, 5 Hill, 60; S. C., 7 id. 503. Where a nonsuit is granted upon a given state of facts, and upon an appeal the judgment of nonsuit is reversed and set aside, the decision establishes the right of the plaintiff to recover upon proof of a similar state of facts upon a subsequent trial. *Buell v. Trustees of Lockport*, 8 N. Y. 55. The credibility of witnesses must be decided as a question of fact, and a nonsuit cannot be ordered on the ground that the plaintiff's witnesses are not entitled to credit. *Merritt v. Lyon*, 3 Barb. 110.

The decision of a justice upon a question of fact is treated in the same manner as the verdict of a jury. *Harpell v. Curtis*, 1 E. D. Smith, 78. In deciding a question of fact the justice should always remember the rule which throws the burden of proof upon the party who holds the affirmative of the issue in question. When the complaint is met by a denial of all its allegations, the burden of proof is on the plaintiff, and there ought to be a preponderance of evidence in his favor before he is entitled to recover. A doubtful case, or a mere possibility from which it may be conjectured that he has a cause of action, will not answer. If there are doubts, the advantage which arises from them goes for the benefit of the defendant. *Ante*, 656. If the evidence is conflicting, it is for the justice to weigh the credit of the witnesses, and all the circumstances of the case before he can decide where the balance of proof lies. See *ante*, 649 to 656. So, where the complaint is admitted, either expressly, or by implication by not denying it, and the defendant relies upon an affirmative defense, the burden of proof is then thrown upon him, and before he can succeed in the action, he must establish such defense as clearly as a plaintiff is required to do when a denial is interposed to the complaint. The rules by which the credit of witnesses is to be determined will be found in another chapter. See *ante*, 652 to 656.

The trial of a cause before a justice alone is conducted substantially like a trial before a jury. And after the evidence is closed, both parties have a right to be heard in relation to their views of the evidence and the law of the case. This is a right which cannot be denied to either party, and if it is, it will be error. And if a justice enters up judgment while one of the parties is summing up the cause, it is an error for which the judgment will be reversed. *Prentiss v. Sprague*, 1 Hilt. 428. There may be cases which seem to be so plain that argument will not change the opinion of the justice, and yet he may enter-

Rendition of judgment.

tain a most erroneous impression of the case. And even when the party arguing is entirely mistaken, he still has a right to be heard, for no man is to be condemned criminally, nor affected materially in his interests or rights by a court of law, without first having an opportunity for a full and a fair hearing. "He who decides a cause without hearing both parties, though his decision may be just, is himself unjust." 4 Bl. Com. 283, note 5; *Bagg's Case*, 11 Coke, 99, b.; *King v. Gaskin*, 8 Term R. 209. After hearing the evidence and the arguments which may be made by the parties or their counsel, the justice must proceed to decide the cause. For this purpose he has four days during which he may deliberate. And when the parties expressly stipulate that the justice may take more than four days during which to render judgment, the agreement is valid. *Barnes v. Badger*, 41 Barb. 98. And see *Judgment*. The first point to which he should turn his attention is to ascertain and determine what facts have been established on the trial. No question of law can arise until the questions of fact are settled, for questions of law are always founded upon facts conceded by the parties, or established by a trial. The justice should first examine whether the plaintiff's allegations have been admitted, or established by the evidence. If they have, then the legal questions relating to such facts may be decided. If such facts have not been conceded nor proved, the plaintiff's case will generally fail for want of proof. But even if a plaintiff has established all the allegations in his complaint, it does not follow that he will, in all cases, be entitled to a judgment in his favor. For it may happen that the defendant has interposed a defense which concedes the truth of the allegations in the complaint, but answers them by showing new matter which constitutes a perfect defense. And, therefore, when an affirmative defense is set up, and the plaintiff's case is admitted or proved, it will then become necessary to examine the evidence to see if the defense is proved. If it is, then the legal questions applicable to it will arise. But if such defense is not proved or admitted, the defendant will fail, for the same reason that a plaintiff does not succeed when he does not prove his case. A plaintiff may have a complete reply to the defense interposed, either by way of denial or by new matter; and if it consists of new matter, he must prove it affirmatively, as in the case of any other affirmative matter. After thus examining the whole issues and the evidence bearing upon them, the justice will decide the questions of fact. And next he will turn his attention to the rules of law which are applicable to the facts so found; and when he has examined the whole matter as to the evidence and the law, he will render such judgment as his judgment and conscience declare is consonant to justice and law.

CHAPTER IV.

TRIAL BY JURY.

SECTION 1. **General principles.** After an issue of fact has been joined, and at any time before the justice proceeds to an investigation of the merits of the action by swearing a witness or receiving evidence, either party, or his attorney, may demand a trial by jury. Vol. 1, p. 40, § 2990. An issue of fact is indispensable to a jury trial. *Ib.*; *Manny v. Dobie*, 3 Caines, 219; *Mead v. Darragh*, 1 Hilt. 395. But when an issue of fact has been joined, a trial by jury is a matter of right, if properly demanded. *Meech v. Brown*, 1 Hilt. 257; S. C., 4 Abb. 19. And it is not necessary to take any exception to the decision of the justice if he refuses to issue a venire. *Ib.* In an action in a justice's court of the city of Brooklyn, a trial by jury is waived unless demanded at the time of joining issue, and a deposit is made of the fees of the jury and of the officer notifying and taking charge of them. Vol. 1, p. 80, § 3127.

Where a trial by jury is duly demanded the justice must issue a venire directed generally to any constable of the county wherein the action is to be tried, commanding him to notify twelve men of the town or city where the justice resides, qualified to serve, and not exempt from serving, as trial jurors in courts of record; not of kin to the plaintiff or defendant; and not interested in the action, — to attend before the justice at a time and place specified therein, to form a jury for the trial of the action. But if the parties agree upon a number of jurors, less than six, to try the action, the venire must direct the constable to notify twice the number so agreed upon. Vol. 1, p. 40, § 2991. Where the action is between two towns or cities, or between a town and a city, the venire must direct the constable to notify twelve men, of the *county* instead of the *town or city*. *Id.*, § 2992.

Venire.

STATE OF NEW YORK, }
County of Fulton, } ss.:

To any Constable of said county, greeting :

The people of the State of New York command you to notify twelve men of the town of Johnstown, in said county, qualified to serve and not exempt from serving as trial jurors in courts of record, not of kin to the *plaintiff* or *defendant*, and not interested in the action hereinafter mentioned, to attend before me, as justice of the peace, at

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my office in the village of Johnstown, in said county, on the 3d day of July, 1882, at 10 o'clock in the forenoon, to form a jury for the trial of a civil action between John Doe, *plaintiff*, and Richard Roe, *defendant*; and you are also required to indorse upon or annex to this venire and deliver to me a return, under your hand, containing a list of the persons notified.

Given under my hand this third day of July, 1882.

R. M., *Justice of the Peace*.

This venire must be delivered to a constable of the county who is disinterested between the parties, who has not acted or been employed to act as the attorney or agent of either party with respect to any claim or matter in controversy in the action; and to whom neither party offers any reasonable objection. Vol. 1, p. 40, § 2993.

A justice ought not to deliver a venire to a constable for service until the parties have had a proper opportunity to make all reasonable objections to such officer. *Rice v. Buchanan*, 41 Barb. 147. And where a venire was issued by a justice, on the demand of the defendant, out of court, and in the absence of the plaintiff, and was delivered to a constable without the knowledge of the plaintiff, or any notice to him of the application thereof, it was held that the justice did right to set aside the venire and the panel of jurors returned by the constable, on a motion made by the plaintiff for that purpose; and that he was authorized to issue a new venire in the place of the one thus set aside. *Ib.* And see *Mead v. Darragh*, 1 Hilt. 395. If either party desires to take out a venire between the time of the joining of issue, or of adjournment, and the time of trial, he ought to be required to give the opposite party a reasonable notice of the time and place of making such application to the justice. *Ib.* The case of *Rice v. Buchanan*, already cited, will well repay a careful perusal by those interested in the question.

As to what is a reasonable objection to a constable within the meaning of the statute, no precise rule can be laid down. But, if either party can show, or if it is evident to the justice, in any manner, that any particular constable has a feeling of enmity or unfriendliness toward one of the parties or a feeling of friendliness and interest in favor of the other, then such constable ought not to serve the venire, and it should be given to some other officer against whom neither party can have any just grounds of objection. The statute does not require that either party should state his objections under oath. But every person who makes an objection in good faith will be entirely willing to swear to the truth of his statements. A refusal to state the objection on oath would naturally excite the suspicions of a justice, while a full and fair

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statement of the facts and reasons might carry conviction that the objection was a valid one.

Form of an oath.

You do swear that you will answer truly all such questions as shall be put to you, in relation to the reasons why A. B. should not execute the venire in this cause.

After hearing a full statement of these reasons, the justice must decide whether the venire shall be delivered to the officer objected to. And he ought to remember that the very fact of objecting to a constable may have a tendency to create a prejudice in the mind of the officer against the objecting party. And, in these cases, if the justice doubts the impartiality of the constable, the better way will be to give the process to some other officer. A venire is the only mandate issued by a justice of the peace which cannot be served by a person deputized for that purpose. Vol. 1, p. 87, § 3156. It must in all cases be served by a constable.

If a constable willfully and corruptly summons a packed or partial jury, in violation of his duty as an officer and in violation of the statute, and of the rights of the injured party, he is indictable for the misdemeanor.

The statute expressly prohibits the constable from notifying any person whom he has reason to believe is biased or prejudiced in favor of or against either party, and requires him, in all other respects, to execute the venire fairly and impartially. He must notify the jurors personally, and indorse upon or annex to the venire, and deliver to the justice, a return under his hand, containing a list of the persons notified. Vol. 1, p. 40, § 2993. The word "notify," as used in the Code of Civil Procedure with respect to procuring the attendance of a juror, is of recent adoption, and is declared to be equivalent to the word "summon" as used in the like connection, in the Constitution and laws of this State. Vol. 1, p. 170.

Constable's return.

By virtue of the within precept, I have personally summoned as jurors the several persons named below.

Dated *July 3, 1882.*

SKINNER FLINT, *Constable.*

The service of the venire may be made either by reading or by stating its contents to each of the persons summoned as a juror.

The jurors should be summoned at such a time as to give them a reasonable opportunity for attending; and care should be taken to state

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distinctly the name of the justice who issued the venire, as well as the time and place of trial.

If a person duly notified to attend as a juror fails to attend, or attending, refuses to serve, without a reasonable excuse, proved by his oath or the oath of another person, he is liable to a fine of not more than ten dollars nor less than one dollar, as the justice deems reasonable. This fine may be imposed summarily at any time during the trial when the juror is present and has an opportunity to be heard, or after judgment upon the return of a warrant issued as prescribed by section 2975 of the Code. The fine is imposed and collected, with costs, in like manner, and applied to the same use, as a fine imposed upon a person subpœnaed as a witness, who does not attend, or attending, refuses to testify. Vol. 1, p. 43, § 3009. The proceedings to punish a defaulting witness by fine have been already considered; and it is unnecessary to again discuss them. See *ante*, 671.

The parties may agree to try the cause with a jury composed of less than six persons. This agreement may be made before the venire issues, or it may be made at the time of impaneling the jury. See *Carman v. Newell*, 1 Denio, 25; *Keeler v. Delavan*, 4 Barb. 317.

If a trial by jury is demanded by either party, and a venire is issued, the cause must then be tried by a jury, unless it is waived by the party who made such demand, with the consent of the other party. For, after a jury has been called for and summoned, either party may insist that the trial shall be by jury. This is evident from the fact that either party may demand a jury at any time before the trial has actually commenced. Vol. 1, p. 40, § 2990. And to insist upon a trial by the jury summoned at the request of the opposite party would be a valid demand of a jury trial.

A jury trial may be waived by consent even after a jury is summoned.

A party who calls for a jury may waive or forfeit his right to it by his own conduct. If the venire is delivered to a defendant instead of a constable, and the party suppresses the venire, and he does not appear at the trial, nor does any jury appear, this conduct is equivalent to a waiver of a jury trial, and the justice may proceed, and try the cause without any jury. *Coon v. Snyder*, 19 Johns. 384. In such a case, however, the justice may issue a second venire, if the first one is mislaid, kept or withheld, by the party who called for it, and to whom it was delivered. *Day v. Wilber*, 2 Caines, 134, 137. And when it does not appear that the party has improperly suppressed the venire in such a case, the justice is bound to issue a new venire, if the defendant de-

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mands it, and to try the cause without a jury, under objection to that course, would be error. *Sebring v. Wheedon*, 8 Johns. 460. But where a defendant demanded a venire, which was issued, but the jury did not appear at the proper time, nor was the venire returned, and the defendant demanded a nonsuit for that reason, but he did not demand a new venire, and the justice proceeded to the trial of the cause without a jury, this was held to be proper. *Blanchard v. Richly*, 7 Johns. 198.

In another case the defendant demanded a jury, and a venire was issued. At the trial but five jurors answered, the sixth one being unable to attend on account of his sickness. The defendant refused to try the cause with five jurors, objected to a new venire, and also refused to have a talesman called. At his request the five jurors were dismissed by the justice. The plaintiff insisted upon an immediate trial, but the defendant objected to that, and asked an adjournment. The justice offered to grant the adjournment upon terms which the defendant rejected. The defendant insisted upon a jury trial, but only on an adjourned day. The justice offered the defendant a new venire returnable forthwith, which was refused. The justice then proceeded to the trial without a jury, and this was held to be proper, and that the conduct of the defendant amounted to a waiver of a jury. *Babcock v. Hill*, 35 Barb. 52.

The parties may, by consent, dispense with a jury at any time before a verdict is rendered. And where a jury cannot agree upon a verdict, the parties may submit the cause to the justice, who may render judgment upon the evidence given before him on such jury trial. Vol. 1, p. 43, § 3008.

A justice cannot, in any case, require that a cause shall be tried by a jury. That is a right which the statute confers upon either of the parties, but not upon a justice. And even when a jury has been demanded and summoned, and the jurors have appeared, the parties may consent to waive a jury, because they may waive any benefit which the statute has given to them, if they so elect. In such a case the justice must dismiss the jury, and try the cause himself, for he has no more power to insist upon retaining a jury against the consent of the parties, than he had to order a jury without their request.

After the return of the venire with a list of jurors summoned, the first duty of the justice is to call over the list of jurors and to write down the names of such as appear, and to note the names of those who do not appear. The names of the jurors who appear are to be written on several and distinct pieces of paper, as nearly of one size as may

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be, and the constable, in the presence of the justice, must roll up or fold each ballot in the same manner as nearly as may be, so as to resemble the others, and so that the name is not visible. These ballots must then be put in a box, or other convenient receptacle, and the justice must then openly draw out, one after the other, six of the ballots, or whatever other less number the parties may have agreed shall constitute the jury. Vol. 1, p. 40, §§ 2994, 2995. The justice has no right or authority to attempt to draw the jury until the number of persons summoned who have appeared is sufficient to enable him to draw the names of six jurors from the box, if that number is required for the jury. At the time when the drawing of the jury commences there must be at least a sufficient number of persons summoned in attendance to render it possible that a jury can be found by drawing the names from the box. *Brisbane v. Macomber*, 56 Barb. 375. The proceedings by which a jury is to be obtained in a justice's court are purely statutory and must be strictly complied with, or the judgment rendered upon their verdict cannot be sustained. *Ib.*; *Becker v. Sitterly*, 58 How. 38.

If any person whose name is drawn is challenged and set aside, or is excused, another ballot must be drawn, and so on successively until the required number of persons is obtained. These constitute the jury to try the action. Vol. 1, p. 40, § 2995. If a sufficient number of competent jurors is not drawn, the justice may, in his discretion, either issue a new venire or direct the constable to summon talesmen from the bystanders. *Id.*, p. 41, § 2996. If the constable to whom the venire is delivered does not return it according to its requirements, or if a full jury is not obtained in the manner prescribed by the statute, the justice must issue a new venire. *Id.*, § 2997. In either case, the persons who have been already selected as jurors will be retained as part of the jury to try the cause. The cause may be held open until the talesmen are summoned or the new venire returned, if the time consumed will not be unreasonable; or, the trial may be adjourned for a time sufficient to enable the jury to be procured, if that time will not exceed ninety-two days from the joinder of issue. See vol. 1, p. 33, § 2968.

When a new venire issues the qualifications of the jurors must be the same as those summoned upon the original venire. The venire, however, will differ somewhat in its form from the ordinary venire. For, instead of commanding the constable to summon twelve jurors, it will direct him to summon "*two good and lawful men*," etc. (or such other number as is needed), "*to make so many of a jury*," etc. A

 Qualifications and exemptions of trial jurors.

new venire may be issued from time to time, as frequently as may be necessary, in order to procure a full jury of competent persons. If a venire is not returned, or if it is quashed on account of partiality in the constable, or if there are no persons who appear, or if so many are challenged and set aside as to prevent the drawing of a full jury, and sufficient talesmen are not present, the justice must issue a new venire. Such second venire will be deemed the process of the party who demanded the first one. *Day v. Wilber*, 2 Caines, 134, 137. The jurors who appear upon a second or subsequent venire are not balloted for as is done upon the first venire. As their names are called either party may challenge them according to law, and if no challenge is interposed the juror will take his place as a juror.

Any irregularity in the impaneling of a jury may be waived by the parties. And where a cause was tried before issue was joined, for want of an answer, but the defendant litigated the cause, and introduced evidence on the trial, this was held to be a waiver of the irregularity. *Keeler v. Delavan*, 4 Barb. 317; *Daybarsh v. Enos*, 5 N. Y. 531. So the parties may waive any irregularity in the manner of summoning the jurors, or any question as to the competency of the individual jurors. *Tallman v. Woodworth*, 2 Johns. 385; *Kittle v. Baker*, 9 id. 354; *Phinney v. Earle*, id. 352.

This waiver may be in express terms, or it may be implied from the act of going on with the trial without making any objection. *Watkins v. Weaver*, 10 Johns. 107. And every objection to the competency of a juror will be waived by neglecting to appear at the trial and taking the objection there, since the objection cannot be made for the first time on an appeal from the judgment. *Clark v. Van Vrancken*, 20 Barb. 278. And see *Eggleston v. Smiley*, 17 Johns. 133.

Qualifications and exemptions of trial jurors. The qualifications and exemptions of jurors for the trial of civil actions, before a justice of the peace, are the same as in courts of record. Vol. 1, p. 40, § 2991. The qualifications of jurors and their exemptions and privileges from jury duty are plainly defined by statute. See vol. 1, pp. 145-148. But a recent amendment of the statute must not be overlooked. Persons are disqualified from sitting as jurors if related by consanguinity or affinity to a party to the issue within the sixth degree. The degree is ascertained by ascending from the juror to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the juror and party, and excluding the common ancestor. Laws of 1883, chap. 234, § 1, amending sections 46 and 1166,

of the Code of Civil Procedure. Relationship by affinity and consanguinity has been sufficiently explained. See *ante*, 50.

Of challenges. The law furnishes every facility for securing an impartial trial by jury. And if a jury has been improperly and unfairly selected, the entire panel may be set aside. So if either of the jurors is incompetent, or if there is legal cause why he should not sit as a juror, he may be rejected. Such objections ought, however, to be taken at the earliest opportunity. And a challenge to the array, or to individual jurors, must be taken before the jury is sworn.

The manner of making a challenge is to state, orally, to the justice the precise grounds of objection, whether made to the array or to an individual juror. It will be convenient, as well as proper, for the justice to take down the objection in his minutes. This question is to be immediately tried.

A challenge to the *array* is an exception to the whole panel of jurors, on account of partiality or corruption in the constable who summoned the jury.

A challenge to the *polls* is an exception to any one or more of the individuals returned as jurors on the ground that they are not competent jurors, or that they are not indifferent between the parties.

A *peremptory* challenge is the right which the law gives for setting aside a person without giving any reason whatever, except the will of the challenging party.

A challenge *for cause* is one in which the party shows the cause or reason why a panel ought to be quashed or a juror ought not to sit.

A *principal* challenge is one in which, if the facts alleged are true, it is sufficient in law of itself, without leaving any thing to the conscience or discretion of the triers.

A challenge *to the favor* is where no principal challenge can be made, but an objection is raised that the juror is not indifferent, or that the officer who summoned the jury is not impartial, which questions are to be left to the decision of the court.

Challenge to the array. A challenge to the array may be either a principal challenge or a challenge to the favor. The grounds of challenge are very numerous. Though the common grounds of principal challenge to the array are the following: It is a ground of principal challenge to the array that the opposite party nominated any of the jurors summoned; that the constable is the servant, counselor or attorney, or acts as advocate of the opposite party; that the constable is interested in the result of the cause, when that interest is adverse to the challenging party; that an action is pending between the constable and the party

Challenge to the array.

challenging, if the action implies malice, such as assault and battery, slander, intentional trespass, or injury to real or personal property, and the like cases; that there is a relationship by consanguinity between the constable and the opposite party within the ninth degree, or even however remote the relationship may be. So relationship by affinity is a principal ground of challenge. So it is a principal cause of challenge that the constable permitted any person to make the panel, for it is the duty of the officer to do this without any interference on the part of any person whatever. A principal challenge will be sustained whenever the facts show clearly that there is such a partiality as is inconsistent with a fair trial, by reason of a partial or improper selection of jurors. A challenge to the array for favor is founded upon the same principle that a challenge to the favor is sustained when made as to an individual juror. If the constable is biased or partial to one party, or is unfriendly, or in litigation with the other, or if there are any reasons why he is not indifferent between the parties, the challenge ought to be sustained, and the array quashed, so that a new jury may be summoned by one whose impartiality is unquestioned.

A challenge to the polls is an exception to the jurors individually, whether they were summoned upon the original venire, or as talesmen, or upon a new venire. The same causes which are good ground of principal challenge to the array are equally valid as against any individual juror.

In a penal action to recover a sum of money, it is not a good cause of challenge to a juror, or to the officer who summoned the jury, that the juror or the officer is liable to pay taxes in a city, town or county which may be benefited by the recovery. Vol. 1, p. 149, § 1179. The statute has provided as to the competency of jurors in certain cases: "No inhabitant of any town, city or county shall be disqualified as a juror or witness in any cause brought to recover any penalty or forfeiture, on the ground that such penalty or forfeiture is to be applied for the benefit of such town, city or county, or for the benefit of the poor thereof; nor shall any officer, on such ground, be disqualified from serving any process for the summoning of a jury in such cause." 3 R. S. 865, § 2, 5th ed.

"On the trial of every action in which a town shall be a party, or be interested, the electors and inhabitants of such town shall be competent witnesses and jurors, except that in suits and proceedings by and against towns no inhabitant of either town shall be a juror." 1 R. S. 837, § 4, 5th ed.

The causes of principal challenges to the polls are numerous. And,

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first, it is always a ground of principal challenge to the polls that the juror is not competent because he is not such a juror as the statute requires. The statutory qualifications will be found in a preceding volume. Vol. 1, pp. 145-148. It is a principal cause of challenge that a juror does not possess the property qualification required by the statute, or that he is an alien, that he is under the age of twenty-one, or over the age of sixty years; that he is an idiot or a lunatic. A juror who is neither a freeholder nor assessed in respect to any personal estate ought to be set aside, on objection made on that account, although it should appear that he is worth personal property above the value of \$250, over and above his debts. *Valton v. National Loan Fund Life Assurance Co.*, 17 Abb. 268. A person in a state of intoxication is unfit to discharge the duties of a juror, and the justice may, on his own motion, set aside such a juror and refuse to swear him. *Bullard v. Spoor*, 2 Cow. 430. But a matter which merely *exempts* a person from serving on a jury, for some reason personal to the juror himself, is not a cause of challenge by the parties, if he is otherwise legally qualified.

It is a good ground of principal challenge to a juror that he is a tenant of the opposite party. *Hathaway v. Helmer*, 25 Barb. 29. So, it is a good ground of principal challenge that the juror has expressed an opinion upon the question in controversy. *Blake v. Millsparugh*, 1 Johns. 316; *Lord v. Brown*, 5 Denio, 345. A juror who has formed an opinion upon a statement of facts made to him by one of the parties is not competent. *Rogers v. Rogers*, 14 Wend. 131. But a mere hypothetical expression of an opinion, which is founded upon mere rumor, stands upon different grounds. And where a juror had expressed an opinion that one of the parties was in the wrong, but he stated, at the time, that he had no personal knowledge of the matter, and that if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff right, this was held not to be a ground of principal challenge. *Durell v. Mosher*, 8 Johns. 445. But when a juror has formed a decided opinion upon the questions in the case, he is not an impartial and competent juror. A juror was called and was challenged for principal cause. He was sworn as a witness, and testified, on his direct examination, that he had formed an opinion and expressed it; but, on his cross-examination, he said that he had no fixed opinion, none which could not be removed by evidence. He was held incompetent, and the court said: "His mind was preoccupied with an opinion upon the issues to be tried, which it would require evidence to remove; and that, upon principle and by all the cases, incapacitated him for a juror." *Cancemi v. People*, 16 N. Y. 501, 505. Relation-

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ship, either by consanguinity or by affinity, is a cause of principal challenge. *Ante*, 716. And whenever it is evident, from the facts admitted or proved, that the juror is interested in the result of the action, or that there is a clear and certain bias in his mind in favor of one of the parties, from whatever cause, that is sufficient to disqualify him from serving as a juror.

Challenges to the polls for favor may arise from so many causes that it is not possible to enumerate them. A juror ought to be above all exception as to his impartiality. The law does not intend that a cause shall be tried by any juror who is not entirely indifferent between the parties. His fairness and impartiality ought to be above all suspicion. There is no general rule which declares what particular acts or things are such evidence of favor or partiality as to disqualify a juror. The feelings, the affections and the prejudices of men are so various, and so easily influenced by circumstances, that it is peculiarly a question for the justice on all the evidence, whether the juror stands indifferent between the parties. Where a juror is an intimate friend of one of the parties, and a stranger or an enemy to the other, he would scarcely be called entirely indifferent. So, if one of the parties and the juror are interested in the result of pecuniary affairs between them, as where the juror is indebted to the party, or the party to the juror. Or, if there is an intimate family relation existing between the party and the juror; or, if there is a personal enmity or a family dispute, in all such cases it is a question for the justice to determine whether such facts do not furnish evidence of the impropriety of permitting such a person to occupy a seat as a juror. It is not necessary to show clearly that a juror is partial, interested, or that he has a feeling in favor of the success of one of the parties in order to set him aside. If the evidence is such that it raises a fair and reasonable doubt in the mind of the justice whether the juror is indifferent, he ought to be set aside. *Smith v. Floyd*, 18 Barb. 522; *Freeman v. People*, 4 Denio, 35, 9. A hypothetical opinion is not a ground of principal challenge, but on a challenge to the favor, the justice may find that such a juror is not indifferent. *Ib.* It is no impeachment of a juror to decide that he is not indifferent. There may be such an intimate friendship or so close a relationship, between one of the parties and a juror as to render the latter an incompetent juror, and yet that is no discredit to the person set aside. The influence of such relations is exceedingly great and many times it is not appreciated by the person who is most influenced in consequence. The declaration of Lord COKE is a most salutary one :

Time of making a challenge.

“The rule of law is, that the juror must stand indifferent, as he stands unsworn.”

Time of making a challenge. Until a full jury of six persons have appeared no challenge can be taken either to the array or to the individual jurors. *King v. Edmonds*, 4 Barn. & Ald. 471; *Vicars v. Langham*, Hob. 235; 2 Hawk., chap. 43, § 1. The parties may waive the enforcement of this rule if they choose. And, in common practice, it is not insisted upon, but the challenge to the array is made upon the return of the venire; and the individual jurors are frequently challenged as they are called to take their seats, if challenged at all. If there are several grounds of challenge, either to the array or to the polls, the causes of challenge must all be stated at once, or those not stated at first will be waived. A party is not permitted to try one ground of challenge, and, if that fails, then to interpose another and then try that, and thus try the matter by piecemeal. If one party challenges a juror and he is found indifferent, this will not prevent the opposite party from challenging the same juror, in the same manner as though he had not been previously challenged. The order of making challenges is important. A challenge to the array cannot be taken after a challenge to the polls. *Mayor of New York v. Mason*, 4 E. D. Smith, 143, 152, 153; Co. Litt. 158, *a*. A challenge to the array may be made at any time before one of the jurors is sworn, and a challenge to the polls may be made any time before the challenged juror is sworn. *Ib.*; Penning. on Small Causes, 170. After a juror is sworn it is too late to challenge him; and any objection to him is waived, even when the defendant does not appear at the trial. *Clark v. Van Vrancken*, 20 Barb. 278; *Eggleston v. Smiley*, 17 Johns. 133.

It is immaterial which of the parties makes his challenge first. And if the parties disagree upon that point, it is a question for the justice to settle. In strictness, the party who makes the first challenge is bound to complete his challenges before the other party commences. But this rule cannot be so applied as to prevent both parties from having an opportunity of challenging either of the jurors called. Suppose that a defendant should challenge several jurors, and that finally six jurors were impaneled who are entirely satisfactory to him; the plaintiff may then challenge any or all of the six jurors, and if some of them are set aside on his challenge, then other jurors must be called to supply the deficiency in the panel. The plaintiff may challenge any of the new jurors thus summoned, until a full jury is obtained, when the defendant will be entitled to challenge any of the new jurors then

Trial of a challenge.

called. And so each party may alternately continue his challenges, until he has had an opportunity of objecting, at some time, to each of the jurors called. In ordinary cases there is no strictness as to the practice on this point, and either party challenges such jurors as he deems objectionable, without regard to the question whether the opposite party has finished his challenges or not. The important object to be attained is to secure to each party a full opportunity for making all legal challenges.

The challenges of the party who first challenged will be entitled to be first tried. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor; and, secondly, whether the facts, if true, are sufficient to support that challenge. Again, the challenger must state why the juror does not stand indifferent; he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified; or which create a probability or suspicion that he is not, or may not be, impartial. When the facts are stated, the opposite party may take issue as to their truth, by denying them. If denied, it is a question to be decided upon the evidence; if admitted, it is a mere question of law for the court to decide, as it would a question raised by a demurrer. *The People v. Vermilyea*, 7 Cow. 108. An erroneous decision upon the law as to the competency of a juror may be corrected on an appeal. *Ib.*; *The People v. Freeman*, 4 Denio, 10; *Hathaway v. Helmer*, 25 Barb. 29.

A principal challenge, either to the array or to the polls, must be tried by the justice alone, upon such evidence as may be given; or upon a demurrer to a challenge, which is an admission of the facts stated in the challenge. If witnesses are sworn, the oath may be as follows:

Oath to witness.

You do swear that you will answer truly all such questions as may be put to you in relation to the challenge now depending and on trial.

On the trial of a challenge to a juror, such juror may himself be called as a witness to testify as to his competency to sit as a juror. And he may be asked whether he has formed or expressed an opinion in relation to the merits of the cause, or in favor of one of the parties. *Pringle v. Hulse*, 1 Cow. 432; *The People v. Vermilyea*, 7 id. 108. So, he may be examined as to having formed an opinion, which, if he had done, would disqualify him, although he had not expressed such opinion. *The People v. Mather*, 4 Wend. 230. A juror may be required to testify as to any facts which affect his competency, except.

Trial of a challenge.

such as would tend to his infamy or disgrace, or subject him to punishment or to a penalty. He may be asked whether he is a freeholder or not, or any other question as to his qualifications which the statute requires. *Ogden v. Parks*, 16 Johns. 180; *Fenwick v. Parker*, 3 Code Rep. 254.

Oath to juror.

You do swear that you will answer truly all such questions as may be put to you in relation to your competency as a juror in this action between A. B., plaintiff, and C. D., defendant.

“An objection to the qualifications of a juror is available only upon a challenge. A challenge of a juror, or a challenge to the panel or array of jurors, must be tried and determined by the court only. Either party may except to the determination, and it may be reviewed upon a question of fact, or a question of law, or both, as where an issue of fact presented by the pleadings is tried by the court; except that where one or more exceptions are taken to the rulings of the court, made after the jury is impaneled, an exception to the determination of a challenge must be heard at the same time; and the case must contain the matters necessary to present it upon the facts or the law, or both.” Code of Civil Pro., § 1180.

Where a challenge to the array for favor in the constable is interposed the justice must proceed to try it and determine the fact. If he finds the challenge true, and that the constable is not indifferent, the panel will be quashed; but if, on the other hand, he finds that the constable is indifferent, the panel will be affirmed, and the balloting for jurors will proceed. If the panel is quashed the justice ought to issue a new venire to another constable who is indifferent, unless the parties agree to waive a jury.

If a challenge is made to the polls for favor, the challenging party states to the justice that A. B., the juror called, is not indifferent between the parties for which cause he challenges him. The grounds of objection ought to be stated. If the opposite party denies the allegations, an issue is joined which must be immediately tried.

When a principal challenge is improperly overruled by a justice it is an error for which the judgment will be reversed. And proceeding with the trial is no waiver of the objection. *Hathaway v. Helmer*, 25 Barb. 29. Challenges for principal cause, and to the favor, having been disposed of, it is important to notice another kind of challenge now permitted. It may be that there is no sufficient ground of challenge, or it may be that the justice has decided that a juror is indifferent when he really is not. In such cases it is important that the

Swearing the jury. — Opening the case.

juror may be set aside. And for that reason either party may now, by statute, challenge two jurors peremptorily. Vol. 1, p. 149, § 1176.

No resort to this challenge will be proper until the other methods have failed. And it is best not to exercise the right of peremptory challenge until the last moment when it can be properly made, since it is difficult to anticipate who may be drawn upon the jury. And those jurors who are most objectionable, and who cannot be set aside upon the ordinary challenge, are the persons whom it may be most desirable to challenge peremptorily. Challenges ought to be made with caution and for good reason; and when once made, it is important that they should be sustained. A challenge made against a juror naturally affects his feelings as to the result, even when he is a fair and just man. And although he may subsequently try the cause with fairness and justice, he will, in most cases, not feel quite so indifferent as though no challenge had been made.

When a sufficient number of competent jurors appears, and the appropriate number has been selected to try the cause, the next step will be to swear them. The statute prescribes the form of the oath and requires the justice to administer the oath or affirmation to each juror. Vol. 1, p. 41, § 2998.

The oath may be administered to the jurors separately, or several may be sworn at a time.

Form of juror's oath.

You do swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and, unless discharged by the justice, a true verdict to give according to evidence.

After the jury has been sworn they must sit together and hear the allegations and proofs of the parties, which must be made publicly in their presence. Id., § 2999.

When the case is of any importance it is usual, as well as advantageous, to open or state the case to the jury.

The party who has the affirmative of the issue is entitled to open the case to the jury; to introduce his evidence first; to introduce his evidence in reply; and to sum up the cause last to the jury. As to the right to begin, or as to which party holds the affirmative, see *ante*, 471. If the pleadings are extensive or complicated, or if the evidence is likely to be voluminous or contradictory, a full, clear and accurate statement of the case will be of great service to the justice in determining questions relative to the admissibility of evidence; and it will also aid the jury in readily comprehending the bearing and effect of each part of the evidence as it is introduced.

Opening the case. — Swearing witnesses, etc.

The party opening the case should state the nature of the action; the issues which have been joined, or which will be tried; the facts and circumstances of the case; and the substance of the evidence to be adduced, and its effect in proving the case stated.

It is proper, also, to notice the grounds of the defense stated in the answer, and the effect of the defense if established. So it is equally proper to state the nature of the evidence which will be offered in reply by way of disproving the case set up by the opposite party. It is only a general view of the case that should be given in opening; the details will be more appropriate as they appear from the lips of witnesses. And candor, as well as policy, dictates that an opening should never exceed the strict truth as to the real facts to be subsequently proved by the witnesses. A party may omit to state all the material facts of his case in the opening, but this will not prevent him from giving evidence as to all material points in the case, merely because it was omitted in the statement of the case. *Nearing v. Bell*, 5 Hill, 291.

After opening the case, the party holding the affirmative proceeds to introduce his record evidence, or to call his witnesses. The opposite party may object to the competency of the witness, and the court must decide as to the validity of the objection. See *ante*, 551. If no objection is made to the witness, or if the objection is overruled, he is then sworn.

The statute prescribes the form of oath. See vol. 1, p. 41, § 3000; and see *ante*, 553.

Form of oath to witness.

You do swear that the evidence you shall give relating to the matter in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth.

The party who calls a witness first proceeds to examine him; after which the opposite party is entitled to cross-examine him; and he may then be re-examined for the purpose of explaining his cross-examination. See *ante*, 556 to 575.

The number of witnesses to be called and sworn is usually limited by the discretion of the party calling them. There are some cases in which the courts have occasionally limited the number of witnesses to be sworn on each side as to some collateral question, or as to a mere matter of opinion. *Sizer v. Burt*, 4 Denio, 426; *Anthony v. Smith*, 4 Bosw. 503; *Ward v. Washington Ins. Co.*, 6 id. 229; *Spear v. Myers*, 6 Barb. 445; *Nolton v. Moses*, 3 id. 31. But when a witness is called for the purpose of testifying to facts which are material upon

the main issues to be tried, it is difficult to see upon what principle such witnesses can be rejected. It is true that the calling of a large number of witnesses may protract a trial, but that is a small matter when compared with a result which may deprive a party of justice and of his legal rights. The safe rule will be not to reject a witness who is offered to prove material facts upon the main issues in the case. *Eakin v. Brown*, 1 E. D. Smith, 37. If a party wishes to object to the introduction of witnesses on the opposite side, on the ground that a great many witnesses have been already called, he ought to admit that the fact sought to be proved is true. *Ib.* As each witness is called, any objection as to his competency must be made. And so, when a witness has been sworn, and is giving his evidence, any objection to the questions put to him, or as to the relevancy, competency, or legality of his answers, must be taken, or they will be waived.

The right to object, and the manner of taking objections, will be discussed in a subsequent place. See *Objections*. If any record evidence is to be introduced, or any depositions of witnesses, it must be introduced as a part of the plaintiff's case, unless it is intended as a matter in reply.

Regularly and strictly, the party who opens the case must exhaust his testimony on his side before he rests the cause. And, technically, no evidence, except in reply to the evidence of the opposite side, will be admissible after resting the cause. *Ante*, 556. This is a matter, however, which is entirely within the discretion of the justice, and it is very seldom that the rule is enforced. Either party is quite liable to overlook some material matter, and if he desires to correct the mistake, or to supply the omission, at any time before the evidence is closed, it is usually permitted by the justice.

If a justice intends to enforce the strict rule, he ought to give the parties notice of that fact at the commencement of the trial; and not only that, but the same rule must be applied to both parties, so that when either rests his side of the case, he waives the right to introduce any evidence which was properly admissible at the time of resting. It is proper for a justice to require the parties to conform to the proper rule, as nearly as it can reasonably be done, since it promotes order and convenience in the trial of the cause. But that is ordinarily the extent to which the rule should be enforced in justices' courts. And the rule should never be so enforced as to deprive either party of substantial justice and a fair trial. If parties willfully omit to introduce their evidence in proper time and order, for the purpose of gaining

Defense stated and evidence.

some advantage over the opposite party, they, of all persons, would have least cause to complain of an enforcement of the strict rule.

Defense stated and evidence. After the plaintiff has introduced all his evidence and rested his case, the defendant may move for a nonsuit, if the case is one in which the case ought not to be submitted to the jury, or ought not to be heard and decided upon the merits by the justice, if no jury is called. As to nonsuits, see *ante*, 698, 699. If the nonsuit is refused, the defendant, or the party not holding the affirmative of the issue, opens his side of the case. When this is done by the defendant, his proper course is to state the nature of his defense, and the evidence which will be introduced to sustain it. He may also explain how it will be affected by the evidence in reply.

In ordinary cases, each party ought to be limited to a statement of his own side of the case, and an explanation of the claims made by the opposite side. The defendant has no right to sum up the cause while opening his own case. Such is not the object or the intention of an opening by either party. *Ayrault v. Chamberlain*, 33 Barb. 229, 233, 234, 235. In the case last cited, it was held that the court had a right to limit the plaintiff's counsel to a statement of his own side of the case, and that he could not state the evidence which would be given in reply. See, also, *Elwell v. Chamberlain*, 31 N. Y. 611, 614.

After opening his case, the defendant proceeds to call his witnesses and swear them, in the same manner as the plaintiff did. And any objections to witnesses or to evidence must be made as the cause progresses, and as either is offered.

After the defendant rests his case, the plaintiff introduces such rebutting evidence as he may wish to offer. The term "rebutting evidence" may not be clear to every person. It means not merely evidence which contradicts the defendant's witnesses, and corroborates those of the plaintiff, but evidence in denial of some affirmative case or fact which the defendant has endeavored to prove. *Silverman v. Foreman*, 3 E. D. Smith, 323, 324. But rebutting evidence may also be introduced by way of avoidance of the defendant's case. Suppose that the defendant should set up in his answer and attempt to prove a set-off or a release. The plaintiff would be entitled to prove that the claim by way of set-off had been paid, or that the release was obtained by fraud, and this would be strictly rebutting evidence.

If the oath is improperly administered to a witness, or if he gives his evidence without being sworn at all, this will not be an error which will reverse the judgment, unless an exception is properly taken at the time. *Blanchard v. Richly*, 7 Johns. 198; *Reed v. Gillett*, 12 id. 296.

Defense stated and evidence. — Summing up.

The subject of evidence, including the rules for the examination of witnesses, has been explained. *Ante*, 556 to 575. After the entire evidence has been introduced, and both parties have rested their case, the cause is submitted to the jury or to the justice without comment, or it is summed up. The just administration of the law is greatly facilitated by an appropriate summing up. It is not intended to give an extended discussion upon the method of performing this important duty in a cause. But a few suggestions will be made which may be of service to some of the younger members of the profession. In every cause there are two branches, either of which may be most important in some particular case. The first relates to the facts in the case, and the second relates to the rules of law applicable to those facts when settled. In some cases the law of the case is conceded, or at least not disputed, but the conclusion as to facts is denied; in such a case the questions of fact become the most important part of the case. In other cases the facts of the case are undisputed, or are so clearly in favor of one side that it becomes principally important to determine the law of the case. A careful practitioner will endeavor to fully understand both of these branches of every case which he tries, and will use all honorable means to induce the court and jury to view the case from a standpoint favorable to the interests of his client. A clear, concise presentation of the facts in evidence, and of the law applicable thereto, will often turn the scale in a doubtful case.

Neither general rules nor particular instructions will enable all persons to discharge this duty with equal ability. It is a natural endowment which some persons possess and in which they excel without study and without especial effort. But this does not prevent some general hints from being of service to others.

And, in the first place, a jury ought to be clearly and fully informed as to all the issues involved in the case; as to what facts are admitted by the pleadings, and are, therefore, not in issue; and as to the burden of proof upon all the issues in the case.

After the issues are clearly presented to the jury, the evidence which bears upon them will next be a subject of discussion. And the most essential service which can be rendered to a cause is to point out fully and clearly all the evidence which bears upon each of the material issues to be tried. Eloquence and energy and earnestness are valuable qualities; but the logic of established and indisputable facts will weigh conclusively with an honest and an intelligent jury.

The rules by which the value of evidence is determined have been

Charging the jury.

noticed under the title *Evidence*. When there are questions of law involved in the determination of the case, and there is a dispute as to the law, it will be necessary to discuss the legal questions before the jury. And, in doing this, the first step will be to show how the legal question arises and to what issues it is applicable.

There can be no question of law until the facts are settled. And, when the facts are in dispute, every legal question must of necessity be discussed hypothetically. In discussing legal questions, whether before the court or before a jury, each party is entitled to see and examine the authorities cited by the opposite party. And, in summing up, the party who holds the affirmative is bound to furnish his authorities to the other party before he sums up on his side, so that he may be able to examine and discuss their relevancy or their value before the jury. If such authorities are not furnished at the proper time the party demanding them is not deprived of his rights, for he will be entitled to discuss the authorities cited after the summing up of the affirmative side of the case. In the trial of the cause and during the summing up the same course of practice and of courtesy should be observed that would characterize the conduct of a lawyer at the Circuit. If an unfair, technical, frivolous, disrespectful and ungentlemanly course is pursued in justices' courts, the effects of such practices will be certain to exhibit themselves at the Circuit, where they will meet with a proper correction.

Charging the jury. A justice may charge a jury, or he may decline to do so; and his refusal is not a ground of appeal. *Delancy v. Nagle*, 16 Barb. 96; *People v. Eldridge*, 3 Hun, 541; S. C., 6 Sup. Ct. (T. & C.) 20; *Adams v. Clark*, 64 Ga. 648. If he assumes to charge them as to the law, and he errs in his charge, that will be error. *Trustees of Penn Yan v. Thorne*, 6 Hill, 326; *Chapman v. Fuller*, 7 Barb. 70; *Strand v. Butler*, 18 id. 327; *Pettit v. Ide*, 12 Abb. 44. When he charges the jury at all, he must discharge the duty fully, and he cannot then refuse to charge any proper matter at the request of either party. For, by assuming to charge at all, he undertakes to do all that a judge of a court of record could be required to do by way of charge. And, therefore, if he charges incorrectly, or if he refuses to charge a proper matter on request, either will be error.

It is to be wished that every justice of the peace was qualified to charge juries properly. Much injustice would be thereby prevented; and, in many cases, the costs of expensive appeals would be avoided. In charging a jury the justice should aim at presenting all of the issues involved in the case and should call the attention of the jury to all the

Charging the jury. — Withdrawing juror.

important portions of the evidence which has been given on the trial. By taking notes of the arguments of counsel in summing up the justice can ascertain what points each party deems material and then, by adding his own views, he can generally present the whole case with fairness and correctness. There is one advantage which will result from the practice of charging a jury. Not only will questions of fact be quite as properly settled, but on all questions of law there will be a full and fair opportunity to reserve all legal points for settlement upon an appeal. If the charge is affirmative, and is erroneous, an exception to the charge will clearly present the question for review. So, if the justice refuses to charge upon a point on which he ought to charge as requested, an exception to his refusal will save the rights of the party on appeal. When the entire questions, both of fact and of law, are submitted to the jury, it is frequently impossible to determine with certainty whether the case was decided upon a question of fact or upon a question of law. If the jury disposed of the case upon a question of law their decision may be reviewed. But if it was decided upon a question of fact, that is generally conclusive. And since it is not always easy to ascertain upon which ground the jury proceeded, there is sometimes a failure of justice in consequence, though this matter is of less importance since the amendment of the Code, which allows a new trial in the county court.

There are some incidents of the trial which have not been mentioned, that may properly be noticed in this place.

There is occasionally a defect in the proofs or a surprise at some unexpected evidence, which operates unfavorably to one of the parties. In such a case, a juror may be withdrawn by consent, or the entire jury may be discharged and the cause adjourned, if both parties agree. But the party who has the advantage from such a state of facts does not usually consent to such an arrangement, because he prefers to retain the advantage which he thus possesses. It is said that the justice may withdraw a juror in such cases, and still retain the cause for trial, whether the parties consent or not. 2 Cow. Treat. [6th ed.] 833, § 1403. There are cases in which a justice may suspend or delay a trial for a short time. *Ante*, 367. But the withdrawal of a juror is equivalent to discharging the jury before the cause is tried, and before they have rendered a verdict. This is a right which is not given in express terms by any statute relating to justices' courts. And it is difficult to see upon what authority such an act could rest for its support. The statute, it is true, confers all necessary powers which are possessed by courts of record. But such a power can scarcely be

called a necessary one. It might be a convenience to one of the parties, but that is not sufficient. A second adjournment would frequently be of great convenience to a plaintiff, but it will not be contended that it can for that reason be granted. An adjournment cannot be granted after the trial has commenced, unless by the consent of the parties. *Pollock v. Ehle*, 2 E. D. Smith, 541; *Matthews v. Fiestel*, id. 90; *Montfort v. Hughes*, 3 id. 591. And such an adjournment for thirteen days was held ground for reversal of the judgment, and the reason assigned was that no power exists to adjourn a cause when it is half tried. *Aberhall v. Roach*, 3 E. D. Smith, 345; S. C., 11 How. 95. And see *ante*, 366, 367.

The discharge of a jury and an adjournment of a cause against the consent of one of the parties, after the cause has been partially or wholly tried, is not within any of the powers conferred upon a justice. The utmost that the courts have tolerated in this respect is, to permit a justice to hold open his court, and suspend the trial for a short time, to enable a party to procure an absent witness. But even in that case, the time allowed is quite brief, and twenty hours was held to be an unreasonable time to hold open for the purpose of enabling a party to get a witness who was twenty miles distant.

There is another class of cases in which a justice has a discretion to exercise. The parties occasionally omit, by accident, to introduce all their evidence before the close of the trial. And they sometimes discover the existence of important evidence after the close of the evidence, but before the cause has been finally submitted to the justice or the jury. In such a case the justice may permit the introduction of the evidence, even after both parties have declared the case closed. *Burger v. White*, 2 Bosw. 92; *Dunckle v. Kocker*, 11 Barb. 387. And the rule has been extended so far that the justice may receive further evidence on an adjourned day to which the cause was postponed for summing up, when the trial had taken place on a former day. *Heidenheimer v. Wilson*, 31 Barb. 637. The court held that, in such a case, the trial was not closed until the cause was summed up and submitted for final judgment; and that, until that time, it was discretionary with the justice whether to receive further evidence. To open a case for further evidence after it has once been declared closed cannot be claimed as a matter of right. The justice may grant or refuse the application, and his decision is final. And, in deciding the question, the justice ought to be governed by the principle that the granting or the refusing of the motion is to be for the furtherance of justice, and for no other purpose.

Further evidence. — Change of parties.

If the witnesses on both sides are all still present, so that they may any of them be recalled if necessary, it will be pretty much a matter of course to allow the evidence. But if the witnesses of the opposite party have left court so that they cannot be recalled; or if the evidence offered will be a surprise upon the opposite party, so that he cannot meet it by evidence which he may have, but which is not at that time within his reach, the justice will scarcely feel that it would be just to open the cause for the advantage of one party, when it would operate as an injury and injustice to the other. The decision of the justice will not be reviewed unless the circumstances show a gross disregard of the rights of one of the parties. It must appear that the justice acted upon the ground that he had a discretion, and that he decided accordingly. For, if the justice should refuse to receive evidence in a case upon the sole ground that he erroneously supposed he had no power to receive it, his judgment would be reversed. *Russell v. Conn*, 20 N. Y. 81; *Beach v. Chamberlain*, 3 Wend. 366; *Packer v. French*, Hill & Denio, 103; *McElwain v. Corning*, 12 Abb. 16; *Regina v. Pilkington*, 2 Ell. & Bla. 546; *Mercer v. Sayre*, 7 Johns. 306.

When such evidence is material, and its admission will be an advantage to the party offering it, the justice should admit it unless its reception would do an injustice to the opposite party by way of surprise, or from inability to meet it with counter evidence which is not then available. After a jury has been impaneled and sworn the justice has no right to permit some of the jurors to be withdrawn and others substituted in their place, unless both parties consent. *Cook v. Ritter*, 4 E. D. Smith, 253. If this is done, and no objection is made at the time, the parties will be presumed to have assented to the change. *Ib.*

It has been seen, that one of several defendants may be discharged in an action for a tort, when there is no evidence against him. But this rule does not authorize a justice to strike out the name of one of the defendants, on his motion, for the alleged reason that there is a misjoinder of defendants, and that a joint action cannot be maintained against all of them. *Montford v. Hughes*, 3 E. D. Smith, 591. So a justice has no power to compel a substitution of parties in an action. An action against the trustees of a school district does not abate by reason that the term of office has expired; but if it did, that would not authorize the justice to compel a substitution of the new trustees, though this might be done by consent of all the parties. *Colegrove v. Breed*, 2 Denio, 125. And see *Manchester v. Herrington*, 10 N. Y. 164. A nonsuit ought not to be granted until the whole evidence in the cause is properly before the court, where the motion is not made at the close

Refusal of party to be sworn. — Striking out evidence.

of the plaintiff's case. A plaintiff proved a *prima facie* case and then rested his cause. The defendant then proved an affirmative defense, and immediately at the close of his evidence moved for a nonsuit. The justice refused to grant it until after the plaintiff had an opportunity to introduce his evidence in reply to the defense, and this was held to be the correct practice. *Carland v. Day*, 4 E. D. Smith, 251.

In courts of record, the court may strike out a complaint, answer, or reply, if a party refuses to be examined as a witness. Code of Civil Pro., § 853. And see *Richards v. Judd*, 15 Abb. (N. S.) 184; 2 N. Y. Sup. Ct. (T. & C.) 479. But this provision does not apply to a justice's court. And a justice has no power to strike out any pleading on account of the refusal of a party to be examined as a witness. *Mayor of New York v. Mason*, 1 Abb. 344. But if a party refuses upon cross-examination to answer a proper and pertinent question, the justice has power, on motion of the adverse party, to strike out the direct examination of the witness. *Rutherford v. Holmes*, 66 N. Y. 368.

When a complaint or answer is defective, because it does not state facts sufficient to constitute a cause of action, or a counter-claim, and it is not demurred to, but the cause proceeds to trial, the justice cannot dismiss the complaint, nor disregard the answer for that reason. *Wooster v. Chamberlin*, 28 Barb. 602; *Hilliard v. Austin*, 17 id. 141; *Turck v. Richmond*, 13 id. 533; *Smith v. Mitten*, 13 How. 326. If no demurrer is interposed to the pleading, and a substantial case or defense is established by the evidence, that will be sufficient to require the cause to be disposed of on its merits. *Ib.*

When a witness is under examination, and he is suddenly taken ill, the justice may suspend the trial a reasonable time, to enable him to recover sufficiently to complete his examination. And the party producing him as a witness must see that he is present in court, so that he may be cross-examined by the opposite party or his evidence will be struck out. *Clements v. Benjamin*, 12 Johns. 299. But if a witness is partially examined, and the cause is then adjourned by consent of parties, and the witness dies before the adjourned day, his evidence cannot be struck out, but it is to be considered as a part of the evidence in the cause, even though the right of cross-examination should be lost. *Forrest v. Kissam*, 7 Hill, 463; reversing S. C., 25 Wend. 651.

If irrelevant evidence is offered, the justice may reject it on his own motion, even though no objection be taken to it. *Farmers and Manufacturers' Bank v. Whinfield*, 24 Wend. 420; *Keeler v. Delavan*, 4 Barb. 317. And irrelevant evidence ought clearly to be rejected when an objection is interposed to it by one of the parties. But if irrelevant

Duty of justice to preserve order, etc.

evidence is received under objection, the opposite party is entitled to explain, contradict, or answer it by counter evidence. *Ward v. Washington Ins. Co.*, 6 Bosw. 229. By receiving the evidence under objection, the justice decides that it is competent, and this is sufficient to authorize the opposite party to rebut it by evidence. *Ib.* If irrelevant evidence is offered and received without objection, it is discretionary whether to receive contradictory or explanatory evidence in answer to it. *Farmers and Manufacturers' Bank v. Whinfield*, 24 Wend. 420; *Keeler v. Delavan*, 4 Barb. 317.

After a jury has been impaneled and sworn, they ought to have a place assigned to them which is separate and distinct from all other persons. And during the progress of the trial, no persons ought to be allowed to talk or communicate with them unless by the permission of the court. And, above all other things, the justice ought to require the strictest order and quiet to be observed; the proceedings ought to be so conducted that the jurors shall have an opportunity of hearing every word that is given as evidence; not only that, but there ought to be such rules adopted as shall prevent any thing from distracting the attention of the jury from the proceedings at the trial.

If any of the parties or their friends should attempt to produce any influence upon the jury by improper manifestations of satisfaction at some of the evidence and proceedings, and of dissatisfaction with other proceedings, the justice ought promptly and firmly to restrain such conduct. And if a proper admonition should fail of its effect, a commitment for a contempt of court will most effectually remove the cause.

Improper conduct of this character is most severely censured by the courts. *Conrad v. Williams*, 6 Hill, 444, 452. In the case cited the court said: "It is not to be tolerated that men should go into such a place and manifest their feelings, prejudices or passions, for the purpose of exerting an influence upon those who sit in judgment upon the rights of parties." In another case where a party had been guilty of grossly improper conduct toward the justice on the trial, the court expressed itself thus: "The powers of magistrates are ample to repress and punish such behavior in any stage of the cause, whether proceeding from a party, his counsel, or a bystander, and self-respect, as well as a due regard for the administration of justice, imperiously demand that they should be used, and order enforced with a firm and steady hand. Justices may at all times rely upon the countenance and favor of this court, in the due command and vigorous enforcement of good order while conducting their proceedings; and, as all necessary powers have been conferred upon them for this purpose, they should know and feel,

 Restraining counsel summing up.

that they alone are justly responsible for its observance. We cannot commend the forbearance of the magistrate in the instance before us, and would have been better satisfied if he had repressed the disorderly behavior of the party at once, when admonition failed, by fine, or commitment, or both." *Onderdonk v. Ranlett*, 3 Hill, 323, 328, 329.

The justice has a right to restrain the summing up of the cause within its proper limits.

If evidence has been offered on the trial, and rejected by the justice as incompetent or illegal, counsel have no right to comment upon such evidence as though it were in the case. *Mitchell v. Borden*, 8 Wend. 570.

There ought to be the largest latitude allowed to counsel in summing up a cause; but there is no reason for tolerating them in discussing matters entirely foreign to the cause. "The merits of a cause can only be rightly determined by a fair and unprejudiced consideration of the evidence, uninfluenced by any extraneous considerations calculated to excite the passions and warp the judgment. As it is a rule of pleading that the issue should be on a material point, so it is an essential rule of evidence that the proof should be material and relevant to the issue. It is equally indispensable to the orderly course of judicial proceedings, and an impartial administration of the laws, that counsel on either side should not be allowed to lose sight of the evidence and the issues, and indulge in denunciations of a party based upon facts not proved, and which, therefore, should not be permitted to disturb that calm deliberation which it is the duty of jurors to bestow, and which the parties have a right to expect and demand." *Fry v. Bennett*, 3 Bosw. 202, 242, BOSWORTH, J.

If counsel indulge in such remarks in their summing up, where the evidence does not authorize it, the opposite party may object to the remarks, and if the justice refuses to restrain them, it will be error. A proper enforcement of this rule is sometimes indispensable, since it occasionally happens that an unscrupulous person attempts to supply a want of evidence by the most unjust denunciations and charges or insinuations against parties and witnesses, when there is no evidence to warrant their course of conduct.

After a case is closed, and it has been submitted to the jury, they may render a verdict immediately without retiring from court, if they are already unanimous as to their verdict. But ordinarily such is not the practice. A semblance of deliberation is at least a propriety, and it is only in the plainest cases, or when a jury is acting under some strong impulse, that a verdict is rendered without retiring for delibera-

Swearing constable to attend the jury.

tion. A trial must be closed and submitted to a jury on a week day and not on Sunday. In one case a trial was commenced on Saturday and it was continued until two o'clock in the morning of Sunday, when it was submitted to the jury, and they rendered their verdict about three o'clock, A. M. This was held irregular, and the judgment was reversed. *Pulling v. The People*, 8 Barb. 384; *Butler v. Kelsey*, 15 Johns. 177. In such cases, the cause ought to be adjourned over to Monday, when the trial could be legally completed. When a jury retires to deliberate upon their verdict, a constable must be sworn to attend them. Vol. 1, p. 42, § 3006. If this is omitted, the judgment will be reversed. *Douglass v. Blackman*, 14 Barb. 381. And if it appears that the jury retired from court for deliberation, it must also appear affirmatively that a constable was sworn to attend them, or the judgment will be erroneous, for no intendment will be indulged that a constable was sworn. *Coughnet v. Eastenbrook*, 11 Johns. 532. It must expressly appear, however, that the jury retired from the court before it is necessary to show that a constable was sworn. *Hatch v. Mann*, 9 Wend. 262; *Fink v. Hall*, 8 Johns. 437. If the jury are left alone in the room in which the trial was held, a constable must be sworn as in other cases. *Douglass v. Blackman*, 14 Barb. 381. It is in those cases only in which a verdict is rendered by the jury without leaving their seats, that the swearing of a constable can be dispensed with. *Ib.* If, however, the parties expressly agree that the jury may retire for deliberation without any constable to attend them, this waives the irregularity. *Tower v. Hewett*, 11 Johns. 134.

The statute prescribes the following oath to be administered to the constable. Vol. 1, p. 42, § 3006.

Form of oath to constable.

"You swear, in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink except such as shall be ordered by me; that you will not suffer any communication to be made to them, orally or otherwise; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they are discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed on."

A mis-recital of the oath will not be error, if accidental, and if no objection is made at the time of administering the oath. *Brownell v. Slocum*, 3 Johns. 430. So the oath may be waived if the parties agree

 Deliberations of jury. — Improper influence.

to it. *Tower v. Hewett*, 11 Johns. 134. And the waiver need not be express; it is sufficient if no objection is made at the time. *Howard v. Sexton*, 1 Denio, 440. The next subject for consideration is the conduct of the jury after being placed in charge of the constable.

Reading newspapers in the jury-room is not illegal, though such a practice would tend to protract a trial unnecessarily. See *People v. Gaffney*, 14 Abb. (N. S.) 36. If the newspapers, however, contain comments upon the proceedings of the particular trial, and are calculated to produce an improper result, they ought not to be read by the jurors.

After a jury have retired to deliberate upon their verdict they ought to continue together until their verdict is made, and until they return into court. And during that time they ought not to have any communication with strangers in relation to the case, nor upon any other subject without the permission of the court. A separation of the jury will sometimes be considered a sufficient ground for setting aside the verdict; though this is not done when it appears that no improper influence has resulted from it. *Anthony v. Smith*, 4 Bosw. 503. It would be highly censurable for a juror to attempt to inform the successful party what verdict had been found before it was openly delivered in court; yet a mere attempt has been held not to be a sufficient ground for setting aside the verdict. *Fash v. Byrnes*, 14 Abb. 12. A constable is sworn not to interfere with the deliberations of a jury and he violates his oath if he does so; but the fact that he urged the jurors to give a verdict in favor of the successful party is not a sufficient ground to reverse the judgment, especially when the jurors told him to mind his own business, and when the jurors all swear that they paid no attention to his remarks. *Baker v. Simmons*, 29 Barb. 198. And see *Taylor v. Everett*, 2 How. 23; *Hager v. Hager*, 38 Barb. 92.

On the other hand, where it appeared that the officer stated to the jury that the court had adjourned, and left orders for him to lock up the jury and keep them all night unless they agreed upon a verdict; that the case was clear for the plaintiff; that the jury had better agree and go home; that if they did not agree soon he should lock them up for the night; and it also appeared that these statements of the officer induced a portion of the jury to render a verdict for the plaintiff, the verdict was set aside. *Thomas v. Chapman*, 45 Barb. 98. So in a late case in Indiana it was held that the officer in charge of a jury has no right to be present with them during their deliberations even if he does not speak to them, and though his presence does not appear to have produced any injurious influence; that he has no right to speak to them except to ask if they have agreed upon their verdict; and that

Deliberations of jury. — Improper influence.

his speaking otherwise, or his presence, even, will vitiate any verdict afterward found. *Rickard v. State*, 12 Reporter, 332. And see *People v. Knapp*, 43 Mich. 267. But there is no rule in this State which prevents an officer sworn to attend the jury from being in the same room with them during their deliberations, although the practice is not approved. *People v. Hartung*, 4 Park. Cr. 256; *People v. Draper*, 28 Hun, 1. It will be seen from the cases cited that the law in this State does not punish the successful party by setting aside a verdict for the unlawful act of the officer in charge of the jury, unless it appears that the unsuccessful party has been injured by that act.

But the least interference by a party with the jury will be good ground for setting aside a verdict rendered in his favor. *Reynolds v. Champlain Transp. Co.*, 9 How. 7; *Coster v. Merest*, 3 Brod. & Bing. 272; *Oliver v. Trustees, etc., of Springfield*, 5 Cow. 283. In the case last cited the jurors had leave to bring in a sealed verdict, and to separate whenever the verdict had been agreed upon. They fraudulently pretended that they had agreed upon a verdict, and thus induced the constable to permit them to separate; when they went into a public bar-room, where the case was much talked about. They then returned into court, and informed the court that they had not agreed upon their verdict; whereupon, after explaining certain testimony upon which the jury had disagreed, the judge sent them out again for further deliberation, though the plaintiff objected; and the jury found a verdict for the defendant, which was set aside as irregular. But, where leave was given to bring in a sealed verdict, and the jury actually agreed upon their verdict and separated for the night, and in the morning, upon polling the jury, one of them dissented from the verdict, when the jury were again sent out, and he then assented to the former verdict, this was held to be regular. *Douglass v. Tousey*, 2 Wend. 352. A jury have no right to determine a verdict by lot, and where ballots were placed in a hat, and some of the ballots were marked *prize* and others blanks, and it was agreed that if more prizes than blanks were drawn, then the plaintiff should have the verdict, otherwise it was to be for the defendant, the drawing resulted in favor of the defendant, when he had the verdict, which was set aside as irregular. *Mitchell v. Ehle*, 10 Wend. 595.

So it would be irregular to determine the amount of a verdict by lot. In one case the jury fixed the amount of the verdict, by requiring that each juror should mark the amount of his verdict, and that the amount fixed by each should be added together, and the amount thus found divided by six, which should be the amount of the verdict

without alteration. This was held to be erroneous, and the judgment reversed. *Harvey v. Rickett*, 15 Johns. 87. If such a course is adopted for the purpose of comparing views, but without any agreement to abide by the amount found as the verdict, the verdict will be permitted to stand. *Dana v. Tucker*, 4 Johns. 487. But it would be error to charge a jury, on a question of values, that if there was a difference of opinion of the witnesses on that subject, and the witnesses were of equal integrity and capacity to judge, they might then arrive at the average of their estimates by adding together their several estimates and dividing the aggregate by the number of witnesses, and that they might take the quotient as the value of the property; that they were under no obligation to do so, but it was legal for them to resort to this method in arriving at the value, if, after in this way they had ascertained an amount, they were satisfied it was the value of the property, and thought proper to adopt it as such. *Thomas v. Dickinson*, 12 N. Y. 364.

Every verdict is founded upon matter of fact and matter of law. If the justice charges the jury as to the law, they will have nothing to do but to determine the questions of fact and to apply the law as it is laid down to them by the court. But, when no charge is given to them, they must, of necessity, determine first what the facts are, and then declare the law and apply it to the facts found. And in such a case they will be permitted to judge what the law is, as well as to determine the questions of fact. *McNeil v. Scofield*, 3 Johns. 436.

It is now well settled that the justice may permit a jury, on retiring for deliberation, to take with them any deposition or written instrument which has been properly proved and introduced in evidence. *Howland v. Willetts*, 9 N. Y. 171; S. C., 5 Sandf. 219; *Porter v. Mount*, 45 Barb. 422; *Schappner v. Second Ave. R. R. Co.*, 55 id. 497. And see *Sanderson v. Bowen*, 2 Hun, 153. But they are not permitted to take out with them the minutes of testimony of one of the counsel without consent. And, where this was done, and the verdict was in favor of the party whose counsel's minutes were taken, the judgment was reversed. *Durfee v. Eveland*, 8 Barb. 46. In such a case the presumption will be that the counsel delivered the minutes to the jury. *Ib.* Where a paper, not in evidence on the trial, is clandestinely put into the books of account after the close of the testimony, containing criticisms and suggestions as to the accounts, which are the subject of litigation, and the account-books are submitted to the jury in their deliberations, with the paper concealed therein, the

Deliberations of jury. — Communications with court.

verdict cannot be sustained. *O'Brien v. Merchants' Ins. Co.*, 48 How. 448; S. C., 6 Jones & Sp. 482.

The jury have no right to examine a witness by themselves, even though he had been sworn and examined on the trial. If they are in doubt as to what the evidence is upon any question, they should inform the court; and in that case, the witness will be recalled, or more correctly, the justice will state the evidence to them as he has taken it upon his minutes of the trial. *Blackley v. Sheldon*, 7 Johns. 32. If the justice's minutes are not full and accurate, the best method will be to recall the witnesses upon the particular questions as to which information is desired. But both parties ought to be notified, and have an opportunity of being present at such a re-examination; and if they have the opportunity, but refuse to avail themselves of it, the justice may still permit the examination, even if it takes place in the jury-room. *Henlow v. Leonard*, 7 Johns. 200.

A justice has no right to send his minutes of the evidence to the jury, at their request, unless the parties consent; and the error will be sufficient to reverse the judgment rendered. *Neil v. Abel*, 24 Wend. 185.

So, if the jury, on being left in the court-room, find the minutes of the justice, and without the consent of the parties, proceed to read and comment upon portions of the same, their verdict will be fatally irregular. *Mitchell v. Carter*, 14 Hun. 448.

So, after a jury has retired, the justice has no right to go into the jury-room for the purpose of informing them what the evidence is upon any point, or to give them any other information whatever, unless the parties consent in express terms. *Moody v. Pomeroy*, 4 Denio, 115; *Taylor v. Betsford*, 13 Johns. 487; *Bunn v. Croul*, 10 id. 239; *Benson v. Clark*, 1 Cow. 258. The rule is well settled in this State that there can be no communication between the justice and the jury after they have retired to consider their verdict in relation to the oral evidence or his instructions to them, unless it takes place openly in court, or with the express assent of the parties. *Ib.*; *Watertown Bank and Loan Co. v. Mix*, 51 N. Y. 558; *Plunkett v. Appleton*, 51 How. 469; S. C., 9 Jones & Sp. 159. If the parties are notified that the jury wish to communicate with the justice, and they do not go into the jury-room, but the justice does so on the mistaken supposition that the parties were following when they were not, this will not be error if the justice refuses to say any thing to the jury, and he immediately leaves the room because the parties were not present. *Keeler v. Lockwood*, Hill & Denio, 137. And it has been held that, where the jury sent

for the justice, and the defendant consented that the justice might go and see what they wanted, such consent gives the justice a right to read his minutes in explanation of the evidence for the information of the jury. *Hancock v. Salmon*, 8 Barb. 564. The permission of the defendant that the justice should enter the room is an implied consent that he may give such information as is desired, or would have been proper if the parties had been present. *Ib.*

So it has been held that where the court has sent a communication to the jury-room without the consent of the parties, and afterward, and before the verdict is rendered, and while the jury is present in the court-room, the fact is made known to the counsel for the parties, who make no objection to the jury's retiring a second time, the irregularity will be waived. *Mahoney v. Decker*, 18 Hun, 365.

In courts of record the judge will not permit a jury to see a treatise on the law, even if the parties consent; because the jury can state the point upon which they desire information, and it will be furnished by the court. *Burrows v. Unwin*, 3 Carr. & Payne, 310. See *People v. Draper*, 28 Hun, 1.

But where the justice does not charge the jury, nor instruct them as to the law, no such rule exists. And every facility ought to be furnished to the jury which the circumstances of the case will permit. If authorities have been cited by counsel on the argument, there is no reason why the jury should not be permitted to examine them if they wish to do so. Certainly they will not be much more likely to go astray with all the aids they can get, than they would if they groped their way by chance.

While the jury are out of court, or are deliberating in their room, they ought not to hold communications with any third persons; nor should either of them relate facts bearing upon the case, unless he was sworn as to them as a witness; for in the event that he was not sworn his statements would naturally have some influence with the jury; and this would deprive one party of a right to cross-examine him, to rebut it by other evidence, or to have his statements sanctioned by an oath. And it is equally improper for jurors to listen to the statement of strangers. In one case the court said: "Jurors seem not to be aware of the gross impropriety of conversing with other persons about the case on trial before them. Hardly any act can be more reprehensible. Jurors are sworn to try the case according to the law and the evidence. That is not evidence to which the juror listens out of court, where there is no opportunity to meet it, and no chance for cross-examination; and yet it influences the mind, tends to the grossest wrong and injustice.

Discharging the jury on failure to agree.

and is a violation of the most sacred obligations of a juror." *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. 141, 147.

It is desirable that juries should agree in every case if that is possible, since it saves the parties much trouble and expense. But in some cases the character of the evidence is such that the several jurors cannot agree in their views in relation to it. And in such a case, if the jury cannot agree upon a verdict, they ought to notify the justice of that fact. On their return into court, it will be proper to state to the justice what difficulties are in the way of agreeing upon a verdict. And if any explanation as to the evidence will be of service, the justice ought to give it, and then send the jury out for further deliberation.

So, if the difficulty arises as to a question of law, the justice ought to explain it to them as well as he is able, allowing either party an exception as to his instructions if they desire to take one. The duties of a court toward a jury are well expressed by a learned judge in the case of *Green v. Telfair*, 11 How. 260, 262: "A judge may also keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree; but beyond this, I do not think he is at liberty to go. An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. The jury, while all proper motives to induce them to agree upon a common result may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations; that, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court." See *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Slater v. Mead*, 53 How. 57; *Erwin v. Hamilton*, 50 id. 32; *Huntoon v. Russell*, id. 154.

The foregoing remarks are peculiarly appropriate, not merely in relation to courts of record, but are still more carefully to be observed in a justice's court. When it is evident that further discussion between the jurors will be fruitless, the justice ought to discharge them. The length of time during which they ought to be kept out for the purpose of deliberating must necessarily be controlled by the particular circum-

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stances of each case, and the law has confided a proper discretion to the justice in such a case. Vol. 1, p. 43, § 3008; *White v. Colder*, 35 N. Y. 183.

If the jury is discharged, the justice is required to issue a new venire, returnable within forty-eight hours, unless the parties consent to submit the case to the justice upon the evidence already given. Vol. 1, p. 43, § 3008. The parties may agree upon a different time for the return of the venire. And if the justice proposes to make it returnable at a later day than that specified by the statute, and neither party objects, when both are present and hear the proposition, their consent will be presumed. *Fiero v. Reynolds*, 20 Barb. 275.

The verdict. A verdict is the opinion which is declared by a jury as to the *truth* of the matters of fact or law which are submitted to them for trial and decision. It is the unanimous determination of the jury, after hearing the case, the evidence, the arguments of counsel, and the charge of the court if one is given.

A general verdict is one by which the jury pronounce, at the same time, on the fact and the law, either in favor of the plaintiff or of the defendant.

A special verdict is one by which the jury find the facts of the case, and the law arising thereon is submitted to the court for decision.

In a justice's court the verdict must be a general one in all cases, for the law does not authorize the finding of a special verdict in these courts; and the justice would have no power to render a judgment upon such a verdict even if it were found. *Wylie v. Hyde*, 13 Johns. 249. The only verdict the jury can render is for the plaintiff, or for the defendant, for such damages as they find the one or the other entitled to; except in actions for the claim and delivery of property, in which they may find some other facts. *Marcellus v. Countryman*, 65 Barb. 201. The form of a verdict in replevin has already been discussed. *Ante*, 229, 230.

Where double, treble, or other increased damages are given by statute, single damages only are to be found by the jury; except in a case where the statute prescribes a different rule. The sum so found must be increased by the court, and judgment rendered accordingly. Code of Civil Pro., § 1184.

The verdict of the jury must be publicly delivered to the justice, who must enter it in his docket-book. Vol. 1, p. 42, § 3007. Under the Revised Statutes the justice was required to call the plaintiff before receiving the verdict, and if the plaintiff was absent, and no one appeared for him, the verdict could not be received. 3 R. S. (5th ed.)

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443, § 101. It was also provided that the plaintiff should be nonsuited if he did not appear on the coming in of the jury to hear the verdict. *Id.*, § 110. If the justice received the verdict in the absence of the plaintiff, a judgment rendered thereon in favor of the plaintiff was erroneous, and would be reversed on appeal. *Board of Excise of Marion v. Turk*, 2 N. Y. Sup. Ct. (T. & C.) 367. See *Shove v. Raynor*, 3 Denio, 77; *Douglass v. Blackman*, 14 Barb. 381. All this has been rendered obsolete by the provision of the Code that it is not necessary to call the plaintiff before receiving the verdict. Vol. 1, p. 43, § 3007.

If the plaintiff appears, and the jurors are all present, the justice then asks: *Gentlemen of the jury, have you agreed upon your verdict?* To which the foreman of the jury will respond *we have*, if a verdict has been agreed on. The justice next asks: *Whom do you find for?* To which the foreman answers, *we find for the plaintiff* (stating the sum), or *we find for the defendant*. And if a set-off has been proved, which the jury have allowed, so as to entitle the defendant to a judgment in his favor, the foreman will state the amount. In replevin actions, the foreman will state that they find for the plaintiff, or the defendant, and that the damages are assessed at a specified sum, which must be stated.

The justice will immediately note the verdict in his minutes, and after this is done, he will address the jury thus: *Gentlemen of the jury, listen to your verdict as it is recorded by the court. You say you find* (stating the verdict as it was rendered), *and so say you all*. Unless some of the jury then dissent, this will be the verdict in the action.

The justice must forthwith render judgment in conformity to the verdict and enter it in his docket-book. Vol. 1, p. 44, §§ 3014, 3015.

The mere form of the verdict is generally unimportant if it is substantially a verdict in favor of one party or the other. A verdict of "*no cause of action*" is very commonly rendered, and it is substantially a verdict for the defendant, and the justice should so enter it in his minutes and docket, which will be entirely regular. *Felter v. Mulliner*, 2 Johns. 181.

The justice is bound to render a proper judgment upon such a verdict, and it will bar a second action for the same cause, even though no judgment is rendered upon it. *Ib.*

In an action of trespass the jury found a verdict in favor of the defendant, for six cents damages, and six cents costs, and this was held

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to be a verdict for the defendant generally, rejecting the damages. *Goodenow v. Travis*, 3 Johns. 427.

A verdict in favor of a plaintiff, for a sum greater than he claims, or is willing to receive, is a mere formal defect, and the plaintiff may remit the entire verdict or any portion of it, before judgment is rendered upon it by the justice. *Clark v. Denure*, 3 Denio, 319; *Barber v. Rose*, 5 Hill, 76; *Putnam v. Shelop*, 11 Johns. 435.

So, where a verdict is rendered in favor of a defendant for a specified sum, when he is not entitled by law to recover any sum by way of damages, he may remit the amount found in his favor, and take a general verdict in his favor. *Burger v. Kortright*, 4 Johns. 414.

The prevailing party may remit any portion of a verdict in his favor for a sum of money and take judgment for the residue. Vol. 1, p. 44, § 3016.

A verdict may be rendered, and a judgment entered in favor of a defendant, for a set-off which is proved on the trial, although the plaintiff does not prove any claim which is allowed in his favor. *Greenleaf v. Low*, 4 Denio, 168.

A justice has no power to open a judgment, nor to alter it, after his judgment has been once rendered, and entered in his docket. *People v. Delaware Com. Pleas*, 18 Wend. 558; *Appleby v. Strang*, 1 Abb. 143; *Hardy v. Seelye*, 3 id. 103; S. C., 1 Hilt. 90 *Speery v. Major*, 1 E. D. Smith, 361.

But when a judgment is taken by a plaintiff in the absence of the defendant, on the return day, the default may be opened by consent, and the cause tried. *Scranton v. Levy*, 4 Abb. 21; S. C., 1 Hilt. 261.

In certain local courts, the justice is empowered by statute to open defaults, but this power is not general. Vol. 1, 80, § 3128.

At any time before a verdict is recorded, the jury may correct or amend it either in form or substance. This may be done upon their own motion, or at the suggestion of the justice. It may be done in open court, or they may retire to their room for that purpose. But it seems that if a verdict, which is defective in substance, has been received and recorded, it cannot be afterward altered. *Herzberg v. Murray*, 8 Jones & Sp. 271. See *Warner v. New York Cent. R. R. Co.*, 52 N. Y. 437.

In one case the jury came into court with a verdict in favor of the defendant; but the verdict was written upon a piece of paper, which was handed to the justice, who read it, but did not publish it, and he then informed the jury that, in his opinion, they had mistaken the evidence, and he requested them to reconsider their verdict. The jury

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retired, and soon after requested the re-examination of a witness, which was granted in the presence of both parties, without objection by either ; and, after deliberation, the jury rendered a verdict in favor of the plaintiff for \$24.42, which was held valid. *Blackley v. Sheldon*, 7 Johns. 32.

At any time before a verdict is publicly delivered and recorded, any of the jurors may dissent from it, for until that is done it is not a final verdict. *Ib.*

And before that time, any juror may change his mind, and refuse his assent to the proposed verdict, even when it is a sealed one, which he himself has signed. *Root v. Sherwood*, 6 Johns. 68; *Weeks v. Hart*, 24 Hun, 181. See *Warner v. New York Cent. R. R. Co.*, 52 N. Y. 437. In such a case the justice may send the jury out again, to see whether they cannot agree upon a verdict, and if they do, the verdict will be regular. *Bunn v. Hoyt*, 3 Johns. 255.

The jurors must be unanimous, or there is no verdict. And to ascertain whether the jurors are all agreed, either party has a right to poll the jury, at any time before the verdict is recorded. *Labar v. Koplín*, 4 N. Y. 547; *Fox v. Smith*, 3 Cow. 23. And the rule is the same, even where the verdict is a sealed one. *Ib.* To poll a jury is to examine each juror separately, after the verdict has been given, as to his concurrence in the verdict. And at the request of either of the parties, the justice is bound to poll the jury, which he does by calling each juror by his name, and asking him "*Is this your verdict?*" And when there are several defendants the form of question is the same. The defendant polling the jury cannot require the justice to put the question in this form: "*Is this your verdict against each and both the defendants?*" *Labar v. Koplín*, 4 N. Y. 547. If, on polling the jury, they are unanimous, the verdict is recorded, and judgment rendered upon it. If any of them dissent from the verdict, the justice will either send them out to reconsider the case, or he will discharge them, if that, in his judgment, is the best course.

Where a jury retires late at night, and it is probable that they will be out some time, the justice may direct them to find a sealed verdict, whether the parties consent or not. *Green v. Bliss*, 12 How. 428. In such a case, strict practice requires that all the jurors should sign the verdict, since that is the rule in relation to sealed verdicts. *Ib.* But if such verdict is delivered to the court in the presence of the unsuccessful party, without objection, it will be valid. *Ib.* So, on polling a jury, if the answer of any juror is unsatisfactory, the objection must be taken at the time or it will be waived. *Ib.*

 Questions of fact for the jury.

The party who demands a venire is bound to pay the jurors their fees on their coming into court with a verdict, and before it is declared by them or recorded by the justice.

It has been seen, *ante*, 736, that a jury cannot be sent out on Sunday for the purpose of deliberating upon their verdict. But if the jury were sent out on Saturday night, and they do not agree upon a verdict until Sunday, the justice may receive the verdict even upon Sunday. *Hough-taling v. Osborn*, 15 Johns. 119. But no judgment can be entered upon it until the next day, and if there is it will be reversed. *Ib.*

There are several matters which are incident to jury trials, which may as well be noticed here as in any other place.

Questions of fact for jury. Every question of fact which arises in the case upon the issues raised by the pleadings must be determined by the jury upon all the evidence given on the trial. And whenever there is any evidence given which raises a question as to the existence of any fact or facts, the jury are the exclusive judges of the question. When there is evidence upon both sides of the question, it must be submitted to the jury for their determination, notwithstanding the fact that the preponderance of the evidence is decidedly in favor of one of the parties. *Carland v. Day*, 4 E. D. Smith, 251; *Robbins v. Dillaye*, 33 Barb. 78; *Ayrault v. Chamberlain*, id. 229; *Cook v. Litchfield*, 2 Bosw. 138.

So, where there is a general denial of the complaint, and there is some evidence given by the plaintiff in support of his case, the question must be submitted to the jury, if the evidence is so far sufficient that a verdict in favor of the plaintiff would not be reversed because it was contrary to the evidence, or unsupported by it. *Gates v. Brower*, 9 N. Y. 205; *Thompson v. Dickerson*, 12 Barb. 108; *Russell v. Cronkhite*, 32 id. 282; *McGrath v. Hudson River R. R.*, id. 144; *Earnest v. Same*, id. 159; *Borrodale v. Leek*, 9 id. 611; *Kellogg v. Wilkie*, 23 How. 233. And, on the other hand, where the complaint is not denied, and an affirmative defense is set up, or where there is both a denial and an affirmative defense, if there is any evidence given by the defendant to establish the truth of such defense, the question must be submitted to the jury. *Thompson v. Dickerson*, 12 Barb. 108; *Gardner v. MeEwen*, 19 N. Y. 123; *Griswold v. Sheldon*, 4 id. 582.

Where the law prescribes a particular measure of damages, the jury must follow it. But in actions for torts, and in all cases where the amount of damages is to be assessed upon all the evidence, the jury are the exclusive judges as to the amount of damages which shall be given,

Questions of fact for the jury.

unless the sum should be so large and disproportionate as to furnish evidence of fraud, partiality or some other improper motive in the conduct of the jury. *Tift v. Culver*, 3 Hill, 180; *Cropsey v. Murphy*, 1 Hilt. 126; *Pierce v. Dart*, 7 Cow. 609. Or unless the sum is so small as to show gross injustice to the plaintiff, upon the uncontradicted evidence given on the trial. *Robbins v. Hudson River R. R. Co.*, 7 Bosw. 1; *Stephens v. Wider*, 32 N. Y. 351.

The credibility of witnesses is always a question for the jury. *Merritt v. Lyon*, 3 Barb. 110; *Leach v. Kelsey*, 7 id. 466; *Whiting v. Otis*, 1 Bosw. 420; *McLaughlin v. Barnard*, 2 E. D. Smith, 372; *Conrad v. Williams*, 6 Hill, 444. And the court below cannot take the question from them, nor can a court above, on an appeal, reverse their decision. *Ib.*

Fraud is a question of fact for a jury, where there is any evidence fairly tending to establish it, but whether the evidence tends to establish fraud or not is always a question of law for this court. *Erwin v. Voorhees*, 26 Barb. 130, 127; *Gage v. Parker*, 25 id. 141.

Whether there has been a delivery and acceptance of goods in pursuance of a contract of sale, or whether the delivery was a conditional, or an absolute one, is a question of fact for a jury. *Smith v. Lynes*, 5 N. Y. 41. So, a question whether a negotiable note was taken before or after due, or with or without knowledge of prior equities. *Clark v. Dearborn*, 6 Duer, 309. And so, whether a bill or note was taken as an absolute payment, or by way of collateral security. *Atlantic Fire Ins. Co. v. Boies*, 6 Duer, 583. So, as to whether a sale was made with an intent to hinder, delay or defraud creditors of the vendor. *Brown v. Wilmerding*, 5 Duer, 220. So, whether consent was given to an act which would be a trespass but for the license. *Walter v. Post*, 6 Duer, 363. Where a contract was made on the 8th day of October, for the sale of a quantity of oats which were to be delivered "on or about the first of November next," and the oats were not delivered, it was held that the measure of damages was to be regulated by the price at the time when the oats ought to have been delivered, which must be within a reasonable time after the first of November; and the question of reasonable time is one of fact for the jury. *Kipp v. Wiles*, 3 Sandf. 585. So, when it is shown that money is delivered by one person to another, it was a question for the jury, whether it was a payment or a loan of the money. *Morse v. Bogert*, 4 Denio, 108; S. C., 1 N. Y. 377. Where there is a dispute between two persons as to the amount which is due from one of them to the other, and a certain sum is paid, it is a question for the jury whether that sum was paid in part

Questions of law for the court.

or in full payment. *Pierce v. Pierce*, 25 Barb. 243. So, whether the payment and acceptance of money was a usurious transaction is for them to decide. *Carland v. Day*, 4 E. D. Smith, 251; *Robbins v. Dillaye*, 33 Barb. 78; *Ayrault v. Chamberlain*, id. 229.

But, where there is no dispute as to the facts, it is a question of law whether a transaction is usurious. *Thomas v. Murray*, 34 Barb. 157; *Dunham v. Dey*, 13 Johns. 40. Whether services were rendered gratuitously, or with an expectation of compensation therefor, is for the jury. *Pendleton v. Empire Stone Co.*, 19 N. Y. 13. So, whether a written contract for the sale of goods was delivered conditionally or absolutely. *Scott v. Pentz*, 5 Sandf. 572.

So, it is for the jury to say for whose benefit an accommodation note was indorsed. *Bridgeport City Bank v. Empire Stone Co.*, 30 Barb. 421; S. C., 19 How. 51. So, where a principal is sought to be charged with the acts of his alleged agent, the question of authority in fact is for the jury. *Thurman v. Wells*, 18 Barb. 500.

So, as to whether a sealed instrument was executed and delivered at the time it bears date, if there is any evidence to rebut the legal presumption that it was so executed. *Genter v. Morrison*, 31 Barb. 155; *Elsey v. Metcalf*, 1 Denio, 323. So, it is a question of fact for a jury, whether material alterations in a written agreement were made before or after execution. *Pringle v. Chambers*, 1 Abb. 58. So, when an instrument has no date, the time of making it is a question of fact. *Coons v. Chambers*, 1 Abb. 165.

The question of negligence, when the facts constituting it are alleged to exist, either on the part of the plaintiff or of the defendant, is for the jury, if, on the evidence, it is contested or doubtful who was negligent. *Johnson v. Hudson River R. R.*, 20 N. Y. 65; S. C., 5 Duer, 21; *Vanderpool v. Husson*, 28 Barb. 196; *Brown v. New York Central R. R.*, 31 id. 385; *Bernhardt v. Rensselaer & Saratoga R. R.*, 32 id. 165; S. C. affirmed, 23 How. 166; *Fero v. Buffalo & State Line R. R.*, 22 N. Y. 209; *Brown v. Same*, id. 191.

Whether a specific erection or building, or whether particular acts amount to a nuisance, is a matter entirely for a jury. *Morgan v. King*, 18 Barb. 277; *St. John v. Mayor of New York*, 6 Duer, 315. But if the facts are undisputed, it is then a question of law whether such facts amount to a nuisance. *Harlow v. Humiston*, 6 Cow. 189; *Udike v. Campbell*, 4 E. D. Smith, 570; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Smith*, 18 N. Y. 79.

Questions of law for the court. Whether a witness is competent to be sworn is question of law for the court in all cases, whether the

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question is one relating to the legal capacity of the witness to be sworn, or for any other cause. *Prall v. Hinchman*, 6 Duer, 351. There are numerous cases of incapacity, such as idiocy, insanity, infancy, where the witness is of too tender years to comprehend the nature of an oath, and intoxication, where it is so gross as to incapacitate the witness. Some of these defects are temporary, and others are permanent.

So, too, it is always a question for the justice to decide whether evidence which is offered is admissible; its competency or admissibility is for the court; its credibility or value for the jury. *Hills v. London, etc., Gas Co.*, 3 Hurlst. & Norm. 920.

Where there is no question as to the facts, the construction of a written instrument is for the court, as for instance, the sufficiency of a notice. *Cook v. Litchfield*, 2 Bosw. 138; S. C., 9 N. Y. 279. So, where a chattel mortgage is fraudulent on its face, the justice must so hold it as a matter of law; and, in that case, there is no question of fact to submit to a jury. *Edgell v. Hart*, 9 N. Y. 213; *Williston v. Jones*, 6 Duer, 504; *Spies v. Boyd*, 1 E. D. Smith, 445. Whether a party has committed a fraud is a question for the jury upon such evidence as is introduced; but whether particular evidence which is offered tends to prove fraud is for the justice to decide. *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 id. 127.

Those cases in which a justice is called on to decide upon the validity of written instruments are, first, where the plaintiff sues upon some instrument and the defendant insists that upon the face of the paper it is evident that, as a matter of law, there cannot be a recovery; and this objection is frequently, if not usually, taken by way of motion for nonsuit, if it is the sole cause of action, or by way of objection to its introduction in evidence, when it is offered; or, secondly, when the defendant relies upon some similar instrument, by way of defense, as a set-off or otherwise, and the plaintiff objects to its introduction in evidence; or, thirdly, whenever either party offers in evidence a paper which, it is alleged, is not admissible because its invalidity or its incompetency appears upon its face. In all such cases the justice is called upon to decide the questions as they arise. But, in the great majority of cases, the parties leave all the questions of fact or of law to the jury, unless it is in the three classes of cases which have been just mentioned.

There is one other case in which a justice is called upon to decide upon the law relative to the whole case. When the defendant insists that there is a material defect in the plaintiff's proofs, or when he insists that upon all the facts proved, even if taken as true, there cannot be a legal recovery because the law will not authorize it, the defendant

may insist upon a decision of this question by way of motion for a nonsuit. And, if the objection is well taken, the motion must be granted, or it will be error. See title *Nonsuit*.

After the evidence is all in, and the case is submitted to the jury, they will be authorized to decide all the questions involved upon the merits, whether of law or of fact, unless the justice shall elect to charge them as to the law; and, in that case, they are bound to follow the rules of law as laid down by the court in the charge given. But all questions of fact are exclusively for the jury, and the court has no right to instruct them how to find upon any question of fact. The law has made them sole judges of the questions of fact, upon such evidence as the court shall permit to be introduced before them on the trial.

If the jury err in deciding as to the law, when the whole case is submitted to them, this error can be corrected by an appeal. See title *Appeal*. But upon questions of fact, when the evidence is contradictory, or when the case turns upon the credibility of witnesses, and there is impeaching evidence, the general rule is that the verdict is conclusive. See title *Appeal*. When a judgment will be reversed because it is contrary to evidence, or is unsupported by it, see *Appeal*.

A verdict will cure every irregularity in the practice which is not objected to, as well as every defect in the pleadings, if a substantial cause of action or a good ground of defense has been established by the evidence. *Brown v. Harmon*, 21 Barb. 508; *Dias v. Short*, 16 How. 322.

Objections, exceptions, etc. In the trial of every action it is very important that each party should protect his rights and secure an opportunity for relief on an appeal, by making objections to every irregularity in practice, whether it relates to matters of process, pleadings, or evidence. If an objection is made in due time, and in regular and sufficient form, it will enable the objecting party to review the error complained of; but if no objection is made, or if it is not made in due time or manner, most important interests may be hazarded, if not altogether lost. The first step in the way of reserving a question is to state, orally, to the justice the precise objection which is urged, and if, after hearing the matter, the objection is overruled, then an exception may be taken, by stating to the justice, orally, that the party excepts to the ruling or decision of the justice. But no exception to the ruling of a justice is necessary to a right to review the ruling on appeal. *Collins v. Rockwood*, 64 How. 57; *Roe v. Hanson*, 5 Lans. 304. It is enough that objection is made and overruled. *Ib.* Every objection which is made ought to

be one in which the party has some confidence of its propriety ; and the objection ought to be taken down in writing in the minutes of the party, so that the precise ground of objection will appear in writing ; and it is the duty of the justice to take down every objection in writing in his minutes, and precisely as it is made. If it is very lengthy, the substance of it may do ; but the prudent course of every justice will be to note the objections just as they are made, or as nearly so as it can be reasonably done. The object of making an objection, where it is done in good faith, is to be able to have the objection returned on an appeal, and the justice cannot do this properly if he omits to take a correct note of the point made. The law is intended to guard every right of a party, and it is framed on the supposition that fairness will characterize the conduct of counsel on the trial of a cause, and therefore counsel are permitted to raise as many objections as they please on the trial. *Williams v. Eldridge*, 1 Hill, 249, 253. But this right cannot be abused by employing it as a means of wasting time, or of trifling with the court.

A justice ought always to regard an objection as made in good faith until he can clearly see that such is not the case. And this same rule applies to a cross-examination of a witness. A learned judge expressed himself as follows: "I have no doubt of the power of the court to restrain an abuse of the right of cross-examination, and to prevent an improper or vexatious delay in the progress of a trial ; and where a party attempts, by frivolous and impertinent inquiries, to retard the course of justice, and needlessly occupy time, the court may correct the abuse by refusing to permit the party to continue the examination. Such a power is indispensable to the orderly conduct of a trial, and necessary to enable the court to bring the cause to a termination. It is, therefore, the duty of the court to exercise that power whenever the ends of justice clearly require its interposition. Not only so, I think the conduct of a party, or his counsel conducting such an examination, is a contempt of court, and might properly be punished as such. No doubt that if, after the court had thus restrained a frivolous and impertinent trifling with the administration of justice, the examining party should desist from such a course of inquiry, and propose, or offer to propose, a question or questions, clearly pertinent and proper, such questions should be received and propounded to the witness, even though the witness had been previously directed to leave the stand. But neither a party nor his counsel is at liberty to persist in a course of inquiry vexatious to the witness, tending to delay or embarrass his adversary, hindering the course of justice, or disrespectful to the court."

The exercise of this power is a matter of some delicacy, and it should only be exercised in cases which *clearly* require its interposition, and to some extent that exercise must be regarded as resting in the sound discretion of the court. In order to enable the party to review the action of the court in such cases, he should no doubt be suffered to go far enough in his examination to enable the court to see that his *course* of examination is improper, and that he is persisting therein. It could not be said that a single impertinent question warranted such an interference; and, for the same purpose of review, the examining party would be warranted in having a distinct ruling of the court upon a reasonable number of questions, though deemed by the court to be irrelevant, to the end that the party may enter his exceptions to the ruling, and that the appellate court may have an opportunity to see whether the exigency was such as to call the discretion of the court below into exercise. But to go beyond this, and hold that the party may consume the time of the court in receiving such questions and ruling upon their propriety, and noting exceptions to such rulings, would defeat the very power in question, and in its results be as oppressive, improper, disrespectful to the court, and subversive of the ends of justice as to suffer the questions to be propounded to the witness." *WOODRUFF, J.*, in *Peck v. Richmond*, 2 E. D. Smith, 381, 382. And see *Onderdonk v. Ranlett*, 3 Hill, 323, 328, 329.

One of the most frequent objections heard in a justice's court is, that certain proposed evidence is irrelevant, immaterial, incompetent, illegal or improper. And it certainly is of the first importance to interpose a prompt, clear and sufficient objection to every kind of illegal or improper evidence. An omission to object is equivalent to a consent that it may be introduced. The objection must be made in an appropriate manner, and in the natural order of time. If a question is improper in form, the question itself ought to be objected to, and the particular objection as to its form pointed out. If the question is such as to show that a responsive answer would introduce illegal, incompetent or irrelevant evidence, then the question ought to be objected to on that ground, and also on the ground that such answer, if given, would be illegal, incompetent or irrelevant evidence, as the particular case may be. If the objectionable feature of the evidence is as apparent when it is offered as when it is in, and the party makes no objection to the evidence when it is offered, he takes the risk of having the court, in its discretion, refuse to exclude it. *Pontius v. People*, 82 N. Y. 339.

When evidence is clearly illegal, and it bears upon a material issue in

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the case, its admission under a proper objection to it is an error which will reverse the judgment if rendered against the objecting party. *Williams v. Fitch*, 18 N. Y. 546; *Erben v. Lorillard*, 19 id. 299; *Worrall v. Parmelee*, 1 id. 519; *Wilmot v. Richardson*, 6 Duer, 339, opinion; *Murray v. Smith*, 1 id. 513; *Whiting v. Otis*, 1 Bosw. 420, 424; *Ward v. Washington Ins. Co.*, 6 id. 230; *Dresser v. Ainsworth*, 9 Barb. 619; *Penfield v. Carpenter*, 13 Johns. 350; *Tuttle v. Hunt*, 2 Cow. 436; *Eggleston v. Columbia Turnpike Road Co.*, 82 N. Y. 278.

If improper evidence is given upon the trial, although it be merely cumulative, it will be a cause for a reversal. *Osgood v. Manhattan Co.*, 3 Cow. 612; *Baird v. Gillett*, 47 N. Y. 186. But see *Sutherland v. New York, etc., R. R. Co.*, 9 Jones & Sp. 17. And if illegal evidence is admitted which bears in the least degree upon the result, it is fatal. The rule is the same whether the action is legal or equitable, and whether the trial is by the jury or by the court. *Foote v. Beecher*, 78 N. Y. 155.

The reception of illegal evidence is presumptively injurious to the party objecting to its admission. *People v. Gonzales*, 35 N. Y. 49, 59; *Vandervoort v. Gould*, 36 id. 639, 644; *Anderson v. Rome, Watertown, etc., R. R. Co.*, 54 id. 334, 341. Error in this respect can be disregarded only when it can be clearly seen that the introduction of the evidence could do no possible harm. *Foote v. Beecher*, 78 N. Y. 155; *Brague v. Lord*, 67 id. 495; *Baird v. Daly*, 68 id. 547; *Baird v. Gillett*, 47 id. 186; *Havemeyer v. Havemeyer*, 11 Jones & Sp. 506; *Hydorn v. Cushman*, 16 Hun, 107.

But the presumption of injury from the reception of such evidence may be rebutted, and when the presumption is repelled, and it is clear beyond rational doubt that no harm was done to the party objecting, and that the illegal evidence did not and could not affect the result, the error furnishes no ground for reversal. *Ward v. Kilpatrick*, 85 N. Y. 413; *People v. Gonzales*, 35 id. 49; *Vandervoort v. Gould*, 36 id. 639; *Anderson v. Rome, Watertown, etc., R. R. Co.*, 54 id. 334; *Yates v. New York Central, etc., R. R. Co.*, 67 id. 100. If there is abundant competent evidence in the case to warrant the judgment, exclusive of the improper evidence, the admission of irrelevant or improper evidence will not be a cause for reversal. *Bennett v. Austin*, 5 Hun, 536; *Bort v. Smith*, 5 Barb. 283; *Spencer v. Saratoga & Washington R. R. Co.*, 12 id. 382; *Buck v. Waterbury*, 13 id. 116; *Andrews v. Harrington*, 19 id. 443; *Moore v. Somerindyke*, 1 Hilt. 199. This is undoubtedly the rule, but it is to be cautiously applied. *Coleman v. People*,

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58 N. Y. 555. Jury trials should be strictly confined to the issues made and to the legitimate facts bearing upon them, and the practice of dragging in extraneous matters to influence the jury cannot be too strongly condemned. Upon a closely contested question of fact slight influences may turn the scale, and every rule of propriety and justice demand that nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the question. *O'Hagen v. Dillon*, 76 N. Y. 170. Any illegal evidence which would have a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of the jurors in any degree cannot be considered harmless. Nor can illegal evidence be said to be entirely harmless when the party objecting is obliged to call a witness to explain or contradict it. *Anderson v. Rome, Watertown, etc., R. R. Co.*, 54 N. Y. 334. The very admission of evidence under objection authorizes the jury to regard it as competent and relevant to the issue in the action, and as tending in a greater or less degree to prove a cause of action or defense; and if the evidence has no such tendency, but is calculated only to mislead and prejudice the jury, its admission will be error which cannot be disregarded. *Baird v. Gillett*, 47 N. Y. 186; *Green v. Disbro*, 56 id. 334; *Neudecker v. Kohlberg*, 81 id. 296.

Where an irregularity is objected to, or when improper evidence is offered, the party objecting must fully, clearly and distinctly state the grounds of objection. It is well-settled law that objections to testimony without assigning any ground therefor will be disregarded, unless it clearly appears that the objection, if properly made, would have been decisive of the case, and could not have been obviated, or unless the evidence in its essential nature be incompetent. *Tooley v. Bacon*, 70 N. Y. 34; *Williams v. Sargent*, 46 id. 481; *Daly v. Byrne*, 77 id. 182; *Levire v. Russell*, 42 id. 251; *Walker v. Erie R. R. Co.*, 63 Barb. 260; *Shaw v. Smith*, 3 Keyes, 316; *Fountain v. Pettee*, 38 N. Y. 184; *Ward v. Kilpatrick*, 85 id. 413. The rule is based upon the sound notion that the party should let it be known to the court and to the other side what are the real grounds of objection. The other party may then choose to yield to the soundness of them and to withhold the testimony, or the court, having its attention drawn to the true point, may keep the testimony out of the case.

General objection may be sufficient in some cases, as for instance, where the objection could not have been obviated if it had been specifically pointed out. *Merritt v. Seaman*, 6 N. Y. 168; *People v. McGuire*, 2 Hun, 269, 278; *Sinclair v. Neill*, 1 id. 80, 83; *McCombie*

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v. *Spader*, id. 193. If a party offers evidence which is clearly incompetent, a general objection that the evidence is incompetent is sufficient. *Collins v. Rockwood*, 64 How. 57.

If evidence is offered tending to prove any issue in the case, a general objection, without stating the grounds, will not be effectual to raise a question as to the mode and manner of proof. *Tiemeyer v. Turnquist*, 85 N. Y. 516. Where an objection is general, and the evidence is proper, but the mode of proving the fact is improper, the court will presume that the objection is not made to the manner, but as to the matter, then the objection will be unavailing. *Bellows v. Sackett*, 15 Barb. 96. Where a written instrument is offered in evidence, and the objection is general, it will not reach a defect in its execution or acknowledgment, *Mabbett v. White*, 12 N. Y. 442, nor to the want of the subscribing witness. *Ranney v. Gwynne*, 3 E. D. Smith, 59; *Crooke v. Mali*, 11 Barb. 205. Where the exemplified copy of a judgment before a justice, and the docket thereof in the county clerk's office is offered in evidence, a general objection that the evidence is incompetent, but which does not point out any defect in the form of the certificate and exemplification, will be unavailing. *Ross v. Campbell*, 19 Hun, 615.

So, where evidence is offered which is competent as to one of two defendants, but not as to the other, the objection by the latter must limit the objection to himself; for if it is general as to both defendants, it will be too broad, and will not be available as to the one who might have properly objected. *Black v. Foster*, 28 Barb. 387; *Fox v. Jackson*, 8 id. 355. But where there is a connected offer to prove several facts, some of which are admissible and some inadmissible, a general objection to the whole offer will be sufficient to sustain its exclusion by the court. *Hoseley v. Black*, 26 How. 97; S. C., 28 N. Y. 438. On the other hand, if a general objection is made to evidence in gross, most of which is unobjectionable, the objection may properly be disregarded. *Keller v. New York Cent. R. R. Co.*, 2 Abb. Ct. App. 480; S. C., 24 How. 172.

The time of making an objection is of much importance, and especially is this true when the opposite party could have obviated the objection had it been seasonably taken. And whenever the objection relates merely to matters of practice, either as to process, pleadings, the introduction of evidence, or the rulings of the court, the objection must be promptly presented or it will be conclusively waived. See *Booth v. Cleveland Rolling-mill Co.*, 11 Hun, 278. The court does not favor a deceptive, secret or unfair mode of raising an objection;

and, therefore, such objections as could have been fairly answered, if they had been seasonably made, will be disregarded on appeal if not specifically made below. *Coon v. Syracuse & Utica R. R.*, 5 N. Y. 492; *Dayharsh v. Enos*, id. 531; *Barnes v. Perine*, 12 id. 18; *Jencks v. Smith*, 1 id. 90; *Cowperthwaite v. Sheffield*, 3 id. 243; *Bumstead v. Dividend Mut. Ins. Co.*, 12 id. 81; *Brown v. Cayuga & Susquehanna R. R.*, id. 486; *Hunter v. Osterhoudt*, 11 Barb. 33; *Crooke v. Mali*, id. 205; *Hubbert v. Russell*, 24 id. 404; *Westbrook v. Douglass*, 21 id. 602; *Fowler v. Clearwater*, 35 id. 143; *Willard v. Bridge*, 4 id. 361; *Peck v. Richmond*, 2 E. D. Smith, 381; *Fairbanks v. Corlies*, 3 id. 583; *Avogadro v. Bull*, 4 id. 384. The foregoing are but a few of the very numerous cases upon this question.

Where the objection, however, is one which the opposite party could not have answered by further evidence, or by any act on his part, the objecting party may raise it, for the first time, on an appeal. *Tift v. Tift*, 4 Denio, 175; *Pepper v. Haight*, 20 Barb. 429; *Newcomb v. Clarke*, 1 Denio, 226.

Where there is no appearance by the defendant in the court below, he does not waive the right to object to illegal evidence which was introduced at the trial, and he may raise the question for the first time, on an appeal. *Perkins v. Stebbins*, 29 Barb. 523; *Northrup v. Jackson*, 13 Wend. 85; *Squier v. Gould*, 14 id. 159; *Finch v. McDowall*, 7 Cow. 537; *Stafford v. Williams*, 4 Denio, 182, 184; *Warnick v. Crane*, id. 460; *Davidson v. Hutchins*, 1 Hilt. 123; *McNutt v. Johnson*, 7 Johns. 18; *Armstrong v. Smith*, 44 Barb. 120. So, where there is no appearance below by the defendant, he may insist that there is a material defect in the proofs. *Ib.* But, in such cases, if a good case is proved, no objection to the sufficiency of the pleadings can be taken; *Stafford v. Williams*, 4 Denio, 182; nor can any objection to a juror be taken; *Clark v. Van Vranken*, 20 Barb. 278; and in one case it was held that the admission of illegal evidence was not a fatal error, if there was abundant valid evidence besides to sustain the judgment. *Buck v. Waterbury*, 13 Barb. 116.

Objections which go to the jurisdiction may always be raised on an appeal, even when there is no appearance below. *Tiffany v. Gilbert*, 4 Barb. 320; *Robinson v. West*, 11 id. 309; *Willins v. Wheeler*, 8 Abb. 116; S. C., 28 Barb. 669; *Cooper v. Ball*, 14 How. 295. And where the justice has no jurisdiction of the subject-matter of the action, or where he is related to one of the parties, an appearance on the trial and a litigation of the cause, without mentioning the objection, will not prevent the party from raising the question upon an

appeal, because express consent would not confer jurisdiction in such a case, and, of course, an implied consent by waiver will not be any better than an express consent for that purpose. *Post v. Black*, 5 Denio, 66; *Converse v. McArthur*, 17 Barb. 410; *Dudley v. Mayhew*, 3 N. Y. 9; *Beach v. Nixon*, 9 id. 36. And see *ante*, 12, *Jurisdiction*. An erroneous ruling of a justice, in favor of admitting illegal evidence under exception, will do no harm if no illegal evidence is actually introduced under such ruling. *Howland v. Willetts*, 9 N. Y. 170; S. C., 5 Sandf. 219; *Vallance v. King*, 3 Barb. 548.

When a ruling or decision is made by a justice upon any question raised by any objection, it is not important whether the justice assigns a correct reason for his decision; if the decision is right it will be sustained, however erroneous the reason assigned for it may be. *Gillespie v. Torrance*, 7 Abb. 462; *Munroe v. Potter*, 34 Barb. 258; *De-land v. Richardson*, 4 Denio, 95.

A justice has power to strike out illegal evidence on a motion for that purpose. *Heely v. Barnes*, 4 Denio, 73. But if a party gives testimony without objection as to matters, in respect to which he is not a competent witness, and also as to other matters in respect to which he is a competent witness, a motion to strike out all his testimony should be denied. *Spaulding v. Hallenbeck*, 35 N. Y. 204. Where a competent question is put to a witness, and the answer is wholly incompetent and irresponsive, it seems that the adverse party should object to the answer, and move to strike it out, if he would avail himself of the impropriety. But when the question is incompetent, and objected to on that ground, and the answer is harmless, so far as it is directly responsive to the question, but the witness adds other matter, not clearly irresponsive, which is injurious to the adverse party, the party objecting is not required to move that the answer be stricken out, but that the party calling the witness should disclaim the answer, and decline to receive it if he would avoid responsibility for the matter volunteered by the witness. *O'Hagan v. Dillon*, 76 N. Y. 170. If the answer of the witness is responsive to the question objected to, the party calling out the answer has no right to have it stricken out, and he cannot cure the error by an offer to have it stricken out. *Furst v. Second Avenue R. R. Co.*, 72 N. Y. 542. So the admission of improper evidence cannot be cured by directing the jury to disregard it, if they may have been influenced thereby, or if it was of a character likely to influence and prejudice them in regard to the party and to their conclusions upon the remaining parts. *O'Sullivan v. Roberts*, 7 Jones & Sp. 360; *Wright v. Equitable Ins. Co.*, 9 id. 1.

Where evidence is received under objection it must be acted upon as part of the evidence in the case, even though it be illegal. *Heely v. Barnes*, 4 Denio, 73; *Meyers v. Betts*, 5 id. 81; *Penfield v. Carpenter*, 13 Johns. 350; *Allen v. Way*, 7 Barb. 585. When evidence is offered and objected to, the justice must admit it absolutely, or not at all; he cannot admit it conditionally, unless the parties consent. *Haswell v. Brissing*, 10 Johns. 128; *Allen v. Way*, 7 Barb. 585. See *Penfield v. Carpenter*, 13 Johns. 350; *Barker v. Cairo and Fulton R. R. Co.*, 3 N. Y. Sup. Ct. (T. & C.) 328; *Wagener v. Finch*, 65 Barb. 493; *Lathrop v. Bramhall*, 64 N. Y. 365. If the justice does receive the evidence conditionally, the objection will be considered upon review as overruled, and the evidence as having been received absolutely. *Ib.*

But the parties may, by express consent, receive the evidence, subject to a future decision as to its admissibility, and the evidence may, in that case, be taken conditionally. And express consent need not be shown, for if that course is proposed, and no objection is made, consent will be implied. *McKnight v. Dunlap*, 5 N. Y. 537. Whenever any fact or state of facts is assumed below as true such assumption will be held to be conclusive when the case is removed by appeal to an appellate court. When a matter is treated as a question of law in the court below, it cannot be urged on appeal that it was really a question of fact for a jury. *Barnes v. Perine*, 12 N. Y. 18. So when a fact is assumed as proved on the trial, no allegation to the contrary can be heard on appeal. *Andrews v. Harrington*, 19 Barb. 344. See *Sepperly v. Stewart*, 50 id. 62; *Hill v. Heermans*, 17 Hun, 470; *Page v. Fazackerly*, 36 Barb. 392. Where, on the trial of a cause, there is no evidence on the part of the plaintiff to sustain a material allegation in the complaint, which is put in issue by the answer, but the defendant proceeds, without objection, as though a cause of action had been made out, and introduces the evidence on his side, he will be estopped from raising any question, on an appeal, on the ground of a want of evidence on the part of the plaintiff. *People v. Third Avenue R. R. Co.*, 45 Barb. 63. So, in an action upon a chose in action, if no objection is made that the plaintiff has failed to show title to it, that will be conclusive on appeal. *Austin v. Burns*, 16 Barb. 643. A fact assumed to be conceded in the pleadings is conclusive after the trial below. *Munson v. Hegeman*, 10 Barb. 112. Where the defendant assumed that the plaintiff was a corporation, this was held conclusive upon appeal. *Kennedy v. Cotton*, 28 Barb. 59. So an assumption that a plaintiff is a public officer is governed by

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the same rule. *Paige v. Fazackerly*, 36 Barb. 392. Whenever it is intended to raise a question as to the sufficiency of the evidence below, the objection must be distinctly and clearly taken before the justice, or it will be assumed that no objection is made on that account. *Westbrook v. Douglass*, 21 Barb. 602; *Austin v. Burns*, 16 id. 643; *Jencks v. Smith*, 1 N. Y. 90; *Smith v. Hill*, 22 Barb. 656; *Merritt v. Seaman*, 6 id. 330; *Whitlock v. Bueno*, 1 Hilt. 72; *Cabre v. Sturges*, id. 160; *Lee v. Schmidt*, id. 537. But when there is no conflict in the evidence, nor any question as to its sufficiency, and the whole question relates to the right to recover, as a matter of law, upon all the evidence, no objection need be taken as to the sufficiency of the evidence. *Pratt v. Foote*, 9 N. Y. 463.

The rejection of legal and competent evidence is always a fatal objection on an appeal. *Eakin v. Brown*, 1 E. D. Smith, 37; *Kendall v. Grey*, 2 Hilt. 301; *Bissell v. Marshall*, 6 Johns. 100. At least the judgment will be reversed, unless it clearly appears that the party offering the rejected evidence was not prejudiced by the error. To sustain the judgment upon the ground that the facts established by the verdict show that the evidence, if admitted, would not have changed the result, it must be made to appear that such is necessarily the effect of the verdict. It is not enough to show a probability that the jury found as claimed, but it must be shown that the jury *must* have so found. *Starbird v. Barrons*, 43 N. Y. 200.

As we have already seen, *ante*, 755, general objections are usually unavailable. But great care is necessary in taking specific objections, for the reason that, when a specific objection is taken, it will be presumed that the party did not intend to raise any other questions than those specified, and all other objections which might have been taken, but were not, will be deemed to be waived. *Sheldon v. Wood*, 2 Bosw. 269; *Newton v. Harris*, 6 N. Y. 345; *Potter v. Deyoe*, 19 Wend. 361; *Dunham v. Simmons*, 3 Hill, 609; *Smith v. Hill*, 22 Barb. 656. For example, when an action is brought against the representative of a deceased person, the plaintiff cannot be examined in his own behalf or interest, concerning a personal transaction or communication between him and such deceased person, except in certain specified cases. Code of Civil Procedure, § 829. But if the plaintiff offers himself as a witness in such action, and before he is sworn the defendant objects to him "on the ground that he is an interested party, and incompetent under section 829 of the Code of Civil Procedure," this objection may properly be overruled; and if the plaintiff afterward gives testimony as to personal transactions had with the deceased, without any specific objection

thereto being made by the defendant, the evidence so given, although illegal, will not be received against any proper objection, and its admission will be no ground for reversal. *Hoar v. Hoar*, 23 Hun, 33.

Objections are sometimes taken more broadly than is proper, and the objection thus fails altogether, when a proper objection would have been available, and sustained by the court. Where several letters or papers are offered in evidence, a general objection to them all will be useless, if any of the letters or papers are admissible. To secure a valid objection, it should be confined to the objectionable paper or letter. *Day v. Roth*, 18 N. Y. 448. And see *McAllister v. Reub*, 4 Wend. 484; S. C., 8 id. 109. When evidence is offered which is admissible as to one of the parties, but not as to another, the objection must be confined to that purpose or person as to which it is not admissible, or the objection will be unavailing. *Black v. Foster*, 28 Barb. 387; *Fox v. Jackson*, 8 id. 355; *Harris v. Panama R. R.*, 5 Bosw. 312 *Dunham v. Simmons*, 3 Hill, 609; *Richardson v. Wilkins*, 19 Barb. 510; *Stowell v. Hazelett*, 66 N. Y. 635; affirming S. C., 3 Hun, 555; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; S. C., 25 Am. Rep. 182. When evidence is *excluded* upon a mere general objection, the ruling will be upheld, if any ground, in fact, existed for the exclusion. It will be assumed in the absence of any request by the opposing party, or by the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground. If in such a case a ground of objection be specified, the ruling must be sustained upon that ground unless the evidence excluded was, in no aspect of the case competent or could not be made so. But when a general objection to evidence is overruled, and the evidence is *received*, the ruling will not be held erroneous unless there is some ground which could not have been obviated if it had but been specified, or unless the evidence is in its essential nature incompetent. *Tooley v. Bacon*, 70 N. Y. 34.

Offers to prove certain facts are sometimes made, and objected to by the opposite party, and ruled upon by the justice. When it is supposed that the offer will be overruled, it is generally made quite as broadly and strongly as the facts will warrant; though no reputable lawyer will make an offer to prove facts which he knows cannot be established by proof, if permitted to make the attempt. And when an offer is made in good faith, it must be done in such a manner as to show clearly what is offered, and that the evidence is competent and relevant. If the offer is ambiguous, or if it does not show that the evidence is relevant and competent, it will be insufficient. *Daniels v.*

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Patterson, 3 N. Y. 47, 51. Objections which are relied on must be specifically taken; and a general agreement that all the evidence shall be considered as objected to will not be sufficient to raise particular objections upon an appeal. *Stephens v. Reynolds*, 6 N. Y. 454.

When upon a trial an objection has once been distinctly made and overruled, *and evidence has been given under the objection*, the objection need not be repeated to the same class of evidence. The rule in such cases has been laid down and should be observed in the further progress of the trial, without vexing the court with useless objections and exceptions. Nothing is waived by conformity to the rule laid down. *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; S. C., 25 Am. Rep. 182. But if the objection is made and overruled as above stated, and the question is then waived before any answer is given by the witness, a failure to object to a substantial repetition of the question at a subsequent stage of the case will be a waiver of the objection. In such case no evidence is received under objection. *Wagner v. Jones*, 77 N. Y. 590.

An objection will be useless where the decision is one within the discretion of the justice. *Ford v. David*, 1 Bosw. 570; *Holbrook v. Wilson*, 4 id. 65; *Hunt v. Hudson River R. R.*, 2 Duer, 482; *Roth v. Schloss*, 6 Barb. 308; *Brown v. McCune*, 5 Sandf. 224; *Watson v. Bailey*, 2 Duer, 509; *Phinole v. Vaughn*, 12 Barb. 215. At least the exercise of judicial discretion will not be made subject of legal review except in cases of plain abuse and injustice. *Peel v. Kern*, 6 Hun, 298; *Wehle v. Bowery Savings B'k*, 8 Jones & Sp. 161; *Tribune Association v. Smith*, id. 251; *La Beau v. People*, 34 N. Y. 223; *Great Western Turnpike Co. v. Loomis*, 32 id. 127; *Greton v. Smith*, 33 id. 245.

Of the justice's discretion. There are many matters as to which it is impossible to lay down any general rule for their disposition; and at the same time, it is necessary that there should be some decision of them. In such cases a large discretion is conferred upon the justice, in the belief that he will faithfully, fairly and equitably exercise it. The right to open and close the case to the jury, or to the justice in their stead, is not a matter of discretion, but of strict right, to be governed by legal rules. *Huntington v. Conkey*, 33 Barb. 218; *Ayrault v. Chamberlain*, 33 id. 229; *ante*, 471.

But whether the pleadings shall be read to the jury is a mere matter of discretion. *Willis v. Forrest*, 2 Duer, 310. If a portion of them is read, they must all be read if that is asked. And where a plaintiff read a portion of the answer, it was held that the defendant had a right

to have the entire answer read. *Gildersleeve v. Mahony*, 5 Duer, 383. In a justice's court, either party should be permitted to read the pleadings to the jury; for it is important that those who are sworn to try the issues should know what those issues are. All relevant and competent evidence must be received if offered. But the order in which the proof shall be introduced is entirely within the justice's discretion. *Bedell v. Powell*, 13 Barb. 183. And after a plaintiff has given some evidence and rested his cause, and the defendant has introduced his evidence, the justice may, in his discretion, permit the plaintiff to go into evidence in relation to an entirely new cause of action, as to which no proof had been previously given, if it is a matter which is embraced within the pleadings. *Peckham v. Leary*, 6 Duer, 495. But the defendant will be entitled to rebut such proof by evidence, and to make any defense which he may have to it. So, after either or both parties have rested, the justice may permit new witnesses to be recalled upon points as to which evidence has already been given by both parties. *Anthony v. Smith*, 4 Bosw. 503.

A justice may grant, or he may refuse a suspension of the examination of a witness to enable him to look for a paper which is important, and which he had not been notified to produce at the trial. *Fairbanks v. Corlies*, 1 Abb. 150; S. C., 3 E. D. Smith, 582.

If one party introduces irrelevant evidence, the justice may permit a cross-examination as to the same matters. *Keeler v. Delavan*, 4 Barb. 317. Still the justice is not bound to hear irrelevant evidence in answer to irrelevant evidence given on the other side without objection. *Farmers and Manuf. Bank v. Whinfield*, 24 Wend. 420. But, if irrelevant evidence is decided to be competent, and it is admitted in favor of one of the parties under objection, the justice will be bound to permit the opposite party to prove the contrary, or to answer such evidence by evidence in answer or reply. *Ward v. Washington Ins. Co.*, 6 Bosw. 229.

Where both parties have given parol proof of the contents of a written instrument without objection, the justice may permit either of them to pursue the inquiry as to its contents, by parol. *Morss v. Stone*, 5 Barb. 516.

Upon questions relating to the characters of witnesses, the justice may limit the number of impeaching witnesses to be sworn on either side. *Spear v. Myers*, 6 Barb. 445; *Nolton v. Moses*, 3 id. 31; *Green v. Brown*, id. 120. But the rule ought to be laid down at the commencement of the examination upon such questions; and it ought to be equal as to the parties. So, too, the number of witnesses may be limited, when they speak of mere matters of opinion. *Sizer v. Burt*,

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4 Denio, 426. But this rule does not apply when the witnesses are called to prove facts in relation to points material upon the merits.

When evidence is offered which, standing alone, does not seem relevant, the justice may require the party offering it to state how it is to be made material. *Adsit v. Wilson*, 7 How. 64; *Beal v. Finch*, 11 N. Y. 135. So, a party may object to evidence which is apparently irrelevant, and require a statement of facts showing its relevancy. *Ib.*

Irrelevant evidence may be excluded by the justice on his own motion; he need not wait for an objection from the opposite party. *Cooper v. Barber*, 24 Wend. 105; *Corning v. Corning*, 6 N. Y. 97; *ante*, 476.

Whether leading questions shall be put to a witness is entirely discretionary with the justice. *Cheeney v. Arnold*, 18 Barb. 435; *Budlong v. Van Nostrand*, 24 id. 25; *Seymour v. Bradfield*, 35 id. 49. And this discretion will not be interfered with unless it is evident that it has been grossly abused. *Ib.* Whether a witness shall be recalled after he has left the stand is entirely a matter of discretion. *Sheldon v. Wood*, 2 Bosw. 269; *Treadwell v. Stebbins*, 6 id. 538; *Meakim v. Anderson*, 11 Barb. 216. And so of recalling a witness after the case has been declared closed as to the evidence. *Anthony v. Smith*, 4 Bosw. 503; *Chancel v. Barclay*, 1 E. D. Smith, 384; *Heidenheimer v. Wilson*, 31 Barb. 637; *Drunckle v. Kocker*, 11 id. 387; *Burger v. White*, 2 Bosw. 92; *Silverman v. Foreman*, 3 E. D. Smith, 322; *Harpell v. Curtis*, 1 id. 78; *Stacy v. Graham*, 3 Duer, 445.

After a plaintiff has rested his cause, the justice may refuse to receive any further evidence on his side, except by way of reply. *Shepard v. Potter*, 4 Hill, 202. This rule, however, is scarcely ever enforced in a justice's court; and to refuse evidence to supply a mere formal defect in the plaintiff's evidence, even after he had rested his cause, will be sufficient ground to reverse the judgment. *Lewis v. Ryder*, 13 Abb. 1.

Where a question has been in effect once answered, the court may, in its discretion, exclude a question calling for a repetition of the evidence, and this decision is not reviewable on appeal. *Ballard v. Lockwood*, 1 Daly, 159.

A witness will not be permitted to return to the stand merely to reiterate his statements, though the justice may allow it if he sees fit. *Hughes v. Mulvey*, 1 Sandf. 92, 95. This may sometimes be proper, as where there is a disagreement as to what the witness testified, or if it has not been taken down in the minutes. A witness may

be recalled after the summing up of the cause has commenced, if the case is a proper one to require it, and the justice thinks it best to permit it. *Dunkle v. Kocker*, 11 Barb. 389. In the last case cited the witness was recalled to state how he had testified upon a particular point. And see *Law v. Merrills*, 6 Wend. 268. After a cause has been submitted, and partially or wholly summed up, it ought to be a strong case which would induce a justice to permit a witness to be recalled, especially when a corrupt witness would see precisely how to shape his answers, after hearing the entire cause argued by counsel.

It is for the justice to determine how long he will hold open his court for the appearance of a witness who is absent; though the exercise of this discretion will be corrected when it has evidently been abused.

§ 2. **Contempts of courts.** The Code of Civil Procedure has expressly conferred upon justices of the peace power to punish persons for criminal contempt in certain specified cases, and has expressly declared that he has no power to punish for a criminal contempt in any other case. Vol. 1, p. 4, § 2870. It is clear, therefore, that the only question which can arise in respect to the right to the exercise of this power is whether the act done or omitted is one specified in the statute. If the act comes within the statute, the power to punish is clear; if it does not come within the statute, the power does not exist.

A person cannot be punished by a justice of the peace for a contempt until an opportunity has been given him to be heard in his defense; and for that purpose the justice must issue a warrant, directed generally to any constable of the county, requiring the constable to bring the offender before him. *Id.*, § 2872.

Warrant to arrest for a contempt.

ALBANY COUNTY, }
Town of Bethlehem, } ss.:

The People of the State of New York, to any constable of the county of Albany, greeting:

We command you to apprehend Richard Peters, and bring him before J. Wood, Esq., one of the justices of the peace of the town of Bethlehem, in the county of Albany, at his office in said town, to show cause why he, the said Richard Peters, should not be convicted of a criminal contempt, alleged to have been committed on the 2d day of June, 1865, before the said justice, while engaged, as a justice of the peace, in judicial proceedings.

Given under my hand, at Bethlehem aforesaid, this 2d day of June, 1865.

J. WOOD, *Justice of the Peace.*

Contempts of court.

This warrant should be delivered to any constable of the county for service; and the officer will proceed to execute it in the same manner that an order of arrest is executed. After the arrest of the person who committed such contempt, and his appearance before the justice, the latter should state distinctly to such offender the particular circumstances of the offense with which he is charged; and he should be called upon for his defense. The justice may reduce such statement to writing, which will be the more prudent course, since it will then be easy to show precisely what was alleged as the contempt.

The practice governing this proceeding is not prescribed by statute. But some mode of proving that the alleged contempt was not committed is necessarily implied in a hearing of the party accused in his defense, for otherwise the opportunity of being heard would be unavailing. A hearing of the allegations merely, without evidence to sustain them, would be nugatory as a defense. Accordingly such evidence has always been received in courts of record, in some cases in the form of answers to interrogatories, in other cases in the form of affidavits. In cases of contempt committed before courts of justice of the peace, the defense may be made in a less formal manner, by an oral examination of the accused and his witnesses, or it may be made by affidavit. The mode of making the proof is not material, provided it is conformable to the usual practice in analogous cases. But the right of making the proof in some manner is a substantial one, and rests upon an invariable maxim of the common law. *People v. Porter*, 25 Hun, 601.

If the offender can show any facts which will excuse his acts from being considered as a contempt, the justice may discharge him; but if the excuse is unsatisfactory, or if he refuses to make any excuse, the justice will proceed to convict him of the contempt. No evidence is necessary in such a case, since the justice proceeds entirely upon such matters as occurred in his immediate presence. The object of punishing a contempt is to secure that invariable respect for the laws and for courts which must exist if the laws or if justice is to be properly administered by the courts. When a proper apology is offered, the justice may accept it, and omit to enforce the further proceedings. But when there is a refusal to apologize, and a persistence in contumacious conduct, the justice ought to enforce the law with a firm hand; and, if justice requires it, the punishment should extend to the full limit of the law.

Punishment for a contempt may be by a fine not exceeding \$25, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice. Vol. 1, p. 4, § 2871.

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Within ten days after the conviction, the justice must make up, subscribe and file in the county clerk's office a record of the conviction, stating therein the particular circumstances of the offense and the punishment awarded by him upon the conviction. *Id.*, § 2873.

Record of conviction for a contempt.

ALBANY COUNTY, ss.: Whereas, on this 2d day of June, 1865, while the undersigned, a justice of the peace of the town of Bethlehem, in said county, was engaged in the trial of an action (or other judicial act), in which A. B. was plaintiff, and C. D. was defendant, at his office in said town, in accordance with the statute in such case made and provided, Richard Perry did, willfully and contemptuously, interrupt me while engaged in the trial of said case, and did then and there conduct himself so disorderly and insolently toward the said justice, and, by making a loud noise and a great disturbance, did interrupt such proceedings, and impair the respect due to the authority of such justice; and, on being ordered by me, the said justice, to cease making such noise and disturbance, he, the said Richard Perry, refused so to do, but, on the contrary, he declared publicly and with a loud voice that I was a partial justice, and that no defendant ever received justice in a cause tried before me (or whatever the offensive words may be); and whereas, the said Richard Perry was brought before me, upon a warrant duly issued by me for that purpose, and the offense of which he was charged was distinctly stated to him, and he was thereupon called upon to answer to the matter so charged against him, and was allowed opportunity to be heard in his defense thereto; and whereas, the said Richard Perry did not make any defense against said charge, or show any cause why he should not be convicted of contempt, be it therefore remembered, that the said Richard Perry is adjudged to be guilty, and is convicted of the contempt aforesaid, before the said justice, and adjudged by the said justice to pay a fine of \$10, and be imprisoned in the county jail of said county for the term of five days, and until he pays such fine, or he is duly discharged from imprisonment according to law.

Given under my hand this 2d day of June, 1865.

J. WOOD, *Justice.*

In every instance the statement of the offense should be made with particularity and minuteness, so as to comply with the requirements of the statute.

A precedent is useful merely as a guide in the matter, for the circumstances of each case will differ from any precedent, and from almost any other case. Two things should be constantly observed in drawing a record of conviction; one is, that the offense is clearly one within the meaning and intent of the statute, and the other is that the offense should be stated as nearly in the language of the statute as may be, with a circumstantial detail of the acts constituting the offense.

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Warrant of commitment for a contempt.

COUNTY OF ALBANY,
 Town of Bethlehem, } ss.:

The People of the State of New York, to any constable in said county, and to the keeper of the common jail of said county, greeting:

Whereas, etc. (recite the record of conviction so as to show the entire charge therein contained, omitting the conclusion of the record, which states the conviction in the following words: "Be it therefore remembered," etc., and then proceed as follows): And whereas, the said Richard Perry was thereupon adjudged to be guilty, and was convicted by me, the said justice, of the criminal contempt aforesaid, and was adjudged to pay a fine of \$10 and be imprisoned in the county jail of said county for the term of five days, and until such fine is paid or he is discharged from imprisonment according to law.

Therefore you, the said constable, are hereby commanded to take, convey and deliver the said Richard Perry into the custody of the said keeper of the said jail; and you, the said keeper, are hereby required to receive the said Richard Perry into your custody in the said jail, and him there safely keep during the said term of five days, and until he pays the said fine, or is duly discharged according to law; hereof fail not.

Dated this 2d day of June, 1865.

J. WOOD, *Justice of the Peace.*

The warrant must set forth the particular circumstances of the offense, or it will be void. Vol. 1, p. 4, § 2874.

When a person is committed to prison for the non-payment of a fine imposed by the justice for a contempt, he must be discharged at the expiration of ten days; but when he is also committed for a definite time, the ten days must be computed from the expiration of the definite time. Id., § 2871.

The counsel for either of the parties cannot be compelled to produce in evidence a paper which came into his hands as counsel by delivery from his client, and a refusal to produce such paper will not justify a conviction for a contempt. *Mallory v. Benjamin*, 9 How. 419. So, the refusal of a party sworn in his own behalf to answer a question asked upon cross-examination will not justify a conviction for contempt. In order to give the justice jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony. *Rutherford v. Holmes*, 66 N. Y. 368.

If a person is erroneously convicted of contempt in a case where the acts done or omitted do not legally amount to a contempt, the conviction may be reversed if the proper steps are taken for that purpose. *Mallory v. Benjamin*, 9 How. 419. So, if the justice excludes evi-

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dence offered by the accused in his defense, the error will render the commitment void, and the conviction may be reversed upon *certiorari*. *People v. Porter*, 25 Hun, 601. Upon such proceeding the determination of the justice may be reviewed upon the facts as well as the law. *Ib.* See Code of Civ. Pro., § 2140.

If the warrant of commitment does not set forth the particular circumstances of the offense, it will be void, and the justice who issued it and all persons who act under it will be trespassers. It will be no protection to the officer executing it for the reason that the invalidity of the warrant will be apparent on its face.

To give a justice of the peace authority to commit a person for contempt, facts must have arisen before him which give him power to consider whether there has been a contempt committed by such person. When facts arise which give him that power, he has the right to adjudicate upon them, and he is not liable to an action although he may decide erroneously as a matter of law. But the power to consider and determine whether a person is in contempt must be based upon the existence of a state of facts falling within some subdivision of section 2870 of the Code; and if a justice assumes to act in any other case, and causes a person to be imprisoned under a warrant of commitment for a contempt, he is liable to such person for the damages sustained by him, by reason of such imprisonment, in an action for false imprisonment. See *Rutherford v. Holmes*, 66 N. Y. 368.

CHAPTER V.

DAMAGES.

SECTION 1. General principles. The compensation, recompense, or satisfaction which the law gives to the party injured against the party causing or producing the injury is termed damages. As a general rule the damages ought to be precisely commensurate with the injury. But the cases hereafter cited will show how far the rule is enforced in actual practice, and how far it is modified or disregarded. In every case the damages must be the result of the injury complained of; whether it consists of the withholding of a legal right, or the breach of a duty legally due to the plaintiff. General damages are such as necessarily result from the injury, and they may be proved under a general allegation of damages in the complaint. *Ante*, 302.

The law always presumes some damage to follow from the violation of any right or duty implied by law, and therefore nominal damages will be awarded, if none greater are proved. But where the damages, though the natural consequence of the act complained of, are not the necessary result of it, they are termed special damages, which the law does not imply, and, therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the complaint, or the plaintiff will be precluded from giving evidence of them on the trial. *Ante*, 302.

There are few instances in which the right to recover damages to some amount will be disputed if it is conceded that the plaintiff has established a cause of action. And yet there are a few cases in which it is said that no damages are recoverable, because the injury itself was so insignificant as to be beneath the notice of the law.

But, notwithstanding some exceptional cases, the law generally gives a remedy by way of damages to the injured party. "Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action." 3 Bla. Com. 123. And see vol. 2, p.420. "If a statute gives a right, the common law will give a remedy to maintain that right; *a fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage." Lord HOLT in *Ashby v. White*, 1 Salk. 19: "It is the pride of the common law, that wherever it recognizes or creates a private right it also gives a remedy for a willful violation of it." *Yates v. Joyce*, 11 Johns. 140, opinion. "It is a general and very sound rule of law that

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where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." SEDGWICK, J., in *Rockwood v. Allen*, 7 Mass. 254. It is a natural and legal principle that the compensation should be equivalent to the injury. SHIPPEN, Ch. J., *Bussey v. Donaldson*, 4 Dallas, 206.

"The general rule of law is this: Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the person, or the rights or the reputation of another." STORY, J., *Dexter v. Spear*, 4 Mason, 115. But it is not to be assumed, from this general language, that the law will give a remedy for every loss which one individual may sustain from the acts of another. If the damages result from fraud, deceit, or malice, there are many cases which are actionable. Vol. 1, pp. 424 to 427, 619 to 630. But there are some few instances in which one person may suffer injury from the acts of another, and yet the law gives no redress by way of damages.

As a general rule, the measure of damages is a matter of law to be determined by the court. "In cases where a rule can be discovered, the jury are bound to adopt it. That rule is, that the plaintiff should recover so much as will repair the injury sustained by the misconduct of the defendant." WASHINGTON, J., in *Walker v. Smith*, 1 Wash. C. C. 152. Again, in reference to the rate of damages on a foreign bill of exchange, the court said: "In this, as in other cases of contract, the rule by which the amount or extent of redress should be ascertained is a question of law." *Graves v. Dash*, 12 Johns. 17, 23.

Although the law aims at furnishing a compensation to the injured party, it will be found that there are few instances in which such a result is actually attained. Where the injury which results from the acts or omissions of another is from fraud, malice, or willful wrong, there are several considerations which bear upon the measure of damages. If the action is founded upon an unpaid bill or note, or for the price of goods sold, or for the value of property paid for, but not delivered, compensation will be measured by the actual pecuniary loss directly sustained. In such a case no indirect loss is taken into the account, such as a loss of profits that might have been made had the contract been performed; nor is any notice taken of the loss sustained by the derangement or disturbance of business produced by the failure to perform the contract, such as loss of credit, or of business, or even the insolvency of the injured party. Neither is any allowance made in such a case for mental anxiety and suffering; nor is any account taken of the time and money expended in pursuing a legal remedy, except

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such costs, fees and charges as the law allows against the unsuccessful litigant. So, too, the law, as a general rule, does not change the rule of damages by reason of the motives of the party who fails to perform his engagement or contract; and for that reason the measure of damages is the same, whether the contract was broken through honest inability or fraudulent design. There are some cases, however, in which the motives of a party may have an influence upon the question of damages, and these will be noticed in a subsequent place.

Nominal damages. The law recognizes a distinction between nominal and substantial damages. In an action for the recovery of substantial damages the object generally is to attempt to obtain a remuneration for the loss actually sustained, or as near that as the law will permit. But there are cases in which the injury is not such as to entitle the complaining party to substantial damages, and yet the law will permit him to recover nominal damages. Where there is an invasion of a legal right the law infers some damage as resulting therefrom, and in the absence of proof of any particular damage the law will award nominal damages if no other. Vol. 2, p. 473. If the plaintiff proves a valid contract, and a breach of it by the defendant, he is entitled to recover nominal damages at least. *Devendorf v. Wert*, 42 Barb. 227; *Mills v. Gould*, 10 Jones & Sp. 119; *Fitch v. Fitch*, 3 id. 302; *Buess v. Koch*, 52 How. 478; *Alfaro v. Davidson*, 8 Jones & Sp. 87. By nominal damages is to be understood that a small sum is given, as a penny or a sixpence, etc. In some cases the amount of damages recoverable is not important to the plaintiff, except in so far as it affects the right of recovery. When the object of the action is to establish a right or title, the recovery of a small sum is as effectual as a verdict or a judgment for a large sum. In an action for a trespass upon lands, or for injuries to a water-course, or other cases of a similar nature, the amount of damages is frequently quite small. Vol. 2, pp. 472, 473, 507-525. But the judgment in relation to the rights of the parties is as conclusive as though the largest damages were awarded.

Where a right of action is given by statute, and the plaintiff is entitled, on the evidence, to maintain an action, the court ought not to grant a nonsuit, even though the damages sustained by the plaintiff are merely nominal. *Quin v. Moore*, 15 N. Y. 432, 434. And the same rule is applicable in those cases in which the common law clearly gives a right of action for the recovery of some damages for violating a clear legal right. Where the action is brought for the purpose of determining a right as in an action of trespass to real estate, or the like, and the

 Remote and consequential damages.

plaintiff establishes a right of recovery, then the defendant ought to pay the expenses resulting from the litigation of the question. There are cases, however, in which the action is prosecuted from motives of malice or revenge, and in which no important question is involved; and it is sometimes a question what ought to be the decision in such a case. That such litigation ought not to be encouraged is a point upon which there will be a general agreement; but it is not always easy to apply a proper corrective by way of a legal disposition of the case. If, upon undisputed evidence, the plaintiff is entitled to a judgment for some damages, no court or jury have a right to disregard the law by determining the case against the plaintiff; and, in such cases, the only legal mode of disposing of the case is to render a judgment in favor of the plaintiff for nominal damages. Such cases as these, however, are not usual, for there is seldom a trial in which there is not a fair issue made upon a question of fact, upon which there is a conflict of evidence; and when in a case of that character a court or jury can clearly see that malice alone is the motive for bringing the action, they can apply the proper corrective, by finding a verdict in favor of the defendant. This course will give full effect to the principle of law which declares against useless or vindictive litigation. If, however, the plaintiff make out a clear case according to law, it is the duty of a jury to be very careful that they do not disregard their own duties and their oaths by finding a verdict against law and evidence, merely because they suppose that the plaintiff was actuated by an improper motive in bringing his action.

Remote and consequential damages. It is a general principle that every person is liable for the consequences of his own acts, but not for the remote results of the act or injury complained of; or as the rule is commonly stated, he is liable for those damages which are the natural proximate or necessary consequence of his acts, but not for remote or consequential damages. *Knight v. Wilcox*, 14 N. Y. 413; *Walrath v. Redfield*, 11 Barb. 368; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475; *Ryan v. New York Central R. R.*, 35 id. 210. Actions under the Civil Damage Act are exceptions to this rule. *Volans v. Owen*, 74 N. Y. 526.

The principle here enunciated may seem to be easy of application, and in many cases it is so; but there are other instances in which there is no little difficulty in deciding whether a given case falls within the rule which excludes the damages as too remote. A few of the numerous cases will be noticed for the purpose of showing the application of the rule in actions of contract and also those of tort.

In an action to recover damages for the loss of property by reason of

 Remote and consequential damages.

the spreading of fire negligently set upon the property of the defendant, the court defined *remote damages* as those which are not the ordinary and natural, not the expected, not the necessary and usual result of the negligent act, or, as those which depend upon the concurrence of accidental and varying circumstances over which the negligent party has no control. *Ryan v. New York Central R. R.*, 35 N. Y. 210. See *Webb v. Rome, etc., R. R. Co.*, 49 id. 420, 427.

A loss in no way connected with the breach of contract, although sustained for the purpose of enabling the plaintiff to fulfil it, is too remote to be recoverable as damages in an action for the breach. *Candy v. Candy*, 10 Hun, 88.

Loss of profits are frequently claimed as part of the damages arising from a breach of contract, and are sometimes recoverable as such, and in other cases are excluded as too remote.

In an action to recover the price of a steamboat, the defense was that a portion of the machinery was unsound; that in consequence of such imperfections considerable delay was caused in the use of the vessel, and the defendant claimed to deduct not only the amount necessary to remedy the actual defects, but also for the loss of profits upon the trips which might have been run during the time the vessel was delayed for the purpose of repairs; but the court disallowed the claim as to the profits as too remote. *Blanchard v. Ely*, 21 Wend. 342.

So, in an action to recover the price of a steam engine, boilers, and other apparatus, the defendant cannot recoup the gains and profits which would have arisen from the use of the engine if it had been delivered at the time agreed; such damages are too remote. *Freeman v. Olute*, 3 Barb. 424; *Griffin v. Colver*, 22 id. 587. The latter of the cases cited was affirmed by the court of appeals, and the rule laid down by that court was that where there is a breach of a contract which stipulates for the delivery, at a certain day, of a steam engine, built and purchased for the purpose of driving a planing mill, and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for the want of the steam engine may be recovered as damages. *Griffin v. Colver*, 16 N. Y. 489. The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. *Smeed v. Foord*, 1 Ell. & E. 602; *White v. Miller*, 71 N. Y. 118; S. C., 27 Am. Rep. 13; *Messmore v. New York Shot and Lead Co.*, 40 N. Y. 422; *Griffin v. Colver*, 16 id. 489; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61; *Hein-*

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man v. Heard, 50 N. Y. 27; *Smith v. Flanders*, 129 Mass. 322; *Cox v. McLaughlin*, 54 Cal. 605. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are excluded. *White v. Miller*, 71 N. Y. 118; S. C., 27 Am. Rep. 13; *Griffin v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 id. 72. It is only uncertain and contingent profits, therefore, which the law excludes; not such as, being the immediate and necessary result of the breach of the contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. And generally, the damages recoverable for a breach of contract are such as may reasonably be considered to have arisen naturally from such breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of its breach. *Mihills Manuf. Co. v. Day*, 50 Iowa, 250; *Biltmeyer v. Wagner*, 91 Penn. St. 92.

Where the lessor of a dairy has been guilty of a breach of his agreement to put the barns on the premises in a good state of repair, the lessee cannot recover the damages sustained by injuries to the cows and young cattle, or the increase of food and the decrease of produce resulting from the state of the barns, because these damages are altogether too remote and contingent. *Dorwin v. Potter*, 5 Denio, 306; vol. 2, p. 759.

In an action for a breach of the implied warranty of title, on the sale of a horse, the measure of damages is the price paid by the purchaser, with the interest thereon, and the costs recovered against the purchaser in an action by the then owner; but the costs incurred in the defense of the action by the purchaser are too remote, and cannot be recovered. *Armstrong v. Percy*, 5 Wend. 535; *Burt v. Dewey*, 31 Barb. 540.

A brief notice will now be taken of actions for a tort. In cases of deliberate or malicious wrong, the law generally gives very liberal relief; and in cases of reckless or mischievous acts which are injurious to others, and even where exemplary damages are not claimed, the party in the wrong is frequently made answerable for consequences very remote from the original act. In one old case the defendant threw a squib into the market-house, which fell on the stall of a gingerbread seller; he, to save himself, threw it on another stall; the proprietor of the second stall also threw it off, and, in so doing, it struck the plaintiff and put out his eye; here it was held that the in-

jury was the direct and immediate act of the defendant, and that he was liable for the damages. *Scott v. Shepherd*, 2 W. Bla. 892. So, where the defendant went up in a balloon, which descended in the plaintiff's garden, a short distance from the place of ascent, and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables and flowers, it was held that, though ascending in a balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him or to gratify a curiosity which he had excited, he was answerable for all the damage done to the garden of the plaintiff, including that done by the crowd. *Guille v. Swan*, 19 Johns. 381. So, where the defendant, having quarreled with a boy, pursued him with a pickax, and followed him into the plaintiff's store, where in his effort at flight, he committed unintentional damage, the defendant was held responsible for the damage done. *Vandenburgh v. Truax*, 4 Denio, 464. And for a further illustration of these principles see vol. 2, pp. 418-424.

§ 2. **Actions for breach of contracts.** The law in relation to contracts in general, and as to the right of action which may arise from the breach of a contract, express or implied, has been sufficiently noticed in volume one. The cases which will be here noticed relate to the measure of damages recoverable in actions founded upon a breach of contract. Where nominal damages will be awarded has been already seen, *ante*, 772. And it now remains to ascertain and determine what rule is applicable where the damages claimed are substantial. And, in the first place, it will be observed that there are two principles which are prominently kept in view in all such discussions. One of these principles is, that the plaintiff must show that he has sustained damage, and the law will not give actual compensation unless in those cases in which there has been actual loss. The other principle is that the contract itself furnishes the measure of damages. The exceptions to these rules will be noticed while examining the cases cited hereafter. And, since they are so intimately related and connected, the most convenient method will be to discuss them together. There are numerous cases in which the parties may legally fix the amount of damages by a special agreement for that purpose; and when this is done in a case in which the law permits the agreement, the contract of the parties will furnish the measure of damages, or, in other words, they establish a rule for themselves, which will be the law of the case. The general rule is that in all actions for the mere breach of a contract, the dam-

ages are to be limited to the consequence of the breach alone, without any regard to the motives which induced the violation of the contract. To this general rule there are two exceptions, one of them relates to a sale of real estate, and the other to a breach of marriage promise. This subject will be further noticed hereafter.

The principle that the contract furnishes the measure of damages is not, in all cases, to be so construed as to enable a party who performs his part of a contract to recover from the defaulting party the entire sum named in the agreement; for there are many instances in which it has been held that, in actions for the breach of a contract, the measure of damages is not the price stipulated to be paid on full performance, but the actual injury sustained by the defendant's default. The reason for such a decision is, that although the contract furnishes the measure of damages, it is still subject to the qualification of the other rule that compensation is given for the actual loss.

In an action for the breach of a contract, in not furnishing freight for transportation as the defendant agreed, the plaintiff claimed to recover the entire price agreed upon for the transportation of a number of horses upon a canal boat. It was shown that the plaintiff tendered performance on his part, and that there was a neglect or refusal on the part of the defendant; yet the court held that the measure of damages was not the sum or price agreed to be paid on performance, but that it was limited to the actual loss and injury sustained by the defendant's non-performance. *Shannon v. Comstock*, 21 Wend. 457. So, where the plaintiff was employed by the defendant to do certain work, and he commenced and partially performed the job, but the defendant then countermanded the order, though the plaintiff went on and completed the job, and then sued to recover the stipulated price; it was held that he could not recover that sum, and that the measure of damages was a compensation for the work done before the countermand, including the materials furnished, and also such damages as resulted from the defendant's breach of the contract. *Clark v. Marsiglia*, 1 Denio, 317. See vol. 1, pp. 231, 232.

In an old case the action was founded upon an agreement by the defendant to purchase a horse, and the agreed price was to be settled thus: The defendant was to pay one barleycorn for the first nail in the horse's shoes, and then to give two for the second, and afterward doubling the number for each nail in the shoes. It appeared that there were thirty-two nails in the shoes, and that the quantity of barley, at the agreed rate, would amount to five hundred quarters. The judge who tried the case directed the jury to disregard the contract, and to give

 Actions for breach of contracts.

the value of the horse as damages, which was £8, which was done. *James v. Morgan*, 1 Levinz, 111. And see *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164. Such extreme cases, however, are rare, and when they do occur, the decision is put upon the ground that the contract is unconscionable, and the court gives judgment for such sum as is reasonable and just, without regarding the terms of the contract.

In an action by an assignee of a right of action for a breach of warranty, the measure of damages is the same as though the action had been brought by the assignor. *Sweet v. Bradley*, 24 Barb. 549. See, also, vol. 2, p. 351. In such a case the assignee is entitled to recover the full amount of the claim or demand without any reference to the sum which he may have paid for it. *Ib.* But there are cases in which the plaintiff may have a sufficient title or interest in a claim or demand or in property, to entitle him to maintain an action, although he may not be entitled to recover the entire or full value. And in an action between the general owner of property and one having only a lien upon it, or a special interest in it, when the latter prevails, his damages are limited to the amount of his lien or special interest. *Seaman v. Luce*, 23 Barb. 240; *Rhoads v. Woods*, 41 id. 471. Where there is neither fraud nor an express agreement to pay damages, the general rule is that no damages are recoverable for any thing which occurs antecedent to the closing of the contract; and, therefore, no damages can be allowed for the time spent in making a contract which is subsequently broken. *Durkee v. Mott*, 8 Barb. 423, 427. And in an action for the breach of a contract, the defendant may show, if he can, that the fulfillment of the contract would have cost the plaintiff more than he was to receive from the defendant for such performance. *Ib.*

If one contracts for board and lodgings, for a specified time at an agreed price, and he subsequently leaves before the expiration of the time, without just cause, the other party will not be entitled to recover the stipulated price as damages, but merely the actual damages sustained by the breach of the contract. *Wilson v. Martin*, 1 Denio, 602; *Spencer v. Halstead*, id. 606. See *Wetmore v. Jaffray*, 9 Hun, 140; *De Lavalette v. Wendt*, 11 id. 432. And so where a contract is made for the use of lodging rooms for a specified period, and the defendant occupies them a small portion of the time, and then leaves them without legal cause, the plaintiff will be limited to the damages actually sustained by the breach. *Greene v. Waggoner*, 2 Hilt. 297. But if the defendant claims that any thing has been received, or might have been received, for the use of the rooms by way of mitigation of damages, the

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burden of proof is on him, for the plaintiff is not bound to show affirmatively that he could not have rented the rooms. *Ib.* And see *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609; and vol. 1, pp. 231, 232, 233.

Where there is an apprenticeship by deed and the apprentice unlawfully quits the service, the master can only recover damages up to the time of the commencement of the action, and not prospective damages up to the time when the term of apprenticeship would end. *Lewis v. Peachey*, 1 Hurlst. & Colt. 518. In such a case, the deed is still in force, and the plaintiff cannot recover damages for the absence of the apprentice up to the end of the term while, at the same time, he has a right to the apprentice's services. *Ib.*

In an action by one partner against the other, for dissolving the partnership in violation of a provision fixing its continuance for a certain term, the plaintiff may recover probable profits for the time intermediate the dissolution and the end of the term contracted for. *Bagley v. Smith*, 10 N. Y. 489. And evidence as to the amount of the past profits is admissible as a means of estimating the damages sustained. *Ib.*

In an action for a breach of a continuing covenant to keep in repair a gate upon the plaintiff's lands, the measure of damages is not such a sum as will enable the plaintiff to repair or rebuild the gate, but nominal damages for the breach, and such additional actual damages as may have accrued to the plaintiff by the entry of cattle upon his lands, or otherwise, in consequence of the defendant's neglect. *Beach v. Crain*, 2 N. Y. 86; S. C., 2 Barb. 120. In such a case the covenant is a continuing one, and a recovery in one action does not bar another action for damages subsequently accruing from a neglect to make such repairs. *Ib.* But a bond conditioned to furnish the obligee and his wife with all necessary meat, drink, lodging, washing, clothes, etc., during both and each of their natural lives, is an entire contract, and a failure by the obligor to provide for the obligee and his wife according to the substance and spirit of the covenant amounts to a total breach; and full and final damages may be recovered, for the future as well as the past. *Shaffer v. Lee*, 8 Barb. 412.

In an action on an instrument which purports to assign a judgment, when there was, in fact, no such judgment, the measure of damages is the value of the property owned by the alleged judgment debtor, and which might have been taken on an execution at the time of the pretended assignment, not exceeding the amount of the alleged judgment. *Jansen v. Ball*, 6 Cow. 628.

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The measure of damages for the breach of a covenant in an assignment of a judgment against several defendants that the whole amount is due and unpaid, when in fact the only solvent judgment debtor has been released, is the difference in value of the judgment as it was when transferred and as it would have been had not the release been executed. *Bennett v. Buchan*, 61 N. Y. 222. The measure of damages for the breach of a guaranty of the amount due on a note is the loss sustained by the breach, which will be the value of a judgment against the maker, if one has been obtained, or the full amount due on the note as stated in the guaranty, at the time of bringing the action, if the maker is solvent but has proved payment. *Head v. Green*, 5 Biss. 311. See *Clark v. Hampton*, 1 Hun, 612. In an action against bankers to recover damages for omitting to present a note for payment at maturity, and to charge the indorser, the amount of the note is *prima facie* the rule of damages, but the defendants may show that the indorser was not pecuniarily responsible, and the recovery will then be limited to the damages sustained, having reference to the amount of property owned by the indorser. *Bridge v. Mason*, 45 Barb. 37. See *Clark v. Hampton*, 1 Hun, 612; S. C., 4 N. Y. Sup. Ct. (T. & C.) 75.

A telegraph company received from the plaintiff a message informing the person to whom it was addressed where he could get a certain sum of money, which message was, by the negligence of the company, delayed until it was too late for the money to be used as the plaintiff intended, in consequence of which neglect he lost a valuable contract, and was also compelled, by the terms of his contract, to pay a large sum in damages. But the company was not informed that the money was intended for any particular use, and it was held that the plaintiff could not recover of the company any thing more than the amount paid for the message, and the amount of interest which accrued on the sum specified in the message during the time it was delayed. *Landsberger v. Magnetic Telegraph Co.*, 32 Barb. 530. See *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744; S. C., 6 Am. Rep. 165.

The well-settled rule in such cases is, that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation. *Ib.*; *Griffin v. Colver*, 16 N. Y. 489; *Hadley v. Baxendale*, 9 Exch. 341; *Hamilton v. McPherson*, 28 N. Y. 72; *United States Telegraph Co. v. Gildersleeve*, 29 Md. 232. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded

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for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both parties, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744; S. C., 6 Am. Rep. 165.

The measure of damages for delay in fulfilling a contract to repair a vessel, by reason of which the other party lost the use of it in the mean time, is the rent or price which would be paid for the charter of the vessel during the period of delay, and not the probable profits. *Rogers v. Beard*, 36 Barb. 31.

Where there is an executory contract for the performance of work, and it is provided that payments shall be made as the work progresses, but the contract is rescinded by the employer by a refusal to fulfill it, and the other party consequently abandons the work, the covenants for the payment of installments subsequent to the time at which the work was abandoned, though independent covenants, become mere penalties, and the measure of damages is merely the actual losses and expenditures of the party employed. *Skinner v. White*, 17 Johns. 357. And see *Skinner v. Dayton*, 19 id. 513; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61; *Story v. N. Y. & Harlem R. R.*, 6 N. Y. 85.

Where work is done under a special contract, at estimated prices, and there is a deviation from the original plan, by consent, the estimates are to be the rule of payment so far as the special contract can be traced, and for the extra labor the party is entitled to recover upon a *quantum meruit*, with the addition of such sums as may be requisite to compensate for the extra expense caused by the defendant's interruption of the work. *Dubois v. Del. & H. C. Co.*, 4 Wend. 285; S. C., 12 id. 334; 15 id. 87.

So, where work is to be done according to a certain plan, and for a specified sum, and the parties abandon the plan by consent, so that it is impossible to trace the contract in the work done, the measure of compensation is the value of the work, which may be recovered as though no contract had been entered into. *Hollinsead v. Mactier*, 13 Wend. 276. But where there is a special contract to do specified work at stipulated prices, and the employer is to furnish the materials, which he does, for a part of the work, and then neglects to furnish the rest of the materials in season, in consequence of which the laborer abandons the job, the measure of damages is not the value of the work done by estimating its value as though no contract had been made, but

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the recovery must be governed by the contract-price, unless the plaintiff shows affirmatively that the defendant's neglect rendered the work more expensive, or that it had to be done at a less favorable season of the year, at an additional expense. *Koon v. Greenman*, 7 Wend. 121.

As to the rule where an employee is improperly discharged, see vol. 1, pp. 229, 230. Where an employee improperly abandons his employer's service, in a case where he had hired out to serve for a specified time, the legal measure of damages is the difference between the wages agreed to be paid to the defendant and the price which the plaintiff was obliged to pay for labor to supply his place. *Peters v. Whitney*, 23 Barb. 24. Injuries which may occur to the plaintiff's crops by reason of the defendant's leaving the service cannot be considered, and evidence of such damages is inadmissible. *Ib.*

There are cases in which a party is excused from the full performance of a special contract, in the event of sickness or death. Vol. 1, p. 234. In such cases the laborer may recover the actual value of the services rendered. *Wolfe v. Howes*, 20 N. Y. 197. But the recovery must be for what the services are reasonably worth; and if they have not been worth any thing, there can be no recovery. *Clark v. Gilbert*, 32 Barb. 577. The contract-price which was to be paid for the completed service is not the measure of compensation for the partial and interrupted service. *Ib.* In an action for the recovery of the value of services rendered under a contract which was void by the statute of frauds, because the contract was not to be performed within a year, the plaintiff may recover according to the contract-price, if there is no other evidence of value given by either party and the plaintiff is not precluded from recovering any thing by reason of his refusal to go on with the contract. *Nones v. Homer*, 2 Hilt. 116. But when at the commencement of the term of service the plaintiff was ignorant of the business in which he was employed, and ordinary skill therein was acquired only by instruction and practical experience for a considerable time, the rate of compensation fixed by the void agreement for the entire term is not even *prima facie* evidence of the value of services rendered for only a portion of the time. *Galvin v. Prentice*, 45 N. Y. 162; S. C., 6 Am. Rep. 58. If the void contract is fully performed by the person rendering the services, the compensation fixed by the contract will be the measure of the recovery. *Van Valkenburg v. Croffut*, 15 Hun, 147. But where the agreement provides that services are to be paid for in land, or by a permanent lease of land, the contract is void by the statute of frauds, and the measure of damages is the value of the services rendered, not the value of the land or of the

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lease. *Erben v. Lorillard*, 19 N. Y. 299. And evidence of the value of the land or of the lease is not admissible evidence if objected to. *Ib. King v. Brown*, 2 Hill, 485, and *Burlingame v. Burlingame*, 7 Cow. 92, are overruled on these points.

Where an action is brought to recover the value of services upon a *quantum meruit*, and upon the trial the only evidence of value is proof of an agreement on the part of the defendant to pay a specified sum, this constitutes the measure of damages. *Ludlow v. Dole*, 62 N. Y. 617.

Actions upon bills or notes. In an action upon a bill of exchange or a promissory note, where there is no question made as to the currency or rate of exchange, the rule is established by law, and is fixed and arbitrary. The plaintiff will recover precisely the legal rate of interest, neither more nor less. The actual damages may be, and they frequently are, much greater. The non-payment of the money at the time when it was due may have been a cause of great inconvenience to the creditor, or it may have caused him serious and positive loss, even to the extent of causing him to fail in business. And yet the law does not take into account these remote results, nor allow any damages for them. But while it is true that the creditor cannot recover any thing but the legal rate of interest, he is also relieved from proving any damages whatever. And if the money is not paid or tendered when it is due or before action is brought, the plaintiff will recover legal interest, even though he could not have loaned out the money for interest if it had been duly paid.

Notes are frequently given which are payable in specific articles. They usually specify the amount intended to be paid, and contain a promise to pay the amount in chattels of a particular character. Sometimes the number or quantity of articles is mentioned, and at other times the promise is general to pay a given sum in a kind of chattels mentioned. The time when, and the place where, such notes are payable is discussed in vol. 1, pp. 722-729. But it is sometimes a question whether such notes are to be considered as contracts for the payment of money, or agreements for the delivery of goods. In this State such contracts are held to be contracts for the delivery of goods, provided the promisor complies strictly with the terms of his contract by delivering the chattels in due time and manner. But if the promisor neglects to avail himself of the option or privilege allowed to him of paying in chattels, then the contract is regarded as a promise to pay the debt in money, with interest from the time of the default. *Fletcher v. Derrickson*, 3 Bosw. 181, 189. An action was brought

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upon a chattel-note in this form: "For value received, I promise to pay A. B. \$79.50, on, etc., *in salt, at fourteen shillings per barrel*," and it was held that the measure of damages was the sum specified in the note, and not the value of the salt, on the day specified for payment. *Pinney v. Gleason*, 5 Wend. 393; reversing S. C., 5 Cow. 152. And see *Brooks v. Hubbard*, 3 Conn. 58; *Perry v. Smith*, 22 Vt. 301, and *Clark v. Pinney*, 7 Cow. 681.

It does not make any difference in the rule of damages whether the price of the chattels has increased or depreciated in value, nor whether the value of the chattels at the time fixed for payment is greater or less than the sum specified in the note, because the amount of the debt, with interest from the time when payment should have been made, is the measure of damages in any event. *Ib.*; *Fletcher v. Derrickson*, 3 Bosw. 181, 189.

There are other contracts which provide for the payment of chattels, although the promise is not in the usual form of a chattel note, yet, in legal effect, it is treated as a chattel note. Where an agreement is made between a debtor and his creditor, that the former will make and deliver to the latter a specified sum of money in merchandise, of a specified description, at a certain sum per pound, "to be paid on specified days," and that the latter will apply it on debts, for which he also has security, such agreement or contract is, in legal effect, a promissory note, payable in chattels, and the measure of damages, where there is a breach of the agreement, is the amount so agreed to be paid, whether the action is brought against the principal debtor or against his sureties. *Fletcher v. Derrickson*, 3 Bosw. 181. In such a case it is of no consequence whether the market-price of the article is greater or less than the price at which it was to be received. *Ib.*

Interest as damages in actions on contract. The subject of interest has already been fully discussed. Vol. 2, pp. 137-155. And whenever interest is payable by the terms of the contract, or by operation of law, then interest may be allowed by way of damages. And whenever the law gives interest as a matter of right, it is not discretionary with a court or jury whether to allow or refuse it. If not allowed in those cases in which it is clearly allowable by law, the disallowance will be sufficient to render the judgment erroneous.

In an action upon a judgment, interest is recoverable whether the original demand drew interest or not. And even when the action is for a tort, interest is recoverable in an action founded upon a judgment rendered for such tort. *Klock v. Robinson*, 22 Wend. 157; *Lord v. Mayor of New York*, 3 Hill, 426. But interest is recoverable

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from the date of the judgment only, and not from the rendition of the verdict. *Ib.* The Code provides that a judgment for a sum of money rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it was entered. But when the judgment directs that money paid out shall be refunded or repaid, the direction includes interest from the time when the money was paid, unless the contrary is expressed. Vol. 1, p. 152, § 1211.

When a contract provides for the payment of liquidated damages for a breach, interest is chargeable upon the amount fixed, from the time when such damages became due and payable. *Winch v. Mutual Benefit Ice Co.*, 86 N. Y. 618; *Little v. Banks*, 85 id. 258. In other words, the damages draw interest from the time of the breach, the amount at which they were liquidated being treated as the principal.

Sales of personal property. In actions for the recovery of damages for the breach of contracts relative to the sale of personal property, there may be several distinct classes of cases. The vendor may neglect or refuse to deliver the goods sold, whether the purchase-price has been paid or not; the vendee may refuse to accept or pay for the articles purchased; there may be a breach of warranty in relation to the quality or quantity of such article, or there may be a failure of title to it. In all such cases the injured party is entitled to relief by way of damages. Before noticing these several classes of cases, it may be proper to refer to those cases in which goods or chattels are sold and delivered without any express agreement as to the price. In all such cases the vendor is entitled to recover the fair market value of the articles delivered, which will constitute the measure of damages. If there is a running account, interest is not generally recoverable, though there are some exceptional instances. See vol. 2, pp. 142, 143. In an action by a vendee against a vendor for the recovery of damages for the non-delivery of goods, merchandise or chattels, pursuant to the contract of sale, the measure of damages is the difference between the market value of the article contracted for on the day when it ought to have been delivered, and the price which, by the terms of the agreement, was to have been paid for it. *Dana v. Fiedler*, 12 N. Y. 41; *Cohen v. Platt*, 69 id. 348; S. C., 25 Am. Rep. 208; *McKnight v. Dunlop*, 5 N. Y. 537; *Parsons v. Sutton*, 66 id. 92; *Billings v. Vanderbeck*, 23 Barb. 546. The reason for this rule is, that such sum would enable the purchaser to go into the market and supply himself with the same or a similar article from another vendor. It would follow from this rule, that, if at the time fixed for the delivery, the arti-

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cle had not risen in price, or has fallen, the vendee has lost nothing, and he can, therefore, recover nothing. When no precise day is fixed for the delivery, but the articles are to be delivered "on or about" a specified day, the vendee will not be limited to the difference between the contract-price and the market value on the precise day named, but he may recover the difference between the contract-price and the market value within a reasonable time after that day. *Kipp v. Wiles*, 3 Sandf. 585.

Evidence as to the market-price need not be confined to the precise time when the contract was to have been performed. It may sometimes be impracticable to show the price at the precise time, and hence evidence of the price for a brief period before and after the time may be given, not for the purpose of establishing a market-price at any other time, but for the purpose of showing as well as practicable the market-price on the day the contract was to have been performed. So it may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the market-price at places not distant, or in other controlling markets, may be given, not for the purpose of establishing a market-price at any other place, but for the purpose of showing the market-price at the place of delivery. *Cohen v. Platt*, 69 N. Y. 348; S. C., 25 Am. Rep. 203. See *Durst v. Burton*, 47 N.Y. 167; S. C., 7 Am. Rep. 428. Where there is a market-price at the place fixed for the delivery of goods under a special contract of sale, evidence of the market-price at other places is not admissible. *Gregory v. McDowel*, 8 Wend. 435. In ascertaining the market value, the evidence must be confined to the actual market value, and the defendant cannot inquire into the probable effect of throwing upon the market the quantity which he was to deliver. The inquiry is, at what price the vendee could have purchased the commodity in market, not what he could have sold it for if it had been delivered. *Dana v. Fiedler*, 12 N. Y. 40; S. C., 1 E. D. Smith, 463. In such a case, the defendant cannot be permitted to give evidence as to its market value in quantities equal to that named in the contract, unless it is first shown as a matter of fact, that there is a market-price for it in such quantities, nor can he go into a speculative inquiry as to the usual difference between prices on large and small lots, unless it appears that it was, or could be, purchased at the time and place for delivery, in the quantity specified in the contract. *Ib.* The market value is the price at which the goods can be replaced for money in the market, and not the retail

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value, or price for which they are sold at retail. *Wehle v. Haviland*, 69 N. Y. 448.

The rule of damages above stated applies where the purchase-price is not paid in advance. Where such price is paid in advance, a different case is presented, and a different rule may be applied and enforced. And it has been held that in case of contracts for the purposes of trade and commerce, when the purchase-price is paid in advance, and the vendor neglects or refuses to deliver the goods according to the contract, the purchaser is not confined, in measuring his damages, to the value of the goods on the day when they should have been delivered; and if he, without unreasonable delay, commences and prosecutes his action, he is entitled to the highest price between the day fixed for delivery and the day of the trial. *Clark v. Pinney*, 7 Cow. 681; *Dey v. Dow*, 9 Wend. 129; *Rawdon v. Barton*, 4 Tex. 289; *Calvit v. McFadden*, 13 id. 324; *West v. Wentworth*, 3 Cow. 82. But the doctrine of these cases has been questioned in a number of subsequent decisions and their value as authority somewhat weakened. See *Devlin v. Pike*, 5 Daly, 85, 90; *Suydam v. Jenkins*, 3 Sandf. 614; *Baker v. Drake*, 53 N. Y. 211, 222, 223; S. C., 13 Am. Rep. 507.

Where the vendee has not paid the purchase-price in advance, and the vendor neglects or refuses to deliver the property sold, the measure of damages is the difference between the contract-price and the market value on the day fixed for the delivery, with interest from the time of the default. *Clark v. Dales*, 20 Barb. 42; *Belden v. Nicolay*, 4 E. D. Smith, 14; *Davis v. Shields*, 24 Wend. 322; *Havemeyer v. Cunningham*, 35 Barb. 515.

In an action for the breach of an executory contract to sell and deliver goods, the measure of damages is the difference between the contract-price and the market value of such goods at the time and place specified for delivery, with interest thereon. The interest must be allowed as a part of the damages, and is not a matter of discretion with the jury. *Dana v. Fiedler*, 12 N. Y. 40. If there is an agreement to deliver a specified quantity of property, and the vendor partially performs the contract by delivering a portion of it, but he neglects or refuses to deliver the residue, the only damages recoverable are such as result from the non-delivery of such residue. *McKnight v. Dunlop*, 5 N. Y. 537. But where the vendor, in an executory contract for the sale of an entire parcel of goods, has, by disposing of a part thereof, put it out of his power to render a full performance, the proper measure of damages, in an action brought against him by the buyer, is not merely the difference between the price and the value of the portion

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which the vendor was unable to deliver, but such difference upon the whole parcel. *Crist v. Armour*, 34 Barb. 378. If, however, the contract is for delivery of all the grain raised upon specified lands, and it is to be delivered in merchantable order, an offer to deliver all that grew upon the land, when three-fourths of it was unmerchantable, is not an offer of performance, and it leaves the buyer at liberty to treat the contract as broken; and, in that case, his measure of damages would be the difference between the contract-price and the market-price of the merchantable part of the grain, together with the sum he had advanced on the contract, and the interest thereon. *Hamilton v. Ganyard*, 34 Barb. 204.

In an action by the purchaser of goods against the vendor for damage done to them between the sale and delivery, the measure of damages is the difference between the actual value of the goods in their damaged and in their undamaged state. *Gerard v. Prouty*, 34 Barb. 454. The price paid by the purchaser is not a criterion of the actual value of the goods in their undamaged state. *Ib.* See, also, vol. 2, pp. 347-349.

Having thus briefly considered the measure of damages as against the vendor, when he fails to deliver the article contracted for, a few cases will be noticed for the purpose of showing the rule of damages in case the purchaser refuses to accept the article or to make payment. In some cases the contract fixes the price; in others it does not. If the goods have been delivered, and the price is fixed by the agreement, the measure of damages will be the contract-price. If the actual possession of the goods has not been changed by a delivery of them to the purchaser, by reason of his refusal to receive them, the vendor may resell the goods and recover the difference between the contract-price and that realized at the sale. But the vendor is not bound to sell the property on account of the vendee, although he may do so. After a tender of performance on his part, he may abandon the property, treat it as the vendee's, and sue the latter for the price. *Pollen v. LeRoy*, 30 N. Y. 556; *Hunter v. Wetsell*, 84 id. 549. The measure of damages in such action will be the contract-price, less any payments received. *Ib.*

Where a contract is made with a mechanic for the manufacture of an article in the way of his trade, and he makes the article and tenders it to the person who ordered it, but who refuses to accept and pay for it, the mechanic may deposit the article with a third person, and give notice thereof to the purchaser, and then maintain action upon the contract, and recover the price agreed on as the measure of damages. *Bement v. Smith*, 15 Wend. 493. And see vol. 2, pp. 62, 345-347.

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Where a contract is made for the sale and delivery of a specified quantity of articles at a specified price, and the vendor delivers a part of the articles, and is willing and offers to deliver the residue, but the vendee, without legal excuse, refuses to receive them, the vendor may sue for the value of the portion so delivered, and may recover their full market value without reference to the price fixed in the contract. *Terwilliger v. Knapp*, 2 E. D. Smith, 86.

In an action for the breach of a contract in which the purchaser agreed to receive and pay for specified goods, at a fixed price, at an agreed time and place, the vendor may recover the difference between the contract-price and the market-price; but if no evidence is given as to the value of the property, the plaintiff is not entitled to recover more than nominal damages. *Billings v. Vanderbeck*, 23 Barb. 546.

Where there is a sale of goods which are to be paid for by a bill or note, payable at a future day, and there is a neglect or refusal to deliver such bill or note as agreed, the vendor may sue immediately for the breach of the special agreement, and recover as damages the whole value of the goods, allowing a rebate of interest during the stipulated credit. *Hanna v. Mills*, 21 Wend. 90; *Rinehart v. Olwine*, 5 Watts & Serg. 157.

Where there has been a sale of goods or chattels at a certain price,* to be delivered at a specified future time, and before that time arrives the purchaser notifies the vendor that he will not accept the goods, the measure of damages for a breach of the contract is the difference between the contract-price and the market-price on the day fixed for delivery, and not on the day when notice was given that the goods would not be received. *Leigh v. Paterson*, 8 Taunt. 540; *Phillpott v. Evans*, 5 Mees. & Wels. 475; *Steward v. Cauty*, 8 id. 160; *Boorman v. Nash*, 9 Barn. & Cres. 145.

If a contract provides for a performance by both parties at the same time and place, and either party, before that time arrives, notifies the other that he will not perform the contract, and he does not, before the time of performance, recall the notice; or if he puts it out of his power to perform the contract, on his part, this will relieve the other party from averring or proving either performance or an offer to perform. *Crist v. Armour*, 34 Barb. 378. And if the contract is for the sale of a specified quantity of articles, to be paid for on delivery, and the vendor sells and delivers a portion of them to a third person, this will be sufficient to sustain an action by the vendee against the vendor without any averment of performance. *Ib.* In such an action the vendee may recover damages for the breach of the entire contract, and he

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is not limited to the damages sustained by selling a part of them to such third person. *Ib.* See *Skinner v. Tinker*, 34 Barb. 334, as to notice that contract will not be performed. As to the rule of damages in cases of contract of sale or return, see vol. 2, pp. 23, 24; and *King v. Paddock*, 18 Johns. 141, 144.

Warranties as to quality or quantity. There may be a performance of the contract by the vendor so far as it relates to a delivery of the articles sold, and yet he may be liable to an action for a breach of a part of the contract of sale. The general rule is that there is no implied warranty of the quality of the articles sold, though there are some exceptions to the rule. See vol. 2, pp. 91-100. In those cases in which there is an implied warranty, or if there was an express warranty given on the sale of goods or chattels, and there is a breach of the warranty, the purchaser will be entitled to damages for such breach. There are some cases in which the vendee may return the goods and rescind the sale, provided the goods do not answer the warranty. See vol. 2, pp. 66, 74. But where there is neither fraud, nor an express agreement giving a right to return the goods, that cannot be done even though the warranty be broken. Vol. 2, pp. 65, 66.

The law, however, gives an ample remedy, for the vendee may retain the goods and still maintain an action for the recovery of such damages as may have resulted from the breach of the warranty. Vol. 2, pp. 73, 74. In an action for a breach of warranty on a sale, where there is no fraud in the transaction, the measure of damages is, as a general rule, the difference between the value of such an article as it was warranted to be, at the time of the sale, and the value of the inferior article sold. *Voorhees v. Earl*, 2 Hill, 288; *Muller v. Eno*, 14 N. Y. 597, 600.

In an action for a breach of warranty of soundness in the sale of a horse, the measure of damages is the difference between his value at the time of the sale, considering him as sound, and his value with the defects alleged and proved. *Fales v. McKeon*, 2 Hilt, 53; *Comstock v. Hutchinson*, 10 Barb. 211; *Cary v. Gruman*, 4 Hill, 625; *Sharon v. Mosher*, 17 Barb. 518. So, in all actions founded on a breach of warranty as to the quality of goods which have been sold, the measure of damages is the difference between the value of the goods, had they been as they were represented at the time of the sale to be, and their actual value with the defects complained of. *Ib.*; *Muller v. Eno*, 14 N. Y. 597; reversing S. C., 3 Duer, 421; *Lattin v. Davis*, Hill & Denio, 9.

In an action upon a breach of warranty of the quality of material

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for the purpose of manufacture into an article of merchandise, the measure of damages is the difference in value between the articles made of the defective material, and similar articles made of material equal to the warranty. The vendee is not confined to the market-price in ascertaining that difference. *Parks v. Morris Ax and Tool Co.*, 54 N. Y. 586. Where an action is brought to recover damages for a breach of warranty in the sale of seed, the proper measure of damages is the difference in value between the crop raised from the defective seed and a crop of the kind of seed represented, such as would ordinarily have been produced that year. *White v. Miller*, 78 N. Y. 393.

Where the vendors of a quantity of wool knew that it was purchased by the plaintiffs for the purpose of manufacturing it into hats, and that if there were any cotton in it, it would be unfit for that purpose, but they did not warrant that it was fit for that purpose, but only that the flocks sold contained no cotton; it was held that the only damages which the plaintiffs were entitled to recover upon a breach of this warranty was the difference between the market value of the wool in its actual state, and what it would have been worth had it contained no cotton, with interest on that difference; and that they could not recover their losses which were caused by manufacturing hats which proved to be of less value on account of the intermixture of cotton. *Prentice v. Dike*, 6 Duer, 220. So, in an action for a breach of warranty, on the sale of a quantity of coal dust that it had no dust of soft or bituminous coal mixed with it, the legal measure of damages is the difference between the value of the article as it actually was and its value had it been as represented; and the fact that the purchaser stated the purpose for which he bought it will not change the rule so as to entitle him to recover damages for the injuries which resulted from using it. *Milburn v. Belloni*, 34 Barb. 607; S. C., 12 Abb. 451; and 22 How. 18; *Hargous v. Ablon*, 5 Hill, 472; S. C., 3 Denio, 406. And see vol. 2, pp. 83-85.

As to what constitutes a warranty on a sale by sample, see vol. 2, pp. 92, 95.

And where goods were sold by sample upon a warranty or representation that they were of a specified quality, which they were not, and the plaintiff recovered as damages the difference between the price obtained on a resale and that which would have been obtained had the goods been of the quality represented, this recovery was sustained by the court. *Roberts v. Carter*, 28 Barb. 462; S. C., 17 How. 524. The price realized on a second sale is admissible as one mode of deter-

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mining the value. *Reggio v. Braggiotti*, 7 Cush. 166; *Foster v. Rodgers*, 27 Ala. 602. And proof of the amount for which goods were sold at auction is admissible as a circumstance to be considered on the question of value; but it is neither conclusive, nor, in general, sufficient, without other proof. *Renaud v. Peck*, 2 Hilt. 137. There is sometimes a warranty of quantity, either expressed or implied; and in that case the purchaser is entitled to have the article made equal in quantity to what the warranty declared it to be; but he is not legally entitled to claim damages by way of remuneration for injuries remotely sustained in consequence of the deficiency. Vol. 2, p. 101.

Warranty of title. A warranty as to the title of property sold may be express or implied; and, when the warranty is established, the measure of damages is the same in both cases. As to implied warranties of title, see vol. 2, p. 101.

In an action brought for a breach of an implied warranty of title in the sale of a horse, the measure of damages is the price paid, the interest thereon, and the costs recovered against the purchaser or his vendee, in case of a suit by the true owner and a recovery by him, provided due notice of such action was given to the vendor; but the costs and expenses of the defendant in making his defense are not recoverable. *Armstrong v. Percy*, 5 Wend. 535; *Blasdale v. Babcock*, 1 Johns. 517; *Reggio v. Braggiotti*, 7 Cush. 166; *Jeter v. Glenn*, 9 Rich. (S. C.) Law, 374. If no notice of the action is given to the vendor, the measure of damages for the breach of the implied warranty of title is the amount of the purchase-price, with interest thereon. *Burt v. Dewey*, 31 Barb. 540, 543. And see vol. 2, p. 102.

A pawnbroker who sells a chattel as a forfeited pledge merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it. He is not liable to his vendee upon an implied warranty of title, even though the pledgor had no title to the property, and the true owner subsequently reclaims his property. *Morley v. Attenborough*, 3 Exch. 500. So, on sales by officers of the law, there is no implied warranty of title. *Id.* 514, note, and cases cited.

When a vendor is liable for a breach of express warranty, he may also be liable for the expenses of a litigation which has resulted from acting upon his warranty. If the vendor of a horse sells him with a warranty of soundness, and the vendee, relying thereon, resells him with a similar warranty, and is subsequently sued by his vendee, and he then offers the defense of the action to his vendor, who does not interpose, and the party defends the action himself, he will be entitled to

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recover the costs of such defense from the original vendor as a part of the damages occasioned by his breach of warranty. *Lewis v. Peake*, 7 Taunt. 153. So, where the defendants had sold the plaintiff a picture, warranted to have been painted by Claude, but, in fact, not painted by him, and the plaintiff sold it to a third party with like warranty, and the second vendee sued the plaintiff on the warranty, and recovered damages and costs, it was held that if the second sale was a *bona fide* sale, the plaintiff could recover the costs paid to such second vendee. *Pennell v. Woodburn*, 7 Carr. & Payne, 117. But in such cases the vendee from the first vendor must act in good faith and with proper care, or he cannot recover such costs as may result from the breach of a warranty made by him, as will be seen from the following case: The plaintiff purchased a horse of the defendant, with a warranty of soundness, and he then resold it, with a like warranty, to A.; some months afterward A. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, A. brought an action on the warranty; the plaintiff gave the defendant notice that the horse was returned to him as unsound, and that an action was brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by A., and failed. In an action against the defendant, on his warranty, the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to A., it was held that the plaintiff was not entitled to recover the costs incurred by him in the defense of the former action, because such defense was, under the circumstances, rash and improvident. *Wrightup v. Chamberlain*, 7 Scott, 598. And see *Penley v. Watts*, 7 Mees. & Wels. 609.

If a person has bought a horse with a warranty, which has been broken, and he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time, till he can fairly sell it, and he may recover against the seller the expense of keeping the horse during that time as a part of his damages. *Ellis v. Chinnock*, 7 Carr. & Payne, 169.

In such a case the purchaser may keep the horse for a reasonable time for the purpose of selling him. *Chesterman v. Lamb*, 2 Ad. & El. 129. But it must be limited to such time as would be required to resell the horse to the best advantage. *McKenzie v. Hancock*, R. & M. 436. And if the purchaser does not tender the horse to the vendor by offering to return it to him, there can be no recovery for the expense of keeping it. *Caswell v. Coare*, 1 Taunt. 566; *Curtis v. Hannay*, 3 Esp. 83.

Principal and surety. — Principal and agent.

Principal and surety. Some of the cases relating to the measure of damages in actions by and between principal and surety have been given in another place. Vol. 1, p. 671. As to the case of co-sureties see vol. 1, p. 679.

Principal and agent. The rights, duties and liabilities of each of these parties to the other, and the damages following a breach of duty, has been sufficiently explained elsewhere. Vol. 1, p. 385. There are two general principles relating to this subject which may be properly stated in this place. The first is, that when an agent violates his duty or his obligation to his principal, whether by exceeding his authority, or by misconduct or omission, and any damage results to his principal, he is responsible for such injurious consequences, and bound to make indemnity. Vol. 1, pp. 417, 450-453. The other rule is, that an agent who, without any default on his own part, incurs losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, will be entitled to full compensation therefor. Vol. 1, p. 431.

When a bill is payable on a particular day after date, and before its maturity the bill is delivered to an agent for presentment, and he fails to present it properly, the measure of damages is *prima facie* the amount of the bill; but the defendant is at liberty to reduce the damages by proving the plaintiff's actual loss, or that he did not sustain any. *Allen v. Suydam*, 20 Wend. 321. See *ante*, 780. That the agent will be liable for such loss as the principal may sustain, by reason of the agent's negligence, is conclusively settled. *Ib.*; *Walker v. Bank of the State of New York*, 9 N. Y. 582.

Where an agent or factor is intrusted with goods or chattels to take to market and sell, and he makes a sale of the property, but does not pay over the proceeds, and the principal sues for the recovery of the money received on such sale, the jury may allow the highest market value shown by the evidence, if the defendant does not show for what price the goods were actually sold. *Clark v. Miller*, 4 Wend. 628.

If a factor is instructed not to sell goods below a specified price, but he wrongfully sells the goods below that sum, the measure of damages is the injury actually sustained by the principal; and, therefore, the factor may show that from the time of the sale up to the day of trial, the market-price of the goods has not, at any time, been higher than the price for which they were sold. *Blot v. Boiceau*, 3 N. Y. 78. Where the articles are such as not to have any market value, such as antique paintings, statues, or vases, the principal may insist upon the price named in the instructions, without regard to the market. *Ib.*

Landlord and tenant.

Where a factor is instructed by his principal to sell wheat consigned to him, at a specified price, on a given day, and, if not sold on that day, then to ship it to a specified place, and the factor is guilty of a breach of instructions, in such a manner as to be liable for a conversion of the wheat, the measure of damages is the highest price of wheat between the time of the conversion and the trial, if the action is commenced within a reasonable time. *Scott v. Rogers*, 31 N. Y. 676.

Landlord and tenant. The general rules of law relating to the rights and duties of such parties have been stated in another place. Vol. 1, pp. 330–384. A few cases will now be given in illustration of the measure of damages in actions by and between them. Where a landlord refuses to give his tenant possession of the demised premises as he agreed to do, the tenant in an action for the breach of agreement, may recover the expenses incurred by him in preparing to remove to the premises and to occupy them, together with the difference between the real value of the lease and the contract-price. *Driggs v. Dwight*, 17 Wend. 71; *Giles v. O'Toole*, 4 Barb. 261; *Ward v. Smith*, 11 Price, 19; vol. 1, p. 347.

But the tenant cannot recover as damages the profits which he might have made had he obtained possession of the premises. *Ib.* So, in an action by a tenant against a landlord for the breach of an agreement to let a store, the tenant cannot recover as damages the amount of loss which he suffered in consequence of being obliged to crowd his goods into a small space while looking for another store, nor the expense and injury resulting from packing them, where such packing was not done for the purpose of a removal into the landlord's store. *Lowenstein v. Chappell*, 30 Barb. 241. Nor can he recover interest on the value of his stock of goods which he intended to put into the store, for the time during which he was prevented from exposing them for sale. *Ib.* So, in an action by a tenant against a landlord for damages for the breach of an agreement to make an addition to the demised premises, for which addition the tenant was to pay an increased rent, the plaintiff can recover merely the difference between the value of the improvement contracted for, and the additional rent to be charged when the addition was completed. *Berrian v. Olmstead*, 4 E. D. Smith, 279.

In an action by the lessee against the lessor for withholding the premises from the lessee's possession, the measure of damages, whether the action is founded upon contract or for a tort, is the difference between the rent reserved or agreed and the yearly value of the premises. *Trull v. Granger*, 8 N. Y. 115; *Dean v. Roesler*, 1 Hilt. 420. Where there is a breach of the landlord's covenant to renew a lease at the

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same rent, and the lessee accepts a new lease at an increased rent, under a declaration that he reserves his right of action, the measure of damages for the landlord's breach is the difference between what the tenant was to have paid and what he was compelled to pay. *Tracy v. Albany Exchange Co.*, 7 N. Y. 472.

If an action is brought by a tenant against a landlord for a trespass in entering upon the premises after the tenant had left them, but before the expiration of the term, and there is no evidence of actual damages, and there are no circumstances from which improper motives on the part of the landlord can be presumed, the tenant may maintain the action, but upon such evidence he can recover nothing more than nominal damages. *Shannon v. Burr*, 1 Hilt. 39. Where a tenant is in the quiet and peaceable possession of premises, with a right to remain for a particular period of time, or until the tenancy is terminated by a legal notice, and the landlord enters upon the premises without any process, and closes the entrance thereof, and refuses to permit the tenant to remove his goods, these facts will entitle the tenant to maintain an action against the landlord, and the measure of damages will be the value of the goods detained and the injury done by breaking up the tenant's business. *Marquart v. La Farge*, 5 Duer, 559.

In an action brought by the tenant for a breach of an implied covenant for quiet enjoyment, where an erection has been occasioned by the fault of the landlord, the measure of damages is the value of the unexpired term less the rent reserved. *Mack v. Patchin*, 42 N. Y. 167; S. C., 1 Am. Rep. 506; *Hawkins v. Mosher*, 13 Hun, 563. The measure of damages for a breach by the landlord of an agreement to keep the demised premises in repair is the difference in value of the use of the premises as they are and as the lessor agreed to put them. *Cook v. Soule*, 56 N. Y. 420; *Sheary v. Adams*, 18 Hun, 181.

In an action by the landlord against the tenant to recover damages for alterations made by the tenant in the demised premises, the measure of damages is the diminished value of the property, or the difference in the market value of it before the alterations and after. *Agate v. Lowenbein*, 6 Daly, 291.

Where the lessee of premises refuses to perform his agreement to take the premises and pay the rent, the landlord may refuse to relet the premises and hold the lessee for the rent. *Becar v. Flues*, 64 N. Y. 518. In such action the lease will furnish the measure of damages.

Carriers. As a general rule, where goods are intrusted to a carrier, and they are not delivered according to the contract, the measure of damages is the value of the goods, with interest thereon from the day

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when they ought to have been delivered. *Sherman v. Wells*, 28 Barb. 403. But it is also a frequent question as to the place at which the value is to be computed or settled. Where the goods intrusted to a carrier are lost before he commences the journey, he is not liable for more than their value at the place where he receives them, whatever may be their value at the place of their destination. *Lakeman v. Grinnell*, 5 Bosw. 625. But where a carrier reaches his place of destination, and he fails to deliver the goods transported by him, the measure of damages is the value of the goods at the place of delivery, at the time they should have been delivered according to contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his services. *Van Winkle v. U. S. Mail Steamship Co.*, 37 Barb. 122; *Krohn v. Oechs*, 48 id. 127; *Sturgess v. Bissell*, 46 N. Y. 462.

This rule is but a branch of the more general one that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of the contract. *Magnin v. Dinsmore*, 62 N. Y. 35; S. C., 20 Am. Rep. 442.

Every case is to be governed by its own facts, and where the owner of goods has consigned them to another person with the option to take them at a fixed price or return them, the measure of damages for their loss is not their market value at the place of destination, but, at most, the price fixed, with interest from a day when the goods would, in the usual course of carriage, have reached the consignee and been accepted. *Ib.*

Where goods are embezzled, or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like quality at the port of delivery. See *Marshall v. N. Y. C. R. R. Co.*, 45 Barb. 502; *Rice v. Baxendale*, 7 Hurlst. & Norm. 96. But interest is not recoverable as of course, though the jury may give interest, if the conduct of the master has been improper.

In estimating the value of his goods the charges which the owner would have had to pay for freight, etc., had they arrived, must be deducted. *Watkinson v. Laughton*, 8 Johns. 213; *Amory v. McGregor*, 15 id. 24. So, where the owner of a vessel contracts to carry goods to a certain port, and the voyage is abandoned in an intermediate port by reason of the unseaworthiness of the vessel, and the goods are sold there, the measure of the damages is the loss of the increased value of the goods at the place contemplated for their delivery by the contract. *Ib.*; *Wheelwright v. Beers*, 2 Hall, 391. In an action against a carrier,

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for his failure to deliver goods intrusted to him, interest is not allowable as a matter of law; but it is in the discretion of the jury to give or withhold it, according to circumstances. *Richmond v. Bronson*, 5 Denio, 55.

It has been held, that in an action against a common carrier for negligence in not carrying merchandise to market in a reasonable time, the plaintiff can recover as damages the difference between the price of the merchandise at the time when it should have been delivered, and the price at the time of its actual delivery. *Ward v. N. Y. C. R. R. Co.*, 47 N. Y. 29; S. C., 7 Am. Rep. 405; *Collard v. South-western R. R. Co.*, 7 Hurlst. & Norm. 79; *Sherman v. H. R. R. R. Co.*, 64 N. Y. 254; *Heineman v. Heard*, 2 Hun, 324; *Kent v. H. R. R. R. Co.*, 22 Barb. 278.

If there is a special and express agreement to deliver goods at a particular or specified day, and the contract is broken, the measure of damages is the difference between the contract-price of the goods, had they arrived on the day agreed, and the price for which they were actually sold in market at the time of their arrival. *Medbury v. N. Y. & Erie R. R.*, 26 Barb. 565.

In an action against carriers for delay in delivering goods, if it is not shown that the goods depreciated in value in consequence of the delay, the plaintiff cannot recover the value of the goods as though they had been converted, nor can he recover any damages except such as resulted directly and necessarily from the negligence and delay of the defendants, such as trouble and expense in procuring other similar goods for carrying on his business. *Briggs v. N. Y. Central R. R.*, 28 Barb. 515. In such a case, the plaintiff cannot recover for the time and expenses of an agent and team, while waiting for the arrival of the goods at the terminus of the carrier's route, without first showing that the defendants had notice, at the time of contracting for the transportation of the goods, that an agent of the plaintiff would be waiting there to receive them. *Ib.*

In an action for the refusal by the defendant to perform an agreement to transport corn from New York to Liverpool in his ship at a certain price the plaintiff is entitled to recover for his damages the difference between the contract-price and what he would be compelled to pay for the same service. *Ogden v. Marshall*, 8 N. Y. 340. In such an action, when a refusal to perform on the part of the contractor is shown, and it is proved that the price of transportation had risen, before the time the ship sailed, the plaintiff is entitled to his damages

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measured by the rise in price, without proving that he had the corn ready to ship. *Ib.*

In an action against an innkeeper for loss of goods committed to his care, the measure of damages is the actual value of the goods, and not the cost price. *Needles v. Howard*, 1 E. D. Smith, 54.

Liquidated damages. In the absence of any agreement upon the subject, the law fixes the amount of damages payable for the breach of a contract. But the parties may, by express agreement, provide for a different rule or measure of damages; and if, upon entering into an agreement, they stipulate that a definite sum shall be paid for a breach of it, such agreement is valid. And yet, notwithstanding the legality of such a stipulation, the courts sometimes refuses to carry the agreement into effect. Still there are some general rules which are observed and enforced by the courts. Under such circumstances, the most that can be done is to state those general rules, and then to cite those cases in which damages have been held to be fixed or liquidated, as well as those in which the stipulation is held to be a mere penalty.

Wherever the parties fix or settle the amount to be paid for the breach of an agreement, the damages are termed *liquidated, stipulated* or *stated* damages. The Court of Appeals have stated the rule upon the subject of liquidated damages as follows: 1. The language of the agreement is not conclusive, and the effort of the court is to learn the intent of the parties. Hence the term "liquidated damages" is not sufficient to control the construction, if the court can discover in the other parts of the instrument reason even to doubt as to the intention of the parties. 2. Where the word "penalty" is used it is generally conclusive against its being held liquidated damages, however strong the language of other parts of the instrument in favor of such construction. 3. If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or, as some judges say, can be easily ascertained by a jury), and made payable by the same instrument, then it will be treated as a penalty. 4. When the agreement is in the alternative to do an act or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money. 5. If the sum be evidently fixed to evade the usury laws, or any other statutory law, or to cloak oppression, the court will relieve by treating it as a penalty. 6. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated, if they are so denominated in the instrument. 7. If the language of the parties evinces a clear and undoubted intention to

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fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects. *Bagley v. Peddie*, 16 N. Y. 171, 172.

In the case last cited the plaintiff was a gold pen manufacturer, and to secure himself against having the secrets of his trade divulged, as well as against embezzlement, he required from one whom he employed a bond, with surety, which declared the obligor to be bound, "in the sum of \$3,000, as liquidated damages, and not by way of penalty or otherwise," for the performance of the covenants in the agreement by which he was employed. None of the covenants were for the payment of money, or for any other thing where the damages resulting from a breach could be computed from the instrument itself. One of the covenants was, not to reveal the secrets of the trade; and, in an action for a breach of this covenant, it was held that the damages were liquidated, and that the whole sum named was recoverable. And see *Price v. Green*, 16 Mees. & Wels. 346.

The courts have finally adopted the rule, that in the construction of a provision for the payment of a sum certain as the damages sustained for a breach of contract, the actual intention of the parties, so far as it can reasonably and fairly be ascertained from the language of the contract, and from the nature of the surrounding circumstances of the case, is to be considered. *Little v. Banks*, 85 N. Y. 258; *Colwell v. Lawrence*, 38 id. 71; *Cotheal v. Talmage*, 9 id. 551; *Noyes v. Phillips*, 60 id. 408; *Lampman v. Cochran*, 16 id. 275. This intention cannot be determined entirely by the use of the word "penalty," or the words "liquidated damages." *Colwell v. Lawrence*, 38 N. Y. 71; *Little v. Banks*, 85 id. 258; *Staples v. Parker*, 41 Barb. 468; *Beal v. Hayes*, 5 Sandf. 640. Nor is the word "forfeit" conclusive. *Noyes v. Phillips*, 60 N. Y. 408. The intention must be arrived at in view of the circumstances of each particular case. *Little v. Banks*, 85 N. Y. 258.

By a deed for the dissolution of a partnership between the plaintiff and the defendant, it was covenanted by the defendant that he would not at any time or times thereafter, within the next seven years, directly or indirectly, either by himself or in copartnership with another or others, carry on the business of an attorney or solicitor, within the distance of fifty miles named, nor interfere with, solicit, or influence the clients of the late partnership; and that if he should in any respect infringe that covenant, then he should immediately thereupon pay to the plaintiff the sum of £1,000 as and for liquidated damages, and not by way of penalty; and it was held that the sum of £1,000 was, upon

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the construction of this covenant, to be considered by the way of liquidated damages, and not as a penalty. *Galsworthy v. Strutt*, 1 Wels. Harl. & Gord. 659. So, where the defendant sold out his business, and his house and lot to the plaintiff, and covenanted in a bond that he would not locate himself *and* practice as a physician or surgeon in the same village, nor within six miles thereof, for the space of ten years, and that in case he should locate so *or* practice, he would pay to the plaintiff, on demand, \$500 for each and every month that he should so practice as a physician or surgeon, either in or within six miles of said village, it was held that practicing within such limits was a breach of the covenant, even though the defendant resided without the prescribed limits, and that the damages were liquidated, which entitled the plaintiff to \$500 for each month. *Smith v. Smith*, 4 Wend. 468; *Mott v. Mott*, 11 Barb. 127.

Where, from the terms of a contract, there is a manifest difficulty in ascertaining what damages will arise from a breach of it, and the fair and reasonable inference is that the amount is specified and agreed on for the purpose of saving the expense or avoiding the difficulty of proving the actual damages, there the parties should be held to their bargain; and this is especially the case where the amount fixed and liquidated is not far beyond what might naturally be expected to result from a breach of the contract. *Cotheal v. Talmage*, 9 N. Y. 551; S. C., 1 E. D. Smith, 573. And see *Lampman v. Cochran*, 16 N. Y. 275.

Where parties who contemplated a hazardous adventure in California made an agreement by which some of them agreed to go out there as a company, to mine for gold according to specified rules, and agreed to give the plaintiff, who was interested in the adventure, a bond to pay him \$500, as liquidated damages for a breach of the agreement, and the bond was given accordingly, in the penalty of \$1,000, conditioned for the payment of \$500, as liquidated damages upon a breach of the agreement, this was held to be a case of liquidated damages. *Ib.*

Where a contract is made to do a number of acts, and the damages which must result from the breach of the contract, are in their nature uncertain, and not calculable or ascertainable without a resort to evidence, and there is a provision that if either party fails to perform his covenants or agreements, the failing party shall pay to the other the sum of \$500, as liquidated damages, the parties will be held to have liquidated the damages at that sum. *Esmond v. Van Benschoten*, 12 Barb. 366.

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So, where a contract in its legal effect provides for a single act on either side, and is such that the damages, in case of a violation of it, will be uncertain in their nature and amount, and the parties have stipulated that in the event of a breach, a certain sum shall be paid by the party in default as liquidated damages, they will be regarded as having so intended, and that sum will be treated as the measure of damages. *Mundy v. Culver*, 18 Barb. 336.

When the intention of the parties is clear, and the agreement is legal and valid, it will be enforced by the courts without inquiring whether it was wisdom or folly for the contracting parties to make such an agreement. *Hosmer v. True*, 19 Barb. 106. Where the defendant held a lease, of which two years were unexpired, and he covenanted to assign it to the plaintiff by a specified day, and to deliver possession of the premises at that time, and in default to pay to the plaintiff the sum of \$500 as liquidated damages, this was held to be a case of liquidated damages, and upon a breach of the covenant the defendant was held liable to pay the full amount. *Knapp v. Malby*, 13 Wend. 587.

Where a purchaser of certain city lots, in consideration that they were sold to him at a low price, covenanted that he would grade the lots within a reasonable time, and, also, that he would build two houses on them by a certain day, or in default of building the houses he would pay the vendor the sum of \$4,000, on demand, as liquidated damages, it was held that the covenantee was entitled to recover the \$4,000 as liquidated damages, upon a breach of the contract by not building the houses. *Pearson v. Williams' Adm.*, 26 Wend. 630; S. C., 24 id. 246.

Where A., in consideration of \$500, paid by B., in full for fifty acres of land, covenanted to convey the land to B., by a good and sufficient deed, on or before a certain day, or in lieu thereof to pay him \$800, this was held to be liquidated damages, and not a penalty, and that B. was entitled, on a breach of the contract, to recover the \$800, with interest. *Slosson v. Beadle*, 7 Johns. 72. A contract was made between the plaintiff and the defendant for the sale and purchase of real estate. Both parties were to perform the contract on a specified day, on which the plaintiff was to pay \$4,000, to assign two mortgages, one for \$3,737, the other for \$1,000, to convey to the defendant a house and lot, and to deliver to him two promissory notes, to be made by the plaintiff, with a good indorser, for \$500; and on the same day the defendant was to execute a conveyance of the land specified. There was a clause as to damages as follows: "In case either of the said parties shall fail

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to keep, perform and fulfill the covenants and agreements herein contained, on his part to be kept, performed and fulfilled, the party so failing to perform shall pay to the other party the sum of \$2,000, which said sum is mutually agreed by and between said parties to be the ascertained and liquidated damages for such non-performance." In an action by the purchaser against the vendor, for his non-performance, it was held that the damages were liquidated at \$2,000, which sum the purchaser was entitled to recover. *Clement v. Cash*, 21 N. Y. 253, 258. The court said: "The present was a contract for the sale and transfer of real estate, where the damages resulting from a breach would be uncertain in their amount; and it is not to be supposed that the parties were not at least as well able to estimate the value of the bargain, and appreciate the consequences of failure to obtain the land on one hand, or the stipulated consideration on the other, as either judges or juries. The damages for non-performance were liquidated and fixed, if the language used by the parties to a contract can, in any case, fix the amount. It is precise and explicit, leaving nothing for construction or intendment. The parties declare, in language not capable of being misunderstood or misinterpreted, that they have ascertained and liquidated the damages at \$2,000, to be paid by the party failing to perform the agreement to the injured party. If they could do this, that is the sum to be treated as the measure of damages. That they could do it as respected a contract like the present is clear from numerous adjudications and upon principle." And see *Reynolds v. Bridge*, 6 Ell. & Bl. 528.

So, where, in a contract for the sale and conveyance of a farm, the parties agreed as to damages, thus: "the parties to these presents bind themselves, each unto the other, in the penal sum of \$200, as fixed and settled damages, to be paid by the failing party," this was held to be liquidated damages, and the purchaser to be liable for that amount upon a breach of the agreement on his part. *Brinkerhoff v. Olp*, 35 Barb. 27.

In a contract for the sale of personal property, which is to be executed at a future day, if there is a specified sum mentioned which is to be paid as damages in case of non-performance by the vendor, the sum so named will be considered as limiting the amount which the vendee can recover, whether the damages are regarded as liquidated or as a mere penalty. *Main v. King*, 10 Barb. 59.

A mere extension of the time for the performance of a contract is not a waiver of the right to recover liquidated damages. *Esmond v. Van Benschoten*, 12 Barb. 366.

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So, where an agreement provides for the completion of a specified undertaking by a fixed day, and there is a stipulation that the party who is to perform the work shall pay \$10 a day for each day that shall elapse after that day without a fulfillment of the contract, this will be considered liquidated damages, beyond which there cannot be a recovery. *Pettis v. Bloomer*, 21 How. 317.

Having examined some of the cases in which the damages were held to be liquidated, it now remains to examine some of the cases in which it was held that the stipulation was to be considered as a penalty, instead of liquidated damages.

In an action for the breach of a contract relative to the sale of lands, the contract provided that if either party was in default, he should "forfeit" to the other the sum of \$500, to be paid by the defaulting party, unless the default was occasioned by some cause beyond his control, it was held that this was a provision for a penalty, and not a case of liquidated damages. *Richards v. Edick*, 17 Barb. 260. And see *Davies v. Penton*, 6 Barn. & Cres. 216; *Kemble v. Farren*, 6 Bing. 141. Where a contract provides for the performance of a number of things on both sides and a certain sum is fixed to be paid by the failing party, it will be held to be a mere penalty, even though it may in terms declare it to be liquidated damages. *Id.*; *Lampman v. Cochran*, 16 N. Y. 275; S. C., 19 Barb. 388.

A contract which provides that the party who is guilty of a breach of it shall "forfeit" a fixed sum implies a penalty, and not liquidated damages. *Salters v. Ralph*, 15 Abb. 273. But see *ante*, 800.

Though the sum named in a submission to arbitration is stated to be "ascertained and liquidated damages," to be paid by the party refusing to abide by the award, it will be regarded as a mere penalty, and not as liquidated damages. *Spear v. Smith*, 1 Denio, 464. And see *Burgess v. Tucker*, 5 Johns. 105; *Hoag v. McGinnis*, 22 Wend. 163; *Dakin v. Williams*, 17 id. 447; *Astley v. Weldon*, 2 Bos. & Pul. 346.

However strong may be the language in which the parties have declared the sum to be stipulated damages, it will be considered as a penalty only, in all cases in which it applies to a variety of stipulations, differing in importance, and in all cases where, if construed as a debt, it would compel the payment of a larger sum for a default in the payment of a smaller one. *Id.*; *Beale v. Hayes*, 5 Sandf. 640; *Boys v. Ancell*, 5 Bing. N. C. 390.

An agreement was entered into by an attorney and his client, and the latter stipulated that he would forfeit \$100 in default of placing in the hands of the former certain specified claims for collection; this

was held to be a penalty, and not liquidated damages. *Mills v. Fox*, 4 E. D. Smith, 220.

§ 3. **Damages in actions for torts.** In most of the actions which are brought for the recovery of damages for torts committed, the measure of damages may be considered as settled. But, notwithstanding this is the general rule, there are some questions upon which the authorities are not entirely harmonious. In these actions, as in actions for the breach of contracts, the object of the plaintiff is to obtain such compensation or satisfaction as the law will give in the particular instance. As a general rule, in actions for torts, if there is no question of fraud, and there is no charge of willful injury, malice, or oppression, the measure of compensation is a matter of law. But on the other hand, where the wrongful act is accompanied by aggravating circumstances, or where the motive of the defendant is willful, fraudulent, malicious or oppressive, the amount of damages is left quite largely to the discretion of the jury, as will be more fully explained in a subsequent place. One of the first principles relative to damages in such cases is, that if the rights of another are illegally invaded, even though the act may have been done without any evil motive or design, the wrong-doer is still liable for the damages resulting from his wrongful acts. And this is the rule, although his injury may have been done accidentally, unless the act was the result of unavoidable accident. Vol. 2, pp. 548, 610.

The man who unlawfully enters upon the lands of another, upon a mistaken supposition that he had a right to do so, is as clearly a trespasser as he who enters with a full knowledge that he is a wrong-doer. So, too, the man who unlawfully takes or converts the personal property of his neighbor, in the mistaken belief that he is the owner, is as much liable in trespass or trover as he who committed the wrong intentionally. But although the motive in such a case does not affect the right of action, yet it may have an influence upon the question of damages, as we shall hereafter see when discussing that matter.

Trover. Where the plaintiff recovers a judgment in an action of trover, the general rule is that he is always entitled to recover the value of the property at the time of its conversion, and in some cases he is entitled to recover a greater sum. The rule of estimating the value of the article is sometimes important. Where a party has converted property, and he will not produce it, the presumption will be that the article was of the best quality and description. *Armory v. Delamirie*, 1 Strange, 505. In the case last cited the plaintiff had found a jewel, and he took it to the defendant, who was a goldsmith, to find out its

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value, and the defendant took the jewel out of the locket and refused to return it, though the locket was returned. In an action for the conversion, the plaintiff proved what would be the value of a jewel of the first water to fit the locket, but the defendant did not produce the jewel, and the court instructed the jury to find the value of a jewel of the first water as the measure of damages, which the jury did.

Again, it is frequently important to ascertain at what period of time the value should be fixed or determined in those cases in which there has been a change in the price or value of the article between the time of its conversion and the time of the trial.

The general rule is that the measure of damages in an action for conversion is the actual value of the property at the time of the taking with interest thereon from that time. As to this rule there is no controversy. *Wehle v. Haviland*, 69 N. Y. 448; *Kennedy v. Strong*, 14 Johns. 128; *Dillenback v. Jerome*, 7 Cow. 284; *Stevens v. Low*, 2 Hill, 132; *Manufacturers and Traders' B'k v. Farmers and Mechanics' Nat. B'k*, 60 N. Y. 40; *Ormsby v. Vermont Copper Mining Co.*, 56 id. 623; *Spicer v. Waters*, 65 Barb. 227.

In some cases, where the value of property is fluctuating, the value may be fixed at the time the owner is deprived of his property, or within such reasonable time thereafter as he might have replaced it. *Wehle v. Haviland*, 69 N. Y. 448; *Scott v. Rogers*, 31 id. 676; S. C., 4 Abb. Ct. App. 157. See *Gruman v. Smith*, 81 N. Y. 25. And there are cases in which the plaintiff has been allowed to recover the highest price which the property has reached between the time of the conversion and the end of the trial. These are cases in which the value of the property is fluctuating, and the action has been commenced and prosecuted with reasonable diligence. *Romaine v. VanAllen*, 26 N. Y. 309; *Lobdell v. Stowell*, 51 id. 70; *Markham v. Jaudon*, 41 id. 235; *Burt v. Dutcher*, 34 id. 493; *Wilson v. Mathews*, 24 Barb. 295; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *Willard v. Bridge*, 4 Barb. 361.

But these are exceptional cases, and do not apply where the value of the property is not subject to fluctuations, and the value of the property at the time of the tortious taking, with interest thereon, will indemnify the owner. *Wehle v. Haviland*, 69 N. Y. 448.

There are, undoubtedly, cases in which the distinction pointed out has not been observed, and the broad rule has been laid down, that the measure of damages in an action for conversion is the highest market price between the time of the conversion and the time of the trial. But this rule, which was long considered as the correct one, has been

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substantially overruled, and one more in accordance with justice and the proper protection of parties litigant has been inaugurated and approved. The later cases hold that the proper measure of damages in an action of conversion is an amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. *Whelan v. Lynch*, 60 N. Y. 469; S. C., 19 Am. Rep. 200; *Mechanics and Traders' B'k v. Farmers and Mechanics' Nat. B'k*, 60 N. Y. 40; *Baker v. Drake*, 53 id. 211; S. C., 13 Am. Rep. 507.

There are some cases in which the value of the property is enhanced by the acts of the wrong-doer. And the general rule is, that the party whose property has been tortiously taken is entitled to the enhanced value till it has been so changed as to alter the title. Where saw-logs are wrongfully taken and converted into boards and plank, the owner is entitled to recover the value of the boards and plank, and is not confined to the value of the logs either in the woods or at the place where they were sawed into boards and plank. *Baker v. Wheeler*, 8 Wend. 505; *Brown v. Saw*, 7 Cow. 95. In an action for logs which have been converted into lumber and sold at a distant market, the value may be estimated and fixed by introducing evidence of the value of the lumber at its place of destination, deducting the cost of manufacture and of transportation from the market value. *Brizsee v. Maybee*, 21 Wend. 144.

Where trees are wrongfully taken and converted into shingles by the wrong-doer, the owner may recover of him the enhanced value of the timber by estimating it at the value of the shingles. *Rice v. Hollenbeck*, 19 Barb. 664.

When property is taken by a willful trespasser, and it is converted by him into property of a different species, the title of the property will not be changed so long as the owner can identify the original materials which constitute the new or improved articles. *Silsbury v. McCoon*, 3 N. Y. 379. See vol. 2, pp. 566, 567, 568. The law, however, makes a distinction between a willful trespasser, and an involuntary wrong-doer. An intentional wrong-doer can never acquire a title to property, however great may be the changes which he makes to it, but it is otherwise with one who acts in good faith. A. agreed to tan a quantity of hides to be furnished by B., and return the leather to him. B. was to furnish the hides on a commission for buying, and a commission for guaranty and selling the leather. The hides were to be insured and charged to A., and, when the leather was sold, the net

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proceeds, after deducting costs, expenses, commissions, insurance, interest, etc., were to be the profit which was to accrue to A. for tanning the hides. This transaction was held to be a bailment, and not a sale to A., and that in an action by B. against A.'s assignees for a conversion of the property, the proper measure of damages was held to be B.'s interest in the hides, and not the enhanced value thereof when manufactured into leather. *Hyde v. Cookson*, 21 Barb. 92. But B. was allowed to recover the amount of the money paid by him, the commissions for buying the hides, the expenses, interest, and the commissions upon the value of the leather when ready for market. *Ib.*

In an action for the recovery of damages for the conversion of chattels, the plaintiff, if he shows a right of recovery, is entitled to recover interest on the value of the property from the time of the conversion. *Andrews v. Durant*, 18 N. Y. 496; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 53; *Baker v. Wheeler*, 8 Wend. 505; *Stevens v. Low*, 2 Hill, 133.

Interest from the time of the conversion is not a mere matter of discretion with a jury, but a matter of right; and it cannot be refused any more than the damages themselves. *Andrews v. Durant*, 18 N. Y. 496, 502. But in another case reported in the same volume, it was held that it was proper to submit the question whether they would allow interest. *Walrath v. Redfield*, 18 N. Y. 458, 462. The court said: "The jury were not instructed to allow interest, but its allowance was submitted to their discretion. There was no error in this. In general, in actions *ex delicto*, it is in the discretion of the jury whether to allow interest by way of damages or not." The most that this case really decides is that the submission of the question to a jury, and their allowance of interest is no error. It does not decide that the jury may refuse interest, unless that is to be inferred from the expression that interest is in the discretion of the jury. See also *Black v. Camden and Amboy R. R. and Transportation Co.*, 45 Barb. 40.

The plaintiff is not limited to the price which he may have paid for the property, but is entitled to the market-price at the time of the conversion. *King v. Orser*, 4 Duer, 431.

Where the vendor of goods disaffirms the contract of sale on the ground that the vendee has neglected or refused to perform the conditions which would entitle him to hold the goods, and such vendor then sues in trover for the goods, the measure of damages is the actual value of the goods, with interest. *Stevens v. Low*, 2 Hill, 132. The price agreed on is evidence of the value, but it does not estop the vendee from showing the actual market value. *Ib.*

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If a pledgee of stock wrongfully sells it, and when the pledgor offers to pay the debt, and requests a return of the stock, the pledgee puts him off from time to time with promises to replace it, and in the meantime it rises in value, the pledgor may recover the enhanced value. *Wilson v. Little*, 2 N. Y. 443; S. C., 1 Sandf. 351.

Where a constable levies upon property, and it is removed and converted by the defendant in the execution, if the officer brings an action against him he can recover merely the amount of the execution, and not the value of the property. *Spoor v. Holland*, 8 Wend. 445.

Where a person having a lien upon personal property brings an action against the general owner, the plaintiff can recover nothing more than his interest in the property, and not its full value. *Seaman v. Luce*, 23 Barb. 240; *Rhoads v. Woods*, 41 id. 471; *Russell v. Butterfield*, 21 Wend. 300; *Spoor v. Holland*, 3 id. 445; *Weaver v. Darby*, 42 Barb. 411.

But where the action is brought against a stranger who has no title or interest in the property, and who does not act under the authority of the general owner, the plaintiff is entitled to recover the full value of the property. *Alt v. Weidenberg*, 6 Bosw. 176.

In an action brought by a mortgagee of chattels against a receiver appointed in supplementary proceedings, for seizing, selling and converting the mortgaged chattels, the damages ought to be assessed as they would be in an action on the case for an injury to the plaintiff's reversionary interest, by confining the damages to the loss which the plaintiff has sustained by the dispersion of the property among the several purchasers. *Manning v. Monaghan*, 28 N. Y. 585; affirming S. C., 10 Bosw. 231.

Where property is assigned for the payment of some of the assignor's debts and his other creditors attach the property and take it out of the assignee's possession, and he establishes that the transaction was not fraudulent, but was valid, the assignee is entitled to recover the full value of the property attached, and not merely the amount of his debt. *Robbins v. Fitz*, 33 N. Y. 420.

Where a sheriff had levied upon certain personal property, upon an execution issued against B., and as being his property, and B. claimed the property by virtue of a bill of sale executed before the levy, and he thereupon brought an action of replevin against the sheriff, and obtained a delivery of the property to himself, but he failed in the action, and a verdict was rendered in favor of the sheriff for a return of the goods to him; it was held that the sheriff's damages were not limited to the amount of the execution held by him against B., but that he might

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recover the full value of the property. *Buck v. Remsen*, 34 N. Y. 383.

In an action by a mortgagee of chattels against the mortgagor, or a party having his rights, for a conversion of the mortgaged property, the mortgagee is not entitled to recover the full value of the property, but is limited to the amount of his debt. *Parish v. Wheeler*, 22 N. Y. 494. So, where the mortgagee sues a creditor of the mortgagor for seizing and selling the property on an execution against the mortgagor, where he has possession of the property after the mortgage becomes due, the mortgagee cannot recover more than the sum due on his mortgage. *Wood v. Combs*, MS., cited in *Chadwick v. Lamb*, 29 Barb. 522. So where a prior mortgagee claims chattels under a usurious mortgage, and an action is brought against him by a second mortgagee for a conversion of the property, the defendant will be regarded as the general owner of the property, and the plaintiff as only having a special interest, and he will not be permitted to recover more than the amount due upon his mortgage. *Chadwick v. Lamb*, 29 Barb. 518. See, also, vol. 2, p. 585.

The amount due on a note is the measure of damages for its conversion, unless payment, the insolvency of the maker, or some similar fact is shown to invalidate it. *Ingalls v. Lord*, 1 Cow. 240; *Thayer v. Manley*, 73 N. Y. 305; *Booth v. Powers*, 56 id. 22; *Potter v. Merchants' B'k*, 28 id. 641; *Neff v. Clute*, 12 Barb. 466. So, where the plaintiff made a promissory note, and the defendant wrongfully converted it by negotiating it before due, so as to charge the maker with its payment, it was held that the measure of damages was the amount of the note. *Decker v. Mathews*, 12 N. Y. 313; S. C., 5 Sandf. 439.

In an action to recover damages for the conversion of searches and abstracts of title, the measure of damages is the cost of procuring other searches similar to those converted. *Watson v. Cowdry*, 23 Hun, 169. It is a general and a well-settled rule that a return of converted property, and an acceptance of it by the owner, will not bar his action for the conversion, but merely go in mitigation of damages. *Hammer v. Wilsey*, 17 Wend. 91; *Wood v. Jackson*, 8 id. 10; *People v. B'k of North America*, 75 N. Y. 547; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 47; *Livermore v. Northrup*, 44 N. Y. 107. And see vol. 2, p. 549. And where the property is sold under an execution which was illegally issued, the acceptance by the owner of the surplus of the avails of the sale will not deprive him of his right of action, but merely go in mitigation of damages. *Brown v. Feeter*, 7 Wend. 301, 308. Where

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property is wrongfully taken, the subsequent appropriation of it by a sale under an execution in favor of the wrong-doer will not relieve him from liability for damages to the full value of the property. *Otis v. Jones*, 21 Wend. 394. And see *Hammer v. Wilsey*, 17 id. 91; *Wehle v. Butler*, 61 N. Y. 245. But where property which is unlawfully taken is afterward returned to the owner, before action brought, and he accepts it, the return and acceptance must be considered in mitigation of damages; and if a judgment is rendered in favor of the plaintiff for the whole amount, it will be erroneous and reversible upon an appeal. *Hibbard v. Stewart*, 1 Hilt. 207.

In an action against a corporation for a conversion of the plaintiff's stock, by refusing to issue or to transfer it, the measure of damages is not the subscription-money, with interest, but the value of the stock, or its highest price in market, at any time after the demand and a refusal to permit a transfer and to issue a scrip to the owner. *Arnold v. Suffolk Bank*, 27 Barb. 424.

A. bought some sheep on credit and left them with the vendor, who, without any default on the part of A., resold the sheep to a third person, and it was held that this was such a conversion of the sheep as entitled A. to maintain trover against the vendor; and that the measure of damages was not the value of the sheep, but the loss sustained by A. in not having the sheep delivered to him at the price agreed on. *Chinery v. Viall*, 5 Hurlst. & Norm. 288.

Replevin. The law relating to the right of action in replevin has been sufficiently noticed already. Vol. 2, pp. 630-644. And a few words in relation to the measure of damages is all that will be necessary upon the subject. In the first place, it is to be observed that there is one particular in which this action differs widely from ordinary actions. In most cases the plaintiff is the only claimant for damages; but in this action the defendant may claim damages in case he succeeds in the action.

When the plaintiff recovers judgment in the action his claim is for damages for the detention of the property, and, ordinarily, interest on the amount of the value of the property is the measure of damages. *Twinam v. Swart*, 4 Lans. 263; *Britzsee v. Maybee*, 21 Wend. 144. If the property has a usable value, the value of the use during the time of the detention is a proper item of damages. *Allen v. Fox*, 51 N. Y. 562; S. C., 10 Am. Rep. 641; *Keep v. Kauffman*, 6 Jones & Sp. 476; S. C. affirmed, 63 N. Y. 643. If the value of the property has been impaired during the detention the depreciation in value should be included as an element of damage in the assessment of damages

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caused by the detention. *N. Y. Guaranty and Indemnity Co. v. Flynn*, 55 N. Y. 653. But in the absence of proof that the damages are more or less than the interest on the value, the presumption is that the damages are the interest during the time the successful party was wrongfully deprived of the use. *Ib.*; *Keep v. Karuffman*, 6 Jones & Sp. 476; S. C. affirmed, 63 N. Y. 643.

If the plaintiff has only a limited interest in the property, he can recover only to the extent of his interest, as against the general owner, although, as against a mere wrong-doer, he may recover the full value. See *ante*, 230.

When the defendant succeeds in the action, he is entitled to a judgment in his favor for a return of the property, and, also, to recover his damages. And, if the goods or chattels have deteriorated in value, he is also entitled to such sum as will be equal to the value of the goods at the time they were taken, with interest on that value from the time of the taking. *Rowley v. Gibbs*, 14 Johns. 384.

Where exemplary or vindictive damages are not recoverable, and the remedy sought is merely pecuniary, the principle is that the owner must be fully indemnified, and that the wrong-doer must not be permitted to derive any benefit or advantage whatever from his wrongful act. *Suydam v. Jenkins*, 3 Sandf. 614. The damages, when limited to an indemnity, will be ascertained by adding to the value of the property, at the time the owner is dispossessed, the damages which he is proved to have sustained from the loss of its possession. *Ib.* And, to complete the indemnity, it is necessary to allow interest on the value of the property at the time of its wrongful taking, and from that time down to the day of the trial. *Ib.* So, compensatory damages, in addition to the interest, may be added to the value, where it is proved that it is necessary to afford a full indemnity. *Ib.*

Where it is shown that the owner would have derived a larger profit from the use of the property than the interest on its value, or that he had contracted to sell it to a solvent purchaser at an advance on its market-price, or that when the wrong was committed it was on its way to a profitable market, where it would have certainly arrived, in such cases the difference between the value at the time of the tort and the advance which the owner would have realized had he retained the possession, ought to be added to the value as compensatory damages, and interest is allowable on the aggregate. *Ib.* So, when it appears that the owner, in all probability, would have retained the property until the trial, and it is then of greater value than when he was dispossessed, the difference is a part of his loss, and may be added to the original

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value to complete his indemnity. *Ib.* The same rule applies where the evidence justifies the conclusion that the owner, had he kept the possession, would have obtained a higher price for it subsequent to the tort which deprived him of it. *Ib.* Even where exemplary damages are not claimed, the sum which the injured party is entitled to recover is not in all cases to be limited to an indemnity. *Ib.* He is entitled to recover, in all cases, the market value of the property at the time of the conversion, with interest, even where the amount, from special circumstances, may exceed that of his actual loss. *Ib.* So, where the wrong-doer has sold the property for a larger price than its value at the time of its conversion, the difference must be allowed as cumulative damages. *Ib.* So, where the wrong-doer retains the possession of the property at the time of the trial or judgment, and it is then of greater value than at the time of its conversion, the difference must be added to the sum that would be sufficient as an indemnity. *Ib.*

It may, therefore, be stated as the universal rule, that the amount to be recovered will be ascertained by adding to the value of the property, when the right of action accrued, such damages as shall cover every additional loss which the owner has sustained, and also every increase of value which the wrong-doer has obtained, or has it in his power to.

The highest price which the property has borne at any time between its conversion and the trial cannot, *in all cases*, be the measure of damages, since when it does not appear that this price would have been obtained by the owner, or has been obtained by the wrong-doer, the damages recovered by this rule would be vindictive, instead of remunerative. *Ib.* With still less reason can the value of the property at the time of the trial be assumed as the true and sole measure of damages, since this would cast the risk of the depreciation, deterioration or destruction of the property upon the innocent owner. *Ib.* In actions of tort, the value of the property, in estimating damages, is not always to be determined by its market-price. In some cases, as that of family pictures, plate, and the like, its value to the owner, by reason of personal or family considerations, ought to be considered by the jury, by exercising both a sound discretion and a reasonable sympathy with the feelings of the owner. *Ib.*

Where the defendant succeeds in the action, and the proceedings on the part of the plaintiff in taking the property have been fraudulent, vexatious or malicious, or if the defendant's proceedings have been of the same character, and the plaintiff succeeds, the jury may give exemplary damages against either the plaintiff or the defendant, as in cases

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of willful trespass. *Cable v. Dakin*, 20 Wend. 172; *Brizsee v. Maybee*, 21 id. 144.

Where the judgment is in favor of the defendant for a return of the property which has been taken on the plaintiff's replevin process, the plaintiff may show, in mitigation of damages, that the defendant repossessed himself of the greater part of the property shortly after it was replevied. *De Witt v. Morris*, 13 Wend. 496. The return of the property goes in mitigation of damages, in the same manner as in an action of trespass. *Ib.*

Trespass upon real estate. The cases in which trespass may be maintained for a wrongful entry upon real estate have been noticed in another place. Vol. 2, pp. 472-483. The general rule is that every wrongful entry upon lands lays a foundation for nominal damages, at the least. *Id.*, pp. 472, 473. And so it is also a general rule that the measure of damages is usually the amount of injury directly resulting from the act complained of. But where the conduct of the defendant has been malicious, willful or oppressive, the jury may give exemplary damages. In one case, the plaintiff, who was a gentleman of fortune, was shooting on his own estate, in a common field contiguous to the highway, when the defendant, who was a banker, a magistrate and a member of Parliament, who had dined and drank freely, after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to the plaintiff and told him he would join his party, which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot, and accordingly fired several times, upon the plaintiff's land, at the birds, which the plaintiff found, proposed to borrow some shot of the plaintiff, when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring an action. The witnesses described his conduct as being that of a drunken or insane person. Plaintiff conducted himself with the utmost coolness and propriety. The jury gave a verdict to the plaintiff for £500 damages, which the court refused to set aside. GIBBS, Ch. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages? To be sure, one can hardly conceive worse language than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving

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more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'here is a halfpenny for you, which is the full extent of all the mischief I have done.' Would that be a compensation? I cannot say that it would be." HEATH, J., said: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred, who would have behaved with the laudable and dignified coolness that this plaintiff did. It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." *Merest v. Harvey*, 5 Taunt. 442.

So, where the defendant came upon the sidewalk of the plaintiff, in a country village, and there remained, using offensive, vulgar, and vile language toward the plaintiff, and refusing to depart therefrom. The jury gave a verdict in favor of the plaintiff for \$20 damages, which was affirmed by the Supreme Court. *Adams v. Rivers*, 11 Barb. 390, 398. The court said: "The jury were not limited to mere compensatory damages, and the court could not have interfered had the recovery been five times as much as it was." In another case the defendant went to the plaintiff's office, and entered it, for the purpose and with the malicious intent of provoking a quarrel with the plaintiff's clerk, if the latter did not pay a small demand which the defendant claimed of him, and while in the office the defendant wrongfully and violently assaulted such clerk, and in an action by the plaintiff the jury gave the plaintiff a verdict of \$400, for the intrusion and trespass in the office, which was held not to be excessive damages. *Walker v.*

Wilson, 8 Bosw. 586. In the case just cited the conduct of the defendant was entirely inexcusable. He went into the plaintiff's office and demanded pay of the clerk, and on his statement that he could not pay, the defendant struck him several violent blows in the face, causing his nose to bleed copiously; called him harsh names; attempted to seize and arrest him; struck him several other blows; went out of the office, and threatened to go back and continue his violence; he also called the clerk a thief; and on the call of the clerk for assistance, several persons entered from the street. So, in another case, the wife of the defendant went upon the plaintiff's premises, and into his dwelling-house, and enticed a servant girl to leave the plaintiff's service; for this act a jury gave the plaintiff a verdict for \$20 damages, and this was held right. *Haight v. Badgley*, 15 Barb. 499. Again, in another case

 Nuisance.

the defendant threw poisoned barley upon the plaintiff's land and destroyed his poultry, and a verdict was given to the plaintiff, with £50 damages, which was sustained, upon the principle that the jury were not confined to the mere damages resulting from throwing the poisoned barley upon the plaintiff's land, but that they might consider the malicious motives of the defendant. *Sears v. Lyons*, 2 Stark. 317. And see *Matthews v. Fiestel*, 2 E. D. Smith, 90. But, while the laws thus permit a jury to assess damages with a liberal hand, in cases which call for the exercise of such a power, it must still be remembered that such damages are the exception and not the general rule. The recovery of punitive or vindictive damages is allowed in those cases only in which the act causing the injury was willfully done; where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or such a reckless disregard of the safety of person or property as is equally culpable. *Baldwin v. New York & Harlem Navigation Co.*, 4 Daly, 314; *Wallace v. Mayor of New York*, 2 Hilt. 441, 452; *Ives v. Humphreys*, 1 E. D. Smith, 197, 202, 203. For an involuntary trespass, or a trespass committed under an honest mistake, without any intent to injure, the damages should be confined strictly to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages, all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience. *Ib.* For a willful trespass, or a trespass committed in reckless or wanton disregard of another's rights, or accompanied by circumstances of cruelty, or oppression, or other particulars, showing the presence of malice or a corrupt motive, the jury may, and ought not only to give such compensation as above named, but also further damages in view of the aggravated character which the trespass then assumes, usually called "smart money," or "exemplary damages." *Ib.*

In an action of trespass on land, where the trespass complained of is the cutting and carrying away of timber, the measure of damages is the difference between the value of the farm with the timber, and its value after it was cut. *Argotsinger v. Vines*, 82 N. Y. 308.

Nuisance. The general rules of law relating to nuisances will be found elsewhere. Vol. 2, pp. 445-458. The general principles of law relating to the measure of damages in actions of trespass are equally applicable in actions for nuisances.

If the plaintiff's negligence contributed to the occurrence of the injury, or increased the injurious effect of it, this will be a matter to be considered. Vol. 2, pp. 590, 591. If the statute of limitations is

Negligence.

not pleaded, the plaintiff is not limited to damages sustained within six years prior to the commencement of the action. *Waggoner v. Jermaine*, 3 Denio, 306.

As a general rule the measure of damages in an action for a nuisance maintained upon the lands of the defendant is the difference in the rental value of the plaintiff's premises free from the effects of the nuisance and subject to it. *Francis v. Schoelkopf*, 53 N. Y. 152; *Wiel v. Stewart*, 19 Hun, 272. And see *Jutte v. Hughes*, 67 N. Y. 267; *Chipman v. Palmer*, 77 id. 51; *Ruckman v. Green*, 9 Hun, 225.

Negligence. In ordinary cases the measure of damages in actions for injuries resulting from negligence is limited to a reasonable compensation. In one case the defendant negligently left open a large hole in a sidewalk, into which the plaintiff fell and was severely injured. The judge, at the trial, charged the jury that they might give exemplary damages if they thought the defendant was guilty of gross negligence in leaving the sidewalk in that condition; but this instruction was held erroneous, and it was held that the only damages recoverable were such as were the legitimate and direct result of the accident. *Wallace v. Mayor of New York* 2 Hilt. 440.

So, in an action for damages for injuries resulting from a collision of vessels caused by the defendant's negligence, the plaintiff cannot recover, as damages, the probable profits which he might have realized from a return trip from a place to which his vessel was bound at the time of the occurrence of the injury. *Hunt v. Hoboken Land Improvement Co.*, 3 E. D. Smith, 144.

In an action brought to recover the value of fruit trees injured by fire through the negligence of the defendant it was held, that where the thing destroyed, although a part of the realty, has a value that can be accurately measured and ascertained without reference to the value of the soil in which it stands or out of which it grows, the recovery must be for the value, and not for the difference in value of the land before and after the destruction. *Whitbeck v. N. Y. C. R. R.*, 36 Barb. 644. But the case is different where the property injured is not nursery trees grown for market, but forest trees which are usually converted into timber or fire-wood and which are usually sold as they stand for that purpose. In such case the injury to the land becomes an element of damage; and it has accordingly been held, that in an action to recover damages for negligently setting fire to the woodland of the plaintiff and destroying part and injuring part of the wood growing thereon, the measure of damages is the difference in the value of the

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timberland as it was before and after the fire. *Bevier v. D. & H. C. Co.*, 13 Hun, 254. And see *Argotsinger v. Vines*, 82 N. Y. 308. Where the action is brought to recover damages for willful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages. *Emblem v. Myers*, 6 Hurlst. & Norm. 54, 60, and note. And see *Thomas v. Harris*, 3 id. 961; *Britton v. South Wales R. R. Co.*, id. 963.

Trespass to personal property. The principles governing a right of recovery in this action have been fully explained. Vol. 2, pp. 541-553. When this form of action is adopted under ordinary circumstances, and no matters of aggravation are shown, the general rule is the same as in trover, and the measure of damages is the value of the property, with interest. But where the conduct of the defendant has been willful, malicious, cruel or oppressive, the jury may give exemplary damages. *Craddock v. Goodwin*, 54 Tex. 578.

In an action of trespass for killing the plaintiff's horse, by beating it to death, the proof showed the horse to be worth \$50 or \$60; but the jury, under a charge of the court that they might allow *smart money*, gave \$75; and this was held right. *Wort v. Jenkins*, 14 Johns. 352. The court said: "The plaintiff proved the facts charged in the declaration, and with circumstances of great barbarity on the part of the defendant. We think the charge of the judge was correct; and we should have been better satisfied with the verdict if the amount of damages had been greater and more exemplary."

In an action for a willful trespass in overturning the plaintiff's wagon in the night-time, and breaking and injuring it, the proof showed the costs of the repairs to be \$3.37, but the justice gave judgment for \$5.89 damages, besides costs, on account of the willful injury; and this was held right. *Tift v. Culver*, 3 Hill, 180.

Where an officer having process for the collection of a fine or a judgment uses such process oppressively and vexatiously for the purpose of injuring the feelings of the party against whom it was issued, this is actionable, and the jury may give appropriate damages. *Rogers v. Brewster*, 5 Johns. 125.

Where a tenant who has held over, and has been dispossessed by virtue of a justice's warrant regularly issued, on the application of the incoming tenant, the latter is not liable to an action for assisting the officer in removing the goods, where this is done at the request of the officer; nor does an action lie for removing the goods on a rainy day,

 Actions against sheriffs and constables.

by putting the goods out in the rain, if they are put out in a careful and proper manner. *Higenbotham v. Lowenbein*, 28 How. 221. Such a warrant protects all who act under it, unless they act willfully and maliciously. And the law does not recognize the state of the weather at the time of executing such a warrant. *Ib.*

Where process is regular in form and issued upon a regular and valid judgment, but is executed in a place to which the process does not run, and out of the proper jurisdiction, the party whose goods are taken on it may recover the whole value of the goods, and not merely the amount of damages which he may have sustained by their being taken in a wrong place. *Sowell v. Champion*, 6 A.d. & El. 407.

If a sheriff or constable wrongfully seizes goods which are afterward taken from him by another wrong-doer, the owner of the goods may, in an action against such officer, recover as special damages, the amount necessarily paid to the latter wrong-doer to get the goods back. *Keene v. Dilke*, 4 Exch. 388.

Where the property of the plaintiff is sold under illegal process, and the sum demanded is raised by a sale of the property, which is bid off for the benefit of the plaintiff, by his agent and with his money, the measure of damages in an action for the wrongful sale is the amount of the bid with interest thereon, and not the value of the property. *Baker v. Freeman*, 9 Wend. 36; *Clark v. Hallock*, 16 id. 607; *Vedder v. Van Buren*, 14 Hun, 250.

Where a promissory note was left with an attorney for collection, and the maker of the note wrongfully took the note from the attorney's office, it was held, in action of trespass by the attorney, that he could not recover, as damages, the costs, whether incurred or prospective, of an action for the collection of such note. *Dumont v. Smith*, 4 Denio, 319.

In an action for the wrongful taking of personal property, where exemplary damages are not claimed, the actual cash market value of the property at the time of the taking, together with interest, is the measure of damages. But where the property is taken by an officer under an execution, and sold at public auction, the price which the goods brought is competent evidence upon the question of value. *Campbell v. Woodworth*, 20 N. Y. 499; reversing S. C., 26 Barb. 648. See *Hoffman v. Conner*, 76 N. Y. 121, *Knickerbocker Life Ins. Co. v. Nelson*, 78 id. 137; *Gill v. McNamee*, 42 id. 44; *Roe v. Hanson*, 5 Lans. 304; *Crouch v. Fitch*, 1 Abb. Ct. App. 475.

Actions against sheriffs and constables. Actions against ministerial officers are quite frequent; and there are several different classes of

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actions which are resorted to as occasion requires. Sometimes the action is for oppressive conduct, as has been already seen. *Ante*, 818. At other times the action is founded upon a neglect to execute process, or for permitting an escape from it, or for making a false return thereto. In all such cases the law gives a remedy to the injured party, by awarding such damages as ought to be given.

At common law, in an action against a sheriff for a negligent escape, upon mesne process, the measure of damages is the actual loss or injury sustained by the plaintiff; and *prima facie* the plaintiff is entitled to recover the amount of the judgment rendered against the prisoner, though the officer is entitled to give evidence as to the poverty of the prisoner, or other circumstances which tend to show the actual damages sustained. *Patterson v. Westervelt*, 17 Wend. 543. This is now regulated by the Code. That act provides that "where a prisoner in a sheriff's custody goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor in an action against him as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages or sum of money for which the prisoner was committed. Code of Civil Pro., § 158. When the escape falls within the second subdivision of the section cited, the insolvency of the prisoner is no defense. *Dunford v. Weaver*, 84 N. Y. 445.

Where a sheriff has suffered a prisoner to go or be at large, who has been committed to jail upon process for contempt for not paying a sum of money, the measure of damages in an action against the sheriff for the escape is the sum for the non-payment of which the prisoner was committed, and interest on that sum. Code of Civil Pro., § 157.

In an action for neglecting to levy, and for delaying to return an execution, the sheriff is *prima facie* liable for the whole debt, and his only mode of mitigating the amount of the recovery is by showing that he could not have collected it by exercising due diligence. *Bank of Rome v. Curtiss*, 1 Hill, 275; *Ledyard v. Jones*, 7 N. Y. 550; S. C., 4 Sandf. 67; *People v. Lott*, 21 Barb. 130. The plaintiff need not allege, or prove any special damages, because he is presumptively entitled to recover the amount of the entire judgment as damages. *Ib.*,

Actions against justice for false return. — Assessment of damages.

overruling *Stevens v. Rowe*, 3 Denio, 327. But the sheriff may show, if he can, that the defendant had no property, or not sufficient property, out of which to have satisfied the execution, even if he had used the diligence required of him by law. And if such proof is given, the plaintiff may rebut it by evidence on his part, and then the jury will be able to say, upon all the evidence, what damages the plaintiff has actually sustained. *Humphrey v. Hathorn*, 24 Barb. 278.

Actions against justice for false return. Where a justice of the peace makes a false return on appeal he is liable for any damages which a party to such appeal may sustain.

Thus, where a justice of the peace falsely returns that certain proof was not offered on the trial before him, or objected to or excluded, and the judgment is finally affirmed by the General Term, the rule of damages in an action against the justice for the false return is the amount of the recovery which was recovered against the plaintiff at the General Term, together with the amount for which the plaintiff is liable or has paid to his attorney. *MacDonell v. Buffum*, 31 How. 154.

The defendant, in an action pending before a justice of the peace, filed an answer in writing demanding judgment against the plaintiff for \$75 and costs. The plaintiff recovered a judgment in the action for \$49.95 damages and costs, from which judgment the defendant appealed to the County Court for a new trial. The justice did not return the original answer, but set out what purported to be a copy in the return, but which omitted the demand for judgment. It not appearing from the return that the amount in controversy was sufficient to entitle the defendant to a new trial in the County Court, he was limited to errors of law, and none appearing from the return the judgment of the justice was affirmed. In an action against the justice for a false return it was held that the plaintiff was entitled to recover at least the amount of costs paid in the County Court, and the reasonable and proper expense of the attempt to obtain the new trial. *Brooks v. St. John*, 25 Hun, 540.

§ 4. **Assessment of damages.** It is a general rule that no damages can be included in the judgment, unless they had accrued at the time of the commencement of the action. There are some cases, however, in which the damages are a mere incident or accessory to the principal, as where interest accrues on the demand sued on, in which cases interest may be computed down to the entry of judgment. So, in an action by a father against the seducer of his daughter, the plaintiff may prove, by way of aggravation of damages, any circumstances which are

Amount of damages. — Interest as damages. — Double and treble damages.

the natural consequences of the principal act, although they did not transpire until after the action was brought. *Hewit v. Prime*, 21 Wend. 79. But such cases are exceptions to the general rule, which excludes any damages accruing after the commencement of the action, and this is especially the case where a new action will lie for such accruing claim or demand. In actions of trespass, trover, or for torts generally, the damages should be limited to the commencement of the action, although this rule is not without exceptions in those cases in which the jury are permitted to give the value of the goods at any time previous to the trial. *Ante*, 806. Every continuance of a nuisance is a fresh nuisance, and there may be an action for each day's continuance of it, and the damages ought to be limited to the time of commencing the action. Vol. 2, pp. 454, 457, 458.

Amount of damages. The damages awarded must be such as the law allows, and such as are proved by the evidence; and where it is clear from the return that the judgment is for too great damages, it will be reversed. *Ely v. O'Leary*, 2 E. D. Smith, 355. So, on the other hand, if the damages allowed are evidently far less than the law allows, a new trial will be granted. *Robbins v. Hudson River R. R.*, 7 Bosw. 1. But in those cases in which the question arises upon an appeal from a judgment rendered in a justice's court, the general rule is that the appellate court has no power to reverse the judgment upon the ground that the damages are excessive, or that they are too small, unless some rule of law has been violated in the assessment of the amount. *Stephens v. Wider*, 32 N. Y. 351.

Interest as damages. Interest is sometimes payable by the express terms of the contract between the parties. But there are other cases in which there is no such agreement, and interest is not recoverable, except by way of damages. As to the subject of interest generally, see vol. 2, p. 137.

In actions upon contract, where there has been an express promise to pay interest, or where it is payable as a matter of right and of law, there interest must be allowed by way of damages, and if refused, it will be error.

In actions for torts, such as trespass, trover and the like, interest may frequently be given as damages. *Ante*, 808, 819.

Double and treble damages. At common law the damages are always single, but double and treble damages are, in some cases, given by statute. The jury may, in such cases, double or treble the damages themselves and the court will intend that they have done so, unless the verdict be, *in terms*, for single damages. *Livingston v. Plat-*

 Several defendants. — Remitting damages.

ner, 1 Cow. 175. But, to entitle the plaintiff to double or treble damages, the complaint must distinctly refer to the statute. *Ib.* The proper course is for the jury to find single damages, and then for the court to double or treble them, as the case may require, when judgment is rendered. *King v. Havens*, 25 Wend. 420. If the court refuses to render a judgment for the proper amount, the judgment will be reversible. *Ib.*

In an action of trespass, under a statute giving treble damages, judgment should be rendered for treble the amount of damages found by the jury when they find single damages. *Ib.* This was so held in an action for a trespass in cutting down six shade trees belonging to the plaintiff, and in which the jury assessed his single damages at \$30, the court holding that he was entitled to recover a judgment for \$90 on this finding. *Ib.* And see *King v. Havens*, 25 Wend. 420; *Jermain v. Booth*, 1 Denio, 639.

Several defendants. If several persons join in the commission of a trespass, and they are all sued, and a verdict found against all of them, the damages are not divisible, and the jury cannot assess different amounts against the several defendants; and if they should do so, the plaintiff may disregard the finding so far as to be entitled to have judgment against all for the largest amount found against any one of the defendants. *Beal v. Finch*, 11 N. Y. 128; *Bohun v. Taylor*, 6 Cow. 313; *O'Shea v. Kirker*, 4 Bosw. 120; S. C., 8 Abb. 70. There may be cases, however, in which the damages may be severed, as where one defendant is found guilty of a trespass at one time, and the other at another; or if one is guilty of a part of the trespass, and another of the other part; or if some are guilty of the whole trespass and others of a part only. But in actions in justices' courts such judgments would be quite unusual, even if they are ever entered. And where the trespass is not joint in all respects as to all the defendants, the proper course for a plaintiff will be to bring separate actions against the several defendants. And where injuries are done by animals there are cases in which a joint action does not lie. Vol. 2, p. 616.

Remitting damages. Where the jury find damages for a greater sum than that claimed in his complaint, the plaintiff may remit the excess if he chooses. Vol. 1, p. 44, § 3016. In such cases the judgment will be erroneous if it is entered for the full amount. *Dox v. Day*, 3 Wend. 356; *Fish v. Dodge*, 4 Denio, 311. And the rule is the same when the cause is first tried in a justice's court and then retried in the County Court on an appeal. *Ib.* It is true the Code provides liberally for amendments, even upon appeals, but this kind of amendment has

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not heretofore been favored unless upon the terms of granting a new trial. *Ib.* ; *Decker v. Parsons*, 11 Hun, 295 ; *Coulter v. American, etc., Ex. Co.*, 5 Lans. 67 ; *Corning v. Corning*, 6 N. Y. 97 ; *Bowman v. Earle*, 3 Duer, 691. Where the whole case has been fully and fairly tried before the justice, he would be authorized to allow an amendment of the complaint increasing the claim for damages, if done before the entry of judgment. But such an amendment would be wholly in his discretion, to be exercised according to the justice of the application.

So the justice may upon the trial allow an amendment of the complaint reducing the amount of damages claimed below \$50, although the effect of the amendment will be to deprive the defendant of a right to a new trial in the County Court. *Jaycox v. Pinney*, 62 Barb. 344.

CHAPTER VI.

JUDGMENT.

SECTION 1. What a judgment is. A judgment is the decision or sentence of the law, which is pronounced by a judge or court upon the matters contained in the record of an action which has been prosecuted or litigated before such judge or court. It is the final proceeding in an action at law, by which the court applies the law to the particular case presented before it, and specifically grants or denies to the plaintiff the remedy which he has sought by the action. And if the defendant sets up a claim by way of affirmative relief, claim, or defense, such right is also determined and declared.

There cannot be a valid judgment unless it is pronounced by a competent judge or court, at a time and place appointed by law, or in pursuance of it, and in the form which the law requires.

If there is not jurisdiction of the subject-matter, or of the person, or if the cause is tried out of the proper jurisdiction, the judgment will be void. *Ante*, pp. 12, 20, 23.

In every action which is prosecuted to its final termination, the litigant parties present to the court the facts to be considered, and the points of law to be resolved, and the judgment is the result of a full examination of all these matters.

But although the judge or court pronounces the decision, the judgment is really the sentence or decision of the law, and the judge or court is the mere instrument for expressing the determination of the law.

§ 2. Kinds of judgment. In justices' courts there are but few varieties in the mode of entering judgment, and these are very simple in form.

In courts of record there are several kinds of judgment which are appropriate and legal when applied to those courts, but which are not at all proper or applicable to justices' courts. And in discussing the subject under consideration, no explanation will be given of any judgments, except such as are appropriate to these courts.

In civil actions, judgments are usually divided into four classes or kinds :

1. When the facts are admitted by the parties, but the law is disputed, as in the case of a judgment upon demurrers, see *ante*, 341-344.
2. When the law is admitted, but the facts are disputed, as in the case

Judgment by default.

of a judgment upon a verdict. *Ante*, 744. 3. When both the law or the facts are admitted by confession of judgment, or by voluntary nonsuit. 4. By the default of either party in the course of the proceedings. But judgment by default is not entered in justices' courts, except upon a failure to answer a verified complaint which has been served with the summons.

These four species of judgments are again divided into such as are either *interlocutory* or *final*. An *interlocutory* judgment is one given in the course of a cause before final judgment. This form of judgment is rarely pronounced in a justice's court. There is one case, however, in which this is appropriate. When a pleading is demurred to, and the demurrer is sustained, the judgment is not final, but interlocutory, and it requires the party to amend his defective pleading. *Ante*, 341-344.

A *final* judgment is one which puts an end to the action. And when issues have been joined upon questions of fact, the jury or the justice try the issues and assess the damages, and the judgment is final in the first instance either that the plaintiff recover the damages assessed, or that the defendant is entitled to the sum claimed by way of set-off, etc. In all cases of final judgment the general rule is that the judgment rendered by the justice is peremptory, and is collectible of the goods and chattels of the unsuccessful party, whether plaintiff or defendant. There is an exception to this rule where the plaintiff sues as an executor or administrator, and a set-off is allowed. Vol. 1, p. 28, § 506.

§ 3. **Judgment by default.** In courts of record there are cases in which a judgment may be rendered against a defendant by default, provided he neglects or refuses to interpose a defense.

Before the change in the practice in justices' courts made by the act of 1881, a justice of the peace had no power to render a judgment against a defendant who had failed to appear or answer in an action, without first requiring the plaintiff to prove his cause of action, except in certain local courts. Vol. 1, p. 9, § 2891; *id.*, p. 39, § 2988. Not only was the plaintiff required to prove his cause of action, notwithstanding defendant's default, but he was required to prove it by legal evidence; and if the justice rendered a judgment for the plaintiff founded upon illegal or incompetent evidence, or upon insufficient evidence, it could be reversed upon appeal, although the defendant did not appear at the trial. *Armstrong v. Smith*, 44 Barb. 120; *Perkins v. Stebbins*, 29 *id.* 523; *Northrup v. Jackson*, 13 Wend. 85; *Squier v. Gould*, 14 *id.* 159; *Warnick v. Crane*, 4 Denio, 460; *Swift v.*

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Falconer, 2 Sandf. 640 ; *Carter v. Dallimore*, id. 222 ; *Jones v. Pridham*, 3 E. D. Smith, 155 ; *Alburtis v. McCready*, 2 id. 39 ; *Howard v. Brown*, id. 247 ; *Storp v. Harbutt*, 4 id. 464.

The practice in this respect is unchanged, except that where a complaint, duly verified, has been served with the summons in an action arising on contract, or on an account, and the defendant, at the time of the return of the summons, fails to file a written verified answer, or to demur to the complaint, the justice must, upon filing the summons and complaint, with due proof of the service thereof; enter judgment for the plaintiff against the defendant for the amount demanded in the complaint, with costs, without further proof. Vol. 1, p. 177 ; Laws of 1881, chap. 414. In such case, the failure to answer or demur is deemed an admission by the defendant of the truth of all the allegations of the complaint, and this implied admission takes the place of other proof.

The Code of Civil Procedure contains a somewhat similar provision for judgment by default in an action brought in a justice's court of the city of Brooklyn, to recover on or for the breach of a contract, express or implied. Vol. 1, p. 80, § 3126.

The proceedings to recover judgment upon the failure of the defendant to file a verified answer to a verified complaint are few and simple. The plaintiff should attend before the justice upon the return day of the summons, in person or by attorney. The constable will make his return of personal service of the summons and complaint upon the defendant, and this return will be sufficient evidence of such service. After waiting an hour for the appearance of the defendant, the justice should file the summons and complaint with the proof of service, and enter judgment for the plaintiff against the defendant for the amount demanded in the complaint, with costs. The proceeding will be the same in case the defendant appears upon the return day of the summons and neither demurs to the complaint nor files a verified answer in writing as required by the statute. An oral answer, or a written unverified answer, will not take the place of the written verified answer required by the statute, and prevent the entry of judgment by default. But before a judgment is rendered against a defendant who has interposed an unverified answer, or an answer defectively verified, the justice ought to point out to the defendant the failure to comply with the requirement of the statute, and give him an opportunity to correct the defect.

In case no verified complaint was served the summons and the defendant does not appear on the return day, and the plaintiff is then pre-

Judgment on issues of law. — Judgment on issues of fact.

pared to prove his case, he may proceed with the action by putting in his complaint, introducing his evidence, and taking judgment.

As to the power of the justice to relieve a defendant from the consequences of a default, see *ante*, 745.

The rule requiring a plaintiff to prove his case, does not extend so far as to require him to anticipate and negative a defense which might have been pleaded. *Humphrey v. Persons*, 23 Barb. 314.

§ 4. **Judgment on issues of law.** This subject has been sufficiently explained in a previous place. *Ante*, 341.

§ 5. **Judgment on issues of fact.** There are frequently several issues joined in an action. If the plaintiff's complaint contains several separate counts for different causes of action, and issue is taken upon each count, there will, of course, be several issues.

So, too, the defendant may interpose affirmative defenses, either as a bar to the plaintiff's claim or by way of set-off. In such cases there will be issues raised for trial. But, in whatever manner the issues may arise, the sole object of every issue is to present a matter for trial and judgment. The general rule is that judgment will be entered in favor of the party who prevails upon the whole record.

Suppose the plaintiff sues for several distinct trespasses, and he proves them all, but the defendant establishes a defense by way of accord and satisfaction to a portion of the causes of action, in such a case the plaintiff will recover judgment if there is but a single cause of action unanswered. Again, if the action is brought upon several separate promissory notes, and a defense is made out to a portion of them, but not as to all, in that case the plaintiff will have judgment for so much as is proved and unanswered.

The plaintiff may prove a cause of action against the defendant and yet the defendant may be entitled to judgment. For instance, if an order of arrest has been granted and executed in a case specified in subdivision third of section 2895 of the Code of Civil Procedure, the plaintiff cannot recover upon a default, and the defendant is entitled to judgment upon a trial, unless the plaintiff establishes all the matters of fact which are required by that subdivision to entitle him to an order of arrest. Vol. 1, p. 12, § 2903.

Further, suppose that the plaintiff sues upon claims which permit the defendant to interpose a set-off, and the set-off is set up in the answer. If the plaintiff's entire claim is proved or admitted it does not follow of course that he will recover judgment, for if the defendant establishes his set-off, and it is greater in amount than the plaintiff's de-

mand, the defendant will then be entitled to judgment for the balance due him. See vol. 1, p. 28, § 506 ; p. 29, § 2949.

In actions upon money demands, such as bills or notes, bonds, and the like, the judgment, if in favor of the plaintiff, is that he recover the amount due, with such legal damages as may be allowed by law, together with the costs of the action. If the judgment is in favor of the defendant, it is that he recover his costs, unless he has interposed and established a set-off for a greater sum than the plaintiff's demand, in which case judgment is entered in favor of the defendant for the balance, with costs. In actions upon contracts for the recovery of damages for a breach thereof, the plaintiff, if successful, recovers such damages as may be assessed by a jury or the justice, with costs. If the defendant succeeds, the judgment is for costs. So, in actions for torts the general rule is that the plaintiff, if successful, recovers the amount of damages assessed, with the costs of the action ; while, on the other hand, a successful defendant recovers judgment for his costs.

Judgment for the plaintiff, in an action upon a bond given by a third person claiming property which has been attached in an action in justice's court, must award to the plaintiff the value of the property seized and delivered to the claimant, with interest thereupon from the time of the delivery. Vol. 1, p. 16, § 2913.

The requisites of a judgment in an action to recover a chattel, with or without damages for the wrongful taking or detention, has been already noticed. See *ante*, 230. If, from a defect of proof, the plaintiff is nonsuited on the trial, the defendant is entitled to a judgment for the return of the property, without giving any proof of his title. *McCurdy v. Brown*, 1 Duer, 101. See vol. 2, pp. 642, 645.

§ 6. **Judgment on issues of law and of fact.** Where there are several separate causes of action set out in the complaint, there may be issues of law and of fact in the same action, since some of the causes of action may be demurred to, and issues of fact joined on the others. The mode of disposing of the issues in such a case is pointed out. *Ante*, 341.

§ 7. **Judgment of nonsuit.** There are several cases in which a judgment of nonsuit is required by statute. Vol. 1, p. 44, § 3013. But there are other instances in which a judgment of nonsuit must be rendered. If the plaintiff fails to sustain his action by proof at the trial, the justice may grant a nonsuit upon a proper motion, and a judgment of nonsuit follows, with the costs of the action. But there may be voluntary, as well as compulsory nonsuits, and, if the plaintiff is satisfied that the evidence is not sufficient to entitle him to a verdict,

Judgment of discontinuance.

he may elect to become nonsuited by withdrawing his action. But the plaintiff cannot submit to a nonsuit or withdraw the action after the cause has been committed to the jury. Vol. 1, p. 43, § 3007. And after the cause has been tried before a jury, and it has been submitted to them for decision upon all the evidence given by the parties, it will then be too late to take the cause from them and nonsuit the plaintiff upon the motion of the defendant. *Young v. Hubbell*, 3 Johns. 430. So, when an action has been tried before a justice without a jury, and the cause submitted to him for final judgment, it will afterward be too late for the plaintiff to withdraw the action and submit to a nonsuit. *Elwell v. McQueen*, 10 Wend. 519; *Shall v. Lathrop*, 3 Hill, 237; *Peters v. Diossy*, 3 E. D. Smith, 115; *Hess v. Beekman*, 11 Johns. 457. And, in such a case, if the justice should decide to grant a nonsuit, and should enter a judgment in form for a nonsuit, instead of on the merits, such a judgment will, nevertheless, be a final judgment, and be a conclusive bar to a second action for the same cause. *Ib.*

But a cause may be submitted conditionally, with a reservation of a right on the part of the plaintiff to withdraw the action; and if the parties agree to such an arrangement, it will be binding; and if entered into the justice's docket it becomes a part of the record, and cannot be contradicted by parol evidence. *Smith v. Compton*, 20 Barb. 262.

So, where a cause is tried before the justice without a jury, and a motion is made for a nonsuit, but the decision of the motion is reserved, the justice may grant a nonsuit within the four days. *Seaman v. Ward*, 1 Hilt. 52.

The mere submission of the cause to the justice for his decision, after the trial upon the merits, will not be a bar to a subsequent action in the event that no judgment is entered in pursuance of the first trial. *Young v. Rummell*, 5 Hill, 60; S. C., 7 id. 503. See vol. 2, p. 749.

When the docket of a justice shows that a judgment of nonsuit was rendered, parol evidence is not admissible to contradict it by showing that the cause was heard and decided upon the merits. *Brintnall v. Foster*, 7 Wend. 103. And see *Smith v. Compton*, 20 Barb. 262.

Where a justice improperly grants a nonsuit, and enters a judgment thereon, which is reversed on appeal, the justice cannot proceed with the case as though no nonsuit had been granted; but the plaintiff must bring a new action, if he wishes to prosecute the claim further. *Anonymous*, 9 Wend. 503.

§ 8. **Judgment of discontinuance.** There are several instances in which the statute requires the entry of a judgment of discontinuance. One instance is where an answer of title to land has been

Judgment, when to be rendered.

properly interposed to the whole complaint. Vol. 1, p. 30, § 2954. Another instance is where, upon the trial of the action, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400. Id., p. 29, § 2950. Another instance is where the defendant has established a counter-claim exceeding the plaintiff's demand, and amounting to more than \$200, and elects to have such judgment rendered. Id., § 2949. Another instance is where the defendant has established a counter-claim exceeding the plaintiff's demand, no part of which is due from the plaintiff, and elects to have such judgment rendered. Ib. A judgment of discontinuance is also proper when the justice is absent for more than an hour after the summons is returnable, or after the time to which the trial has been adjourned. See vol. 1, p. 63, § 3075; *ante*, 233. Or when the justice is disqualified for a reason specified in section 46 of the Code. See vol. 1, p. 106, § 46; id., p. 63, § 3075; *ante*, 46. Or where the defendant is an infant for whom no guardian *ad litem* has been appointed. Vol. 1, p. 63, § 3075; *ante*, 85.

A very informal judgment of discontinuance has been held sufficient where such judgment is the necessary consequence of the facts stated. *Bradner v. Howard*, 75 N. Y. 417.

The effect of a discontinuance is merely to terminate the existing action. It is no bar to a future action for the same cause for which the first one was instituted, though if rendered upon the ground that the justice had no jurisdiction, it will estop the defendant from claiming, in another action, that the decision was erroneous, and that the justice had jurisdiction. Ib.

§ 9. **Judgment, when to be rendered.** The statute has prescribed the times when judgment shall be rendered in the cases specified. Vol. 1, p. 44, § 3015.

In the following cases it must be done *forthwith*: 1. Where the plaintiff is nonsuited. 2. If he discontinues or withdraws his action. 3. Where judgment is confessed. 4. Where a verdict is rendered in favor of either party. 5. Where the defendant is in custody at the close of the trial. Ib.

In all other cases the justice must render the judgment within *four days* after the cause is finally submitted. Ib. A justice has four days in which to decide a summary proceeding instituted before him. *People v. Loomis*, 27 Hun, 328.

Where a judgment is rendered upon an offer made by the defendant, it must be done before answering in the action. See the practice in full; *ante*, 263 to 267.

 Judgment, when to be rendered.

Where a cause is tried before a justice without a jury, judgment must be rendered within four days after the submission for a final decision; and if it is not rendered until after that time it will be erroneous. *Watson v. Davis*, 19 Wend. 371; *Berrian v. Olmstead*, 4 E. D. Smith, 279; *Wiseman v. Panama R. R. Co.*, 1 Hilt. 300; *Bloomer v. Merrill*, 29 How. 259; 1 Daly, 485; *Fish v. Emerson*, 44 N. Y. 376; *Stephens v. Santee*, 49 id. 35.

The justice may take four days from the time when the cause was finally submitted for judgment. And where a cause is tried before the justice, and the evidence introduced, and the cause then adjourned by consent to a future day for summing up, the cause will not be considered as finally submitted until the summing up, and the justice may take four days from that time within which to render judgment. *Heidenheimer v. Wilson*, 31 Barb. 637.

If the fourth day falls on Sunday, judgment must be rendered on the day preceding; and if it is not rendered until the Monday following it will be erroneous. *Bissell v. Bissell*, 11 Barb. 96. And see *Ex parte Dodge*, 7 Cow. 147; *Youmans v. Simmons*, 7 Hun, 466; *Keating v. Serrell*, 5 Daly, 278. If the judgment appears upon its face to have been rendered upon Sunday, and is attacked for irregularity on that ground, upon appeal, the justice may show by his return that it was actually rendered on Monday, and dated on Sunday by mistake. *Ib.*

The decision of the justice must be evidenced by some official act; and it will be of no consequence that the justice decided the cause in his own mind, if he did not enter the judgment in his minutes or docket, or in some other legal manner. A decision in the mind of the justice is not a legal rendering of judgment, and will not constitute a judgment in law. *Seaman v. Ward*, 1 Hilt. 52; *Stephens v. Santee*, 51 Barb. 532. Although the statute is imperative as to the time within which judgment must be rendered, that does not prevent the parties from agreeing to extend the time beyond the limit of four days, and a stipulation that the justice may take any specified number of days instead of four for the purpose of rendering judgment will be valid and enforced by the courts. *Keating v. Serrell*, 5 Daly, 278; *Barnes v. Badger*, 41 Barb. 98. And where the parties have stipulated that the justice may take five days for the purpose of rendering judgment, and the judgment is rendered on the fifth day, the defeated party will be estopped from alleging that the judgment was not rendered in time. *Ib.* If the last day fixed by the stipulation falls on Sunday, the justice

Judgment, when to be rendered.

may lawfully render judgment on the day following. *Keating v. Serrell*, 5 Daly, 278.

When the action has been tried before a jury, and a verdict rendered, the statute requires that judgment shall be rendered *forthwith*. This statute is enforced quite strictly as to the *time* of rendering the judgment, but is interpreted quite liberally as to the *manner*. No legal judgment can be rendered upon the verdict of a jury after the day upon which the verdict was rendered. *Sibley v. Howard*, 3 Denio, 72. That is, the justice must complete the exercise of his judicial powers upon the day the verdict is rendered, though he may perform any merely ministerial act in relation to the judgment upon any day afterward. When a verdict has been received and entered in the docket of the justice, his only remaining judicial duty is to determine the amount of costs to which the prevailing party is entitled, and add this to the verdict. This must be done upon the day the verdict is rendered as it is a judicial act, and a part of the act of entering judgment. If this act is delayed until a day subsequent to that upon which the verdict was rendered, the judgment will be erroneous and may be reversed upon appeal. *Sibley v. Howard*, 3 Denio, 72. But if the justice upon receiving the verdict forthwith enters it in his docket-book, determines the amount of costs to which the prevailing party is entitled, adds the same to the verdict, and enters the amount under the entry of the verdict in his docket-book, this will be held to be a sufficient compliance with the statute to sustain the judgment on appeal, although the justice does not on that day enter in the docket the words "judgment for the plaintiff" or "judgment for the defendant" immediately preceding the statement of the amount of the verdict and costs. These words may be entered by the justice at any time, and may for the purpose of sustaining the proceedings be regarded as made. *Stephens v. Santee*, 49 N. Y. 35. So the statute requires the entry of the judgment in the docket-book. But the duty of making this entry has been held to be directory merely, owing to its ministerial character; and that although the statute prescribes four days as the time within which this is to be done, it is not a limitation upon the powers of the justice; and that a valid entry may be made afterward, if the judgment has been entered by the justice in his minutes of the trial in proper form and in due time. *Fish v. Emerson*, 44 N. Y. 376; *Walrod v. Shuler*, 2 id. 134; *Hall v. Tuttle*, 6 Hill, 38; *Dalton v. Loughlin*, 4 Abb. N. C. 187; *Goodrich v. Sullivan*, 1N. Y. Sup. Ct. (T. & C.) 191.

The statute authorizes courts to be open for the purpose of receiving a

Judgment, how rendered.

verdict or discharging a jury on Sunday, but prohibits the transaction of any other business on that day. Vol. 1, p. 105, § 6. A verdict rendered on Sunday is, therefore, valid, and a judgment rendered thereon upon the same day is invalid. *Hoghtaling v. Osborn*, 15 Johns. 119. The statute requiring a justice to render judgment forthwith in all cases where a verdict is rendered must harmonize with the provision which forbids the transaction of any business in court on Sunday. The justice must receive and record the verdict on Sunday, and render his judgment on the next day when business may be transacted. The time intervening between the rendition of the verdict on Sunday, and the action taken by the justice in rendering judgment on the following day, is to be regarded as a period during which his authority is suspended, to be resumed and continued when holy time has expired. *Allen v. Godfrey*, 44 N. Y. 433. If the justice assumes to enter judgment on Sunday, his act, being wholly void, will not affect the validity of a judgment entered upon the next day. *Ib.*

A statute which prohibits the service of process on Saturday upon such persons as keep that day as the Sabbath is not so construed as to invalidate a judgment rendered against such a person on Saturday, where the process had been regularly and legally served on a previous day. *Maxson v. Annas*, 1 Denio, 204.

And so a judgment may be legally rendered by a justice on the day of a general election, where the cause was tried before him and submitted on a previous day. *Rice v. Mead*, 22 How. 445.

Where it is sought to reverse a judgment on the ground that it was not rendered forthwith, the error must appear affirmatively, or the judgment will be affirmed. In one case the return stated that the cause was tried by a jury on the 11th day of March, and that the jury returned into court and rendered a verdict for the plaintiff, upon which the justice rendered judgment in favor of the plaintiff on the 12th day of March, and it was held that it might be fairly inferred that the verdict was not rendered until the 12th of March, although the trial commenced on the day preceding, and the judgment was affirmed. *Beatie v. Qua*, 15 Barb. 132.

§ 10. **Judgment, how rendered.** The statute provides that the justice shall enter his judgment in his docket-book. Vol. 1, p. 44, § 3015. The time when it must be entered has been considered in the preceding section. The correct practice is to enter the judgment in the docket in the first instance, promptly, and within the prescribed time.

The statute requires all legal proceedings to be in the English lan-

Judgment, how rendered.

guage. But where the essential facts of the judgment are intelligible it will be valid, notwithstanding the fact that some of the words are very incorrectly spelled. *Jackson v. Browner*, 7 Wend. 388.

There are some cases in which there may be separate judgments as to the several defendants. When the action is for a tort, and there are several defendants, there may be a judgment against some of the defendants and in favor of others. *Ballard v. Lockwood*, 1 Daly, 158; *Moon v. Eldred*, 3 Hill, 104; *Dominick v. Eacker*, 3 Barb. 18; *Noyes v. Hewitt*, 18 Wend. 141, 142, 143; *Van Deusen v. Van Slyck*, 15 Johns. 223. If there is no evidence whatever against one of the defendants in an action for a tort, the court should, if requested, direct the jury to find a verdict for such defendant, if the cause is tried by a jury; or he should, himself, discharge him if there is no jury. *Ib.* If, however, there is any evidence whatever the question must be submitted to the jury. *Ib.* In those cases in which the defendant is entitled to a discharge, it will be error to refuse it on a proper application. *Ib.* If the trial is by jury, and there is no evidence against one of the defendants, it will not be error for the justice to discharge him, instead of directing the jury to acquit him. *Noyes v. Hewitt*, 18 Wend. 141, 143. The correct practice, however, is to direct the jury to acquit him, which is done, as a matter of course, by the jury. *Ib.* Where the cause is tried by a justice without a jury, and a defendant is entitled to be discharged, this is usually done at the close of the plaintiff's evidence. *Moon v. Eldred*, 3 Hill, 104. But in all such cases of discharging a defendant there should be no judgment entered until the trial is completed. *Ib.* In one case the justice discharged one defendant at the close of the plaintiff's case, and entered judgment forthwith in favor of such defendant against the plaintiff for costs; and at the close of the trial the justice rendered a judgment of nonsuit against the plaintiff, and also entered up a judgment against him for costs in favor of the latter defendant; and this was held to be erroneous, upon the ground that no judgment should have been rendered until the trial was completed, and in that case if judgment was rendered in favor of both defendants against the plaintiff there could be but one judgment; while, if the judgment had been in favor of the plaintiff against one defendant, and against the plaintiff and in favor of the other defendant, there ought to be two separate judgments, one in favor of the plaintiff against one defendant, and the other in favor of the other defendant against the plaintiff, for costs. *Ib.* After the evidence is closed and the jury have retired, it is too late to move for the discharge of one of the defendants,

Form of the judgment.

on the ground that there is no evidence against him. *Labar v. Koplin*, 4 N. Y. 547.

There are also some cases in which there may be separate judgments even in actions upon contracts. If the action is brought upon a negotiable promissory note, and the makers and indorsers are joined, there may be a separate judgment against those who are proved liable, and a judgment in favor of those who show a valid defense, or against whom no cause of action is made out. *Parker v. Jackson*, 16 Barb. 33. And see *Bank of Attica v. Wolf*, 18 How. 102; *Zink v. Attenburg*, id. 108; *Wilklow v. Bell*, id. 397. The principle of the decision is that a separate judgment may be rendered in any case in which a separate action might have been brought. *Ib.* If several defendants are sued, and one of them pleads infancy, and proves it on the trial, the court may allow the plaintiff to discontinue as to him without costs, and proceed with the action against the others. *Butler v. Morris*, 1 Bosw. 329.

Although there is a joint contract by several persons, and one of them may have been released under the Joint Debtors Act, this will not prevent a recovery against the other parties. *Moss v. Jerome*, 10 Bosw. 220. But, in an action against several parties, who are charged as joint debtors or obligors, and where all are named as defendants, though but one is served with process, a several judgment cannot be given against the one served, where the plaintiff fails to show a joint liability on the part of the other defendants, and where a motion for a nonsuit on the part of the defendant served has been denied. *Sager v. Nichols*, 1 Daly, 1.

§11. **Form of the judgment.** The statute does not prescribe any particular form of entering judgments, though it requires the entry into the docket of certain specified acts and things. Vol. 1, p. 84, § 3140. The validity of a judgment does not depend upon a literal compliance with the terms of the statute; and if enough appears to show that the justice had jurisdiction of the parties to the action, and of the subject-matter, that the proceedings were regular, and the kind and amount of the judgment, and that it was rendered in due time, this will be sufficient. *Humphrey v. Persons*, 23 Barb. 314; *Hall v. Tuttle*, 6 Hill, 42, opinion. Technical precision in matters of form is not required in justice's court. *Bradner v. Howard*, 75 N. Y. 417. The correct practice however, is for the justice to carefully comply with the statute, and all questions as to the regularity or validity of the judgment in this respect will thereby be avoided. Ordinarily the justice is required to render judgment for the amount found and settled by the verdict of the jury, or the decision of the justice. But the party, whether plaintiff or defendant, may remit a portion of the amount found in his favor and

Form of the judgment.

take judgment for the residue, and the justice should render judgment accordingly. Vol. 1, p. 44, § 3016.

When a jury return into court with a verdict in favor of the plaintiff for a particular sum, the plaintiff may remit any portion of the amount and take judgment for the residue. *Clark v. Denure*, 3 Denio, 319; *Barber v. Rose*, 5 Hill, 76. So, where a jury rendered a verdict in favor of the defendant for a specified sum in an action of tort, where no sum could properly be found for the defendant, he may remit the amount and take judgment in his favor generally, and this will be regular. *Burger v. Kortright*, 4 Johns. 414. So, where the case is decided by the justice without a jury, either party may remit all, or a portion of the amount found, and take judgment for the residue. *Putnam v. Shelop*, 12 Johns. 435. There may be a judgment in favor of the defendant for the amount of a set-off proved by him, although the plaintiff may not have established any claim on his part on the trial. *Greenleaf v. Low*, 4 Denio, 168.

The statute requires that certain incidents of the action shall be entered in the docket-book kept by a justice of the peace. Vol. 1, p. 84, § 3140. The omission of the justice to make the entries required by statute is not a ground of action against him, even where the omission may have been the cause of loss to another. *James v. Hartney*, 6 Hill, 487. In the case just cited a constable had duly returned an execution, but the justice omitted to enter the return in his docket. An action was afterward brought against the constable for a neglect to return the execution, and he was unable to prove the return of it either by the justice or otherwise; but this was held not to give any right of action against the justice in favor of the constable.

The manner of entering in the docket the various proceedings in an action may not be familiar to every person, and for that reason a general precedent for such entries will be given.

Entries in justice's docket on jury trial.

IN JUSTICE'S COURT.

Bradford T. Simmons	}
agst.	
Peter L. Frederick.	

April 12, 1865, summons issued; returnable on the 20th instant, at one o'clock, P. M., at my office. April 20, summons returned, personally served, by John P. Albro, constable, on the 12th instant. Fees, \$0.50.

April 20, both parties appeared, the plaintiff in person, and the

Form of the judgment.

defendant by Richard H. Rosa, who produced a written authority (or who swore to his authority). Plaintiff complained on a promissory note executed by the defendant to him, and dated April 1, 1860, for \$25, payable one day after date, and also for goods, wares and merchandise sold and delivered to the defendant, and claimed damages to the amount of \$50.

The defendant answered, and denied each and every allegation in the complaint, and also claimed a set-off of \$25 for grain and wood sold and delivered to plaintiff, and also for work and labor performed for the plaintiff.

On motion of the plaintiff (or of the defendant), the action was adjourned to the 30th day of April instant, at one o'clock, P. M., at my office.

A venire was issued at the plaintiff's request (or at the defendant's) returnable at the time and place last mentioned.

April 30, the parties appeared at one o'clock, P. M., and proceeded to the trial of the cause. The following jurors were returned as summoned upon the venire by John P. Albro, constable. (Insert their names.) The following jurors who were returned as summoned, did not appear. (Insert their names.) The following jurors appeared. (Insert their names.) The following jurors were sworn to try the action. (Insert their names.)

Harvey Pixley and Jeremiah V. Marselis were sworn as witnesses for the plaintiff, and William Fry at the request of the defendant.

John Smith was offered as a witness on the part of the defendant, and objected to by the plaintiff (state the ground of objection), and rejected.

After hearing the evidence (and the arguments of counsel, if any), the jury retired under the charge of John P. Albro, a constable duly sworn for that purpose, and afterward returned into court, and the plaintiff having answered to his name when called, * the jury found a verdict for the plaintiff for \$50, damages, which was received April 30, 1865, whereupon, I did forthwith, and on the 30th day of April, 1865, render judgment for the plaintiff for

Damages	\$50 00
Costs (stating the items), total	5 00
	<u>\$55 00</u>

April 30, 1865, execution against property of defendant issued to John P. Albro, constable.

May 10, 1865, a notice of appeal was served on me by Richard H. Rosa, Esq., and my fees and the costs of the action paid to me. A copy of undertaking to stay proceedings was also served by him on me at the same time.

The precedent which has been given is merely intended to give a general idea of the manner of making entries in the justice's

Form of the judgment.

docket. And since each case has features peculiar to itself, so in each case the entries must conform to the facts as they actually occur.

If the cause is tried by the justice, without a jury, that fact will be evident by omitting any statements as to the jury.

The foregoing form will be a sufficient guide for ordinary cases; but since the change in the law which gives the justice jurisdiction in replevin actions, there are some forms of judgment which ought to be given for such cases.

Judgment for plaintiff in replevin where property was not delivered to him.

State the ordinary proceedings as in the foregoing form down to the *, and then proceed thus:

The jury found by their verdict that the plaintiff was entitled to the possession of the property described in the complaint; that the value of said property is \$100, and that the damages sustained by the plaintiff by the wrongful taking (or detention) were \$25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the plaintiff recover of the defendant the possession of the following described personal property (describing it), or the sum of \$100 in case a delivery cannot be had; and also that he recover \$25 damages, together with \$5 costs, amounting in the whole to \$130.

Value of property.....	\$100 00
Damages	25 00
Costs (stating the items) total.....	5 00
	\$130 00

Judgment for plaintiff in replevin where property was delivered to him.

State the facts as in the form, *ante*, 837, down to the *, and then proceed.

The jury found by their verdict that the plaintiff was entitled to the possession of the property described in the complaint; that the said property had been taken into the possession of the plaintiff, and that the damages sustained by the plaintiff by the wrongful taking (or detention) are \$25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the plaintiff retain possession of the following described property (describe it), and also that he recover \$25 damages, together with \$5 costs, amounting in the whole to \$30.

Damages	\$25 00
Costs (<i>by items</i>), total.....	5 00
	\$30 00

Form of the judgment.

Judgment for defendant in replevin where property was delivered to plaintiff.

State facts as in the form, *ante*, 837, down to the *, and then proceed as follows:

The jury found by their verdict that the defendant was entitled to the possession of the property described in the complaint; that the value of said property is \$100, and that the damages sustained by the defendant by the taking and withholding the same are \$25. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the defendant have a return of the following described personal property (describing it), or the sum of \$100 in case a return cannot be had; and, also, that he recover \$25 damages, together with \$5 costs, amounting in the whole to \$130.

Value of property.....	\$100 00
Damages	25 00
Costs (stating the items), total	5 00
	\$130 00

Judgment for defendant in replevin where property was not delivered to plaintiff.

State facts as in the form, *ante*, 837, down to the *, and then proceed as follows:

The jury found by their verdict that the defendant was entitled to the possession of the property described in the complaint, and that the said property has not been taken from the possession of the defendant. Whereupon I did forthwith, on the 30th day of April, 1865, render judgment that the defendant retain possession of the following described property (describe it), and, also, that he recover \$5 costs of the plaintiff.

Judgment in actions of tort, where one defendant is convicted and another acquitted.

State the facts as in the form, *ante*, 837, down to the *, and then proceed as follows:

The jurors found by their verdict that the defendant, A. B., committed the trespass (or converted the property, etc.), as alleged in the complaint, and they assessed the damages of the plaintiff at the sum of \$75; and the said jurors also found that the defendant, C. D., did not commit the trespasses (or convert the property, etc.), as alleged in the complaint. Whereupon I do forthwith, on the 30th day of April, 1865, render judgment for the plaintiff against the defendant, A. B., for \$75 damages and \$5 costs, amounting in the whole to \$80; and I did also forthwith, on the said 30th day of April, 1865, render a judg-

Form of the judgment.

ment in favor of the said defendant, C. D., and against the said plaintiff, for \$5 costs of the defense.

Where the action is for a tort, and some of the defendants are convicted and some acquitted, it will be very easy to state briefly what the finding actually was, and the judgment rendered thereon. And where the action is founded upon contract, and a verdict is found against some of the defendants, and in favor of others, as in the case of infancy, or of actions against the different parties to a bill or note, the findings and judgment may be readily stated.

In the forms given, it is stated that the *jury* found, etc. But if no jury is called, and the cause is tried by the justice, the statement will be that the justice decided, etc. And in every case the court will make the changes which may be found necessary in conforming the judgment to the facts found by the jury, or decided by himself.

When costs are allowed by law to the prevailing party, these costs must be included in the judgment. Vol. 1, p. 62, § 3074. And the *items* of costs allowed must be specified by the justice in his docket-book when he renders the judgment. Id., p. 64, § 3078. The determination of the amount of costs to be inserted in the judgment is as much a judicial act as the determination of the amount of damages to be inserted therein, and is a part of the act of rendering judgment. The entry of the items is the evidence of the judicial determination, and must be made in the manner and at the time required by the statute.

Entry in docket-book on judgment by default.

IN JUSTICE'S COURT.

Bradford T. Simmons	}
<i>agst.</i>	
Peter L. Frederick.	

July 22, 1882, issued summons returnable July 29, 1882, at 10 o'clock, A. M., at my office.

July 29, 1882, plaintiff appeared in person; defendant did not appear. John P. Albro, constable, made return that on the 22d day of July, 1882, he served said summons and the verified complaint thereto attached upon the defendant by delivering to and leaving with him true copies thereof. Fees, \$1. Complaint demands judgment against the defendant for \$34, claimed to be actually due from the defendant to the plaintiff, on a promissory note made by the defendant on the 12th day of January, 1879, whereby he promised to pay to the plaintiff, on demand, the sum of \$57, with interest. Filed summons and complaint, with constable's certificate of service indorsed thereon, and,

Opening or altering judgment.

the defendant having failed to answer or demur to said complaint, I did forthwith, on said 29th day of July, 1882, enter judgment for the plaintiff against the defendant for

Damages	\$34 00
Costs (by items). total.....	2 10
	\$36 10

July 28, 1882, issued execution against the property of the defendant to John P. Albro, constable.

August 9, 1882, execution returned satisfied, by John P. Albro, constable, who at the same time paid to me upon the execution, the sum of \$35.10.

§ 12. **Opening or altering judgment.** Where a judgment has once been regularly entered up by the justice, his powers cease; and he cannot open the judgment for the purpose of relieving the defendant from the consequences of a default, even though that occurred by reason of an excusable mistake or omission. *Alburtis v. McReady*, 2 E. D. Smith, 39; *Appleby v. Strang*, 1 Abb. 143; *Sperry v. Major*, 1 E. D. Smith, 361; *People v. Lynde*, 8 Cow. 133. So, where a judgment has been entered for a wrong amount, through inadvertence or otherwise, the justice has no power to change the amount, either by increasing or diminishing it. *Hardy v. Seelye*, 1 Hilt. 90; S. C., 3 Abb. 103. If the justice by mistake renders judgment for too large a sum, in consequence of errors in adding up the items of the demand, he cannot, afterward, correct the mistake by reducing the amount. *People v. Delaware Com. Pleas*, 18 Wend. 558. So, if a mistake is made in making up the items of costs, and the amount inserted in the judgment is less than that allowed by law, the error cannot be corrected by increasing the judgment. *Daruchy v. Brown*, 41 Barb. 555. In all such cases, whether the mistake makes the judgment for damages too large or too small, or whether the amount of costs is greater or less than allowed by law, the judgment, when once entered up, is conclusive, and cannot be altered by the justice.

While the justice has no right to correct any error or mistake in making up or rendering his judgment after it has been completed by entering it in the docket as rendered, yet when the mistake is in the entry merely, so that the judgment entered does not conform to the one actually rendered, then the entry may be corrected to make the judgment, as entered upon the docket, conform to that actually rendered. A mistake of that kind is merely clerical and may be corrected. *Christopher v. Van Lieu*, 57 Barb. 17, 30. For instance, if the jus-

Judgment by confession.

tice renders a judgment in favor of the plaintiff, but by mistake enters it in his docket as in favor of the defendant, he may correct the error. *Ib.* So, if by mistake he enters the judgment in his docket under the wrong date, he may correct the error so as to make the entry conform to the fact. *Keating v. Serrell*, 5 Daly, 278, 281. But if there is any question which it is the duty of the justice to pass upon and to embody his judicial conclusion in his judgment, he must perform this duty when the judgment is rendered, and if he omits it by mistake or otherwise, he cannot afterward supply the omission. *Carpenter v. Willet*, 1 Abb. Ct. App. 312; S. C., 31 N. Y. 90; 28 How. 225; 1 Keyes, 510. On the other hand, if, after the exercise of all his judicial duties in the matter of entering judgment, a mere ministerial duty still remains to be performed, this may be performed at any time before a transcript has been furnished to either party. Thus, if the cause has been tried by a jury, the verdict rendered, received and entered in the docket-book, the amount of cost determined, entered in the docket and added to the verdict, the judicial duties of the justice in the case are at an end, and the law makes a judgment for the amount so entered the only one he can render in the case. This amount he has no power or discretion to vary in any respect. But if he has omitted to state in the docket in whose favor the judgment is rendered, he may at any time afterward add the words, "judgment for plaintiff," or "defendant," as the case may be, so as to complete the entry in the docket, this being a mere ministerial act. *Stephens v. Santee*, 49 N. Y. 35.

There are cases in which a judgment may be opened by consent; and if this is done by the consent of the parties, and the cause retried and a judgment is rendered against the defendant he cannot allege the opening of the case as error. *Scranton v. Levy*, 4 Abb. 21. And where the cause is retried by the consent of both parties, it would be in accordance with well-settled principles to hold that both of them are estopped from subsequently questioning the regularity and validity of the proceedings. See vol. 2, p. 939, etc.

There are also certain local courts, exercising the general powers, and having substantially the same system of practice as justices' courts, which have the power of opening defaults in certain cases conferred upon them by statute. Vol. 1, p. 80, § 3128; *id.*, p. 180, § 5; Laws of 1880, chap. 344, § 16.

§ 13. **Judgment by confession.** The jurisdiction of a justice of the peace to render judgment upon the confession of a defendant has been considered elsewhere. *Ante*, 22. The power of one partner to

Judgment by confession.

bind his co-partner by a confession of judgment has also been discussed in another volume. Vol. 1, p. 536.

The Code of Civil Procedure clearly points out the proceedings necessary to a valid confession of judgment, and declares that a judgment confessed, otherwise than as prescribed in section 3011 of that act, is void as against every person, except a purchaser in good faith of property, real or personal, thereunder and the defendant making the confession. Vol. 1, p. 44, § 3012. A strict compliance with the requirements of the statute is, therefore, necessary.

In order to comply with the statute the defendant must personally appear before the justice. Vol. 1, p. 44, § 3011; *Tenny v. Fyler*, 8 Wend. 569; *Martin v. Moss*, 6 Johns. 126; *Bromaghim v. Throop*, 15 id. 476. And see *Colvin v. Luther*, 9 Cow. 61. Though it is not necessary that the judgment should be confessed at the justice's office or residence, *Stone v. Williams*, 40 Barb. 322, or even in the town where the justice resides. *Pollock v. Aldrich*, 17 How. 109. The confession must be in writing, signed by the defendant, and filed with the justice. Vol. 1, p. 44, § 3011. But if the confession is partly in writing and partly printed it will comply with the statute. *Id.*, p. 170, § 3343, subd. 23. This is all that is required to authorize the justice to render the judgment, if the judgment confessed is not for a sum exceeding \$50. If it exceeds that sum, the confession must be accompanied by the affidavit of the defendant and of the plaintiff, stating that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein, over and above all just demands which the defendant has against the plaintiff, and that the confession is not made or taken with intent to defraud any creditor. *Id.*, p. 44, § 3011. Upon receiving and filing the confession and the accompanying affidavits, if any, the justice may proceed to enter judgment for the amount confessed, if it does not exceed \$500, with such a stay of execution, if any, as is agreed upon by the parties to the judgment. *Id.*, p. 43, § 3010.

The requirement that there shall be a written confession, accompanied by the affidavit of the plaintiff and defendant when the sum confessed exceeds \$50, does not destroy the effect of an oral admission of indebtedness made by the defendant in open court upon the trial of a cause. Where an action is regularly commenced by the issuing and service of process, the defendant may appear in court and confess judgment orally, and without any affidavit of indebtedness, even when the amount of the judgment exceeds \$50. In such a case, if the defendant appears on the return day of the process, and, when the complaint is filed, he

Judgment by confession.

admits in open court that a specified sum is due from him to the plaintiff, and he consents that the justice shall render judgment for the amount, this may be done, and the judgment will be regular and valid. If, however, the proceedings are merely colorable, and are taken for the purpose of defrauding the creditors of the pretended debtor, the judgment will be void as to them. *Gates v. Ward*, 17 Barb. 424. And see *Beecher v. Kendall*, 14 Hun, 327, 329.

The effect of omitting to annex an affidavit to the confession, as required by the statute, is merely to render the judgment void as to creditors. *Stone v. Williams*, 40 Barb. 322. Notwithstanding such omission the judgment will be valid and binding upon the defendant. *Ib.*

There are cases, too, in which an affidavit may be dispensed with, even though the plaintiff's claim originally exceeded the sum of \$50. If the plaintiff's demand is a large one it may be divided into sums less than \$50 in amount, by the consent of the plaintiff and defendant, and then separate judgments entered upon each portion of it; and if this is done, and none of the confessions exceed \$50 in amount, there need not be any affidavit of indebtedness or of the justice of the claim. *Cornell v. Cook*, 7 Cow. 310.

Form of confession of judgment.

IN JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.	}	<i>Before DAVID KENNEDY, a justice of the peace of Mayfield, Fulton county, N. Y.</i>
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I hereby confess judgment in favor of John Doe, for the sum of \$500, and authorize the said justice to enter judgment against me for the same, with costs.

Dated the *15th day of April*, 1865.

RICHARD ROE.

In presence of DAVID KENNEDY, *Justice*.

Affidavit where the sum confessed exceeds fifty dollars.

(*Title of the cause.*)

(*Venue.*)

John Doe and Richard Roe, being severally sworn say, and each for himself says: that they are the parties plaintiff and defendant above named; that the said Richard Roe is honestly and justly indebted to the said John Doe in the sum of \$500 specified in the foregoing (or annexed) confession of judgment over and above all just demands which the said Richard Roe has against the said John Doe, and that

Transcripts of judgments.

said confession is not made or taken with intent to defraud any creditor.

(*Jurat.*)

(*Signatures.*)

Agreement to stay execution.

(*Title of the cause.*)

It is hereby stipulated and agreed by and between the parties above named that execution upon the judgment rendered by said justice upon the foregoing (or annexed) confession be stayed sixty days from the entry of said judgment.

(*Date.*)

(*Signatures.*)

Judgment upon confession.

(*Title of the cause.*)

The parties above named having personally appeared before me on this 15th day of April, 1865, and the defendant, Richard Roe, having by an instrument in writing, signed by him, confessed judgment in favor of said John Doe, plaintiff, for the sum of \$500, and the said parties having made an affidavit that the said defendant is honestly and justly indebted to the plaintiff in that sum over and above all just demands which said defendant has against the plaintiff, and that said confession is not made or taken with intent to defraud any creditor, and the said parties having agreed to a stay of execution for sixty days from the entry of judgment upon such confession, now after filing said confession, affidavit and agreement, judgment is hereby rendered in favor of the said John Doe against the said Richard Roe for the sum of \$500, with dollars costs amounting in all to with stay of execution for sixty days from the date hereof.

Damages..... \$500 00

Costs (giving the items), total.....

DAVID KENNEDY, *Justice of the Peace.*

§ 14. **Transcripts of judgments.** A justice of the peace who renders a judgment, except in an action to recover a chattel, must, upon the application of the party in whose favor the judgment was rendered and payment of the fee therefor, deliver to him a transcript of the judgment. Vol. 1, p. 44, § 3017. And in the cases specified in the statute, the justice must deliver to the successful party in an action to recover a chattel, a transcript of the judgment upon application, and the payment of his fees therefor. Id., p. 45, § 3019.

So a justice of the peace must furnish upon request and the payment of his fees, to any person interested in a judgment or order entered by him, a transcript of the judgment or order, together with all the entries in his docket-book relating to the cause; a copy of his minutes of the evidence in the cause, or the substance of the testimony, if he has not

taken minutes, and a copy of any paper on file in the cause; or such portions thereof as are required. *Id.*, p. 86, § 3149.

A transcript of a judgment rendered by a justice of the peace may in all actions, except an action to recover a chattel, be filed in the office of the clerk of the county in which it was rendered; and it then becomes the duty of the clerk to docket the judgment in his office. The judgment so docketed is thenceforth deemed a judgment of the County Court of that county. *Id.*, p. 45, § 3017.

So, where the justice has rendered a judgment for a chattel, which has been delivered to the unsuccessful party, or for the value thereof in case a return cannot be had, and the value exceeds \$25, the justice may deliver to the successful party a transcript of the judgment, stating the particulars thereof; and this transcript may be filed, and the judgment docketed in the office of the clerk of the county in which it was rendered. The judgment so docketed becomes a judgment of the County Court of that county. *Id.*, § 3019.

When a justice of the peace issues a transcript of a judgment rendered against a male defendant in an action to recover a fine or penalty; or to recover damages for a personal injury, or damages for an injury to property, including the wrongful taking, detention or conversion of personal property; or damages for misconduct or neglect in office, or in a professional employment; or damages for fraud or deceit, he must insert in the transcript the words "defendant liable to execution against his person," whether an order of arrest was granted and executed in the action or not. But this does not apply to a claim for damages in an action to recover a chattel. The same words must be inserted in a transcript of a judgment rendered against a male defendant in an action brought to recover for money received, or to recover a chattel, where it appeared that the money was received or that the chattel was embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association in the course of his employment; or by a factor, agent, broker, or other person in a fiduciary capacity, provided, however, than an order of arrest was granted and executed in the action, but not otherwise. *Id.*, § 3018.

When the justice issues a transcript of a judgment rendered in favor of the plaintiff in an action brought against two or more persons jointly indebted upon contract, and the summons has been served upon one or more of the defendants, but not upon all of them, he must distinctly designate in the transcript each defendant who was not summoned. *Id.*, §§ 3020, 3021. This may be done by writing opposite or under the

Setting aside docketed judgments.

name of each defendant upon whom the summons was not served, the words "not summoned." See vol. 1, p. 46, § 1936.

A justice of the peace, whose term of office has expired may make a transcript of a judgment rendered by him. Id., p. 47, § 3023. And whenever a justice refuses to give a transcript of the judgment to a party legally entitled thereto, the justice may be compelled to give it by *mandamus*. *People v. Lynde*, 8 Cow. 133.

A transcript, if intelligible in its essential parts, will be held sufficient, although written in bad English or worse Dutch. *Jackson v. Browner*, 7 Wend. 388. So it will be good although it does not show upon its face that the justice had jurisdiction. *Russell v. Rowland*, 6 Wend. 666.

A justice should enter his judgment in his docket-book before issuing a transcript. But if he has entered judgment upon his minutes of trial, a transcript taken from such judgment before it is entered in his docket-book will authorize the docketing and enforcement thereof as a judgment of the County Court. *Fish v. Emerson*, 44 N. Y. 376.

Form of transcript.

JUSTICE'S COURT.

John Van Slyke <i>agst.</i> Patrick MacCabe.	}	Before RICHARD MURRAY, <i>Justice</i> .
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FULTON COUNTY, <i>Town of Johnstown,</i>	}	ss. :
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Judgment rendered before me, as justice of the peace, for the plaintiff against the defendant, on the 24th day of July, 1882, for the sum of \$97.37, and for costs, \$4.23, in all \$101.60.* Fee for transcript to be added, twenty-five cents.

COUNTY OF FULTON, ss. :

I certify that the above is a correct transcript of a judgment, rendered by and before me, and now remaining unsatisfied upon my docket.

Dated the 28th day of July, 1822.

RICHARD MURRAY, *Justice of the Peace*.

If the action is such that the defendant is liable to execution against the person, insert at the* "defendant liable to execution against the person."

§ 15. **Setting aside docketed judgments.** The County Court has no power to inquire into the regularity or validity of a judgment rendered by a justice of the peace, in those cases in which a transcript has been docketed, and the injured party applies by *motion* for relief. *People*

Setting aside docketed judgments.

v. *Washington Com. Pleas*, 1 Wend. 79. In such a case, the judgment cannot be set aside for irregularities in obtaining it, though the court has power to control the execution issued upon such docketed judgment, and in a proper case, may set it aside. *Ib.* Where an injured party wishes to obtain relief against the judgment rendered by the justice, his remedy is by *appeal* and not by *motion*. *McCunn v. Barnett*, 2 E. D. Smith, 521. Filing a transcript makes the justice's judgment a judgment of the County Court, for the purpose of enforcing it, by execution and the like, but not for the purpose of investigating the manner in which the judgment was obtained.

CHAPTER VII.

COSTS.

SECTION 1. When the plaintiff is entitled to costs. In the absence of any special provision of law to the contrary, a plaintiff who recovers a judgment in an action in justice's court, whether it be upon the verdict of a jury or the decision of the justice, is entitled to costs, which must be included in the judgment. Vol. 1, p. 44, § 3014; *id.*, p. 62, § 3074. This is the general rule, and is subject only to the exceptions made by some special statutory provision.

In an action to recover one or more chattels the plaintiff may recover judgment for a part of the property in controversy, and yet may not be entitled to costs. If the plaintiff recovers all of the property in controversy, or its value, he will be entitled to costs under the general rule above stated.

So if he recovers a part of the chattels or of a chattel, or the value thereof, and the defendant also recovers a chattel or part of a chattel, or the value thereof in the same action, the plaintiff will be entitled to costs, unless the chattel for which the defendant recovers has been replevied and delivered to the plaintiff, in which case neither party can recover costs, but each must pay his own costs. Vol. 1, p. 63, § 3075.

A plaintiff cannot recover costs in an action brought upon a judgment of a justice of the peace, in the county in which it was rendered, within five years after the rendition thereof, against a defendant upon whom the summons was personally served, except when the justice who rendered the judgment is dead, or out of office, or otherwise incapable of acting, or has removed from the county; or where one of the parties has died, or where the docket of the judgment has been lost or destroyed. *Id.*, p. 87, § 3154. When the case falls within either of the exceptions contained in the section above cited, the plaintiff is entitled to costs under the general rule that the prevailing party is always entitled to recover costs unless there is an express provision of statute to the contrary. *Id.*, p. 62, § 3074.

Where the defendant has obtained leave to defend as a poor person, no costs can be recovered against him so long as the order granting leave is in force. *Id.*, p. 121, § 465.

§ 2. When the defendant is entitled to costs. In the absence of any special provision of law to the contrary, a defendant, who recovers

When neither party is entitled to costs.

a judgment in an action in justice's court, whether the judgment is rendered upon a verdict of a jury or the decision of the justice, is entitled to costs, and to have them included in the judgment. Vol. 1, p. 44, § 3014; *id.*, p. 62, § 3074.

The defendant is entitled to costs when the accounts of both parties, proved to the satisfaction of the justice upon the trial, exceed \$400, and a judgment of discontinuance is rendered against the plaintiff. *Id.*, p. 29, § 2950. So the defendant is entitled to costs where he succeeds in establishing a counter-claim which equals or exceeds the plaintiff's demand. *Id.*, § 2940. So the defendant is entitled to costs when a judgment of nonsuit is rendered upon the trial, upon a discontinuance or withdrawal of the action by the plaintiff, or upon the failure of the plaintiff to appear within one hour after the summons is returnable, or within one hour after the time to which the trial is adjourned. *Id.*, p. 44, § 3031. So where a plaintiff in an action against two or more defendants who are united in interest and have made separate defenses by separate answers, fails to recover judgment against all, the defendants who have judgment in their favor are entitled to costs. *Id.*, p. 64, § 3080.

Where there is but one plaintiff and one defendant, the costs are taxed in favor of the successful party and against the unsuccessful one. If there are several plaintiffs and several defendants, the recovery is generally in favor of all the plaintiffs and against all of the defendants, and the costs are taxed accordingly. Where there is a recovery by the plaintiff against one defendant, and a verdict or decision in favor of the other defendants, the justice should tax the costs in favor of the plaintiff and against the unsuccessful defendant, in the same manner as though there were no other defendant. And, on the other hand, he must tax the costs in favor of the successful defendant as though there were but one defendant. In such a case there will be but one entry of judgment, which will include a proper judgment in favor of each successful party. See a form of judgment, *ante*, 840.

When a plaintiff has obtained leave to prosecute an action, as a poor person, no costs can be recovered against him so long as the order granting leave remains in force. Vol. 1, p. 120, § 461.

§ 3. When neither party is entitled to costs. Costs cannot be awarded to either party, and each party must pay his own costs when the action is discontinued by the absence of the justice for more than one hour after the summons is returnable, or after the time to which the trial has been adjourned, or where the justice is disqualified, by reason of relationship, interest, etc., or where the action is discontinued

What costs the prevailing party is entitled to recover.

upon the ground that the defendant is an infant for whom no guardian *ad litem* has been appointed, vol. 1, p. 63, § 3075, or where the action is discontinued upon an answer of title to land accompanied by the proper undertaking, id., p. 30, § 2954, or where in an action to recover one or more chattels, the plaintiff recovers a chattel or part of a chattel, or the value thereof, and the defendant also recovers a chattel, or part of a chattel, which has been replevied and delivered to the plaintiff, or the value thereof. Id., p. 63, § 3075.

When an action brought by the district attorney of any county of this State to recover a penalty for the violation of the act for the preservation of game, Laws of 1879, chap. 534, is discontinued by him, no costs can be recovered by any defendant therein. Laws of 1880, chap. 531, § 6. Of course no costs could be awarded to the plaintiff in such case.

"Costs cannot be awarded to the plaintiff, in an action against a school officer, or a supervisor, on account of an act performed by him, by virtue of, or under color of his office ; or on account of a refusal or an omission to perform a duty enjoined upon him by law ; where his act, refusal or omission might have been the subject of an appeal to the State superintendent of public instruction, and where it is certified that it appeared upon the trial that the defendant acted in good faith. But this section does not apply to an action for a penalty ; or to an action or a special proceeding to enforce a decision of the superintendent." Code of Civil Procedure, § 3244.

"Costs cannot be awarded to the plaintiff, in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only ; unless the claim upon which the action is founded was, before the commencement of the action, presented for payment to the chief fiscal officer of the corporation." Code of Civil Procedure, § 3245 ; *Baine v. City of Rochester*, 85 N. Y. 523. And see *Childs v. West Troy*, 23 Hun, 68 ; *McClure v. Supervisors*, 50 Barb. 584 ; *McGaffin v. Cohoes*, 74 N. Y. 387, 390.

§ 4. **What costs the prevailing party is entitled to recover.** Costs consist of the fees allowed by law for services necessarily rendered in the action, at the request of the party entitled to costs, or paid by him as prescribed by law ; and of such other expenses as a party is entitled to include in his costs by express provision of law. Vol. 1, p. 62, § 3074.

The costs which are to be entered in the judgment are those which the prevailing party is entitled to recover against the losing party. If the plaintiff succeeds, none of the defendant's costs are taxed in the

What costs the prevailing party is entitled to recover.

judgment. So, if the defendant prevails, none of the plaintiff's costs can be entered in the judgment.

The law proceeds upon the theory that each party pays for such services as are rendered for him in the action as they are rendered or requested, and gives him the right to include these disbursements in the judgment for the purpose of rendering him whole. But if a party to an action in justice's court neglects to pay the fees allowed for services rendered for him, the other party may pay those fees; and if he recovers costs, the amount so paid must be taxed as a part of his costs. Vol. 1, p. 102, § 3229. Except in the case just stated, where a verdict is found for the defendant, the justice has no right to enter in the judgment the costs which had accrued on the plaintiff's part for the summons, the constable's fee for its service, or the fees for swearing the plaintiff's witnesses. *Penfield v. Carpenter*, 13 Johns. 350. So, on the other hand, where the plaintiff recovers judgment, the justice cannot enter in it charges for the subpoenas issued to the defendant. *Bronson v. Mann*, 13 Johns. 460; *Timmerman v. Morrison*, 14 id. 370. Nor can he, in such a case, include in the judgment the fees for swearing the defendant's witnesses; *Williams v. Sherman*, 15 Johns. 195; or the costs of an adjournment granted on the motion of the defendant. *Dennison v. Collins*, 1 Cow. 111. The costs of a venire, however, always abide the event of the action, and must, therefore, be always included in the judgment, let which ever party may succeed. *Rickey v. Bowne*, 18 Johns. 131.

When a warrant of attachment has been executed against a defaulting witness, and the witness has shown a reasonable and satisfactory excuse for his failure to attend, the party procuring the warrant must pay the fees of the justice and constable for issuing and serving it, and if he recovers costs, the amount of such fees must be allowed him as a part of his costs. Vol. 1, p. 35, § 2972.

Where an action has been commenced before one justice and has been continued by him before another, either because his term of office was about to expire, or he was about to remove from the town or city before final judgment, or because he was a material witness for the defendant, the costs recovered in the action will include the fees allowed by law for services performed by the constable and the justice before the transfer, together with the fees allowed by law for the proceedings before the justice to whom the cause is transferred. Id., p. 87, § 3152.

There are certain limitations imposed by the Code upon the amount of costs which may be awarded to the prevailing party. If a commis-

What costs the prevailing party is entitled to recover.

sion has been issued to examine a witness not a resident of the county, or of an adjoining county, or if there has been more than one adjournment granted upon the application of the party against whom the judgment is rendered, the lawful costs and fees for such commission, and for each of such adjournments exceeding one, are not to be included in making up the amount limited, but are to be allowed in addition of the sum fixed by the statute as the limit of the amount of costs recoverable. There are certain cases in which the justice may award to the prevailing party costs to the amount of \$10 besides the fees of witnesses, and the costs above stated, provided the items of cost properly taxable in favor of the successful party amount to that sum. Costs to that amount may be awarded upon the trial of an issue of law or of fact in the following cases :

1. When either party recovers damages to the amount of \$50 or more.
2. When either party recovers one or more chattels, the value of which, as fixed, together with the damages, if any, amounts to \$50, or more.
3. Where the defendant recovers judgment, and the sum for which the plaintiff demanded judgment was \$50 or more, or the value of all the chattels, to recover which the action was brought, was stated in the complaint at \$50 or more.

But the sum awarded as costs cannot exceed \$10, besides the items above mentioned, except where it is otherwise specially prescribed by law. Vol. 1, p. 63, § 3076.

In every other case the sum awarded as costs to the prevailing party cannot exceed \$5 besides the fees of witnesses attending from another county, and the cost of a commission or of adjournments as above stated, except where it is otherwise specially prescribed by law. *Ib.*

In an action to enforce a mechanic's lien under the act of 1880, chap. 440, the plaintiff may be allowed the expense incurred in serving by publication the notice by which the action is commenced, in addition to the amount of costs allowed in justices' courts. Laws of 1880, chap. 440, § 7. So, in an action brought in a justice's court of the city of Brooklyn, the amount of the recovery, or the amount sought to be recovered, or the nature of the action may be such that the prevailing party may have costs awarded to him greatly in excess of the limitation above noticed. See vol. 1, p. 81, §§ 3129-3133.

If a justice should err in taxing costs by allowing too great a sum, this will not be a ground of reversal of the judgment. If illegal fees or costs are allowed and collected, the injured party may recover them back by action. *Id.*, p. 64, § 3081.

What costs the prevailing party is entitled to recover.

There is one case in which the allowance of costs is discretionary. If an amendment of the pleadings is made after the joining of issue, and an adjournment becomes necessary in consequence thereof, the justice may impose costs as a condition of allowing the amendment. *Id.*, p. 27, § 2944.

The statute does not prescribe any particular items of costs allowable in such case, but leaves the amount discretionary with the justice. The object of the statute evidently was to give the justice power to require the party asking the amendment to obtain it upon such terms as should be just toward the opposite party. In fixing the amount the justice ought to be careful not to go to extremes, either by allowing an unreasonably large sum, or by giving so little as to be equivalent to a refusal of costs. The intention of the statute is that the costs thus allowed are to be paid immediately, since they must be paid as the *condition* of allowing the amendment. *Ib.* There is no provision for the entry of such an allowance in the judgment, and it could not be properly taxed as costs in the final judgment. And, besides that, the judgment itself might happen to be in favor of the party asking for the amendment; and, in that event, there certainly could not be an entry of the amount in the judgment, while there could not be a separate judgment in favor of the other party for the costs, as in the case of a defendant who obtains a verdict or decision in his favor.

In taxing the costs and fees allowed by law the justice will not require any proof of the right to their allowance in those cases in which the acts were performed to his personal knowledge, as in the case of witnesses sworn by him. In such a case, the witness' fees would be taxed without proof of the service of the subpoena. If, however, a witness had been subpoenaed, and had attended the trial, but was not sworn, the justice might require proof of the service of the subpoena.

Where the fees of officers are items of the taxable costs, their returns as to the amount are generally received as proper and legal evidence of the amount. In taxing costs the justice acts judicially. *Sibley v. Howard*, 3 Denio, 72. Until the items of costs and fees are considered and allowed they do not constitute any part of the judgment. *Ib.* Merely setting down certain items without adding them up within the time required by law is not taxing the costs in such a manner as to render them available as a part of the judgment. *Ib.* And see *ante*, 841.

The Code requires the justice to specify in his docket-book the items of costs allowed by him, and provides that before any item of costs is thus allowed other than a fee to the justice, or to a juror or witness

Increased or double costs.

who attended, or to a constable who has certified the amount of his fee upon a paper filed with the justice, the party must show by his oath, or that of his attorney, to the satisfaction of the justice, that the item was actually and legally paid or incurred. Vol. 1, p. 64, § 3078.

In taxing costs the justice should include such prospective costs as may be incurred in carrying the judgment into effect. He will, therefore, include the costs of entering the judgment, for issuing an execution, and for a transcript of the judgment in a proper case. If the judgment is paid before an execution is issued, the defendant is entitled to a deduction of the amount inserted for issuing the execution.

The fees allowed by law for services rendered by a justice, constable, witness or juror in an action or special proceeding brought before a justice of the peace, have been given in full in a prior volume; and want of space forbids a repetition of the same matter here.

For the fees of a justice of the peace in an action brought before him, see vol. 1, pp. 98, 99.

For the fees of a justice of the peace in a special proceeding or in an action not brought before a justice of the peace, see *id.*, pp. 99, 100.

For the fees of a constable for services rendered in an action brought before a justice of the peace, or in a justice's court of a city, see *id.*, pp. 100, 101.

For the fees of a constable in a special proceeding, see *id.*, pp. 101, 102.

For the fees allowed for taking the deposition of a witness upon a commission, see *id.*, p. 102.

For the fees of a juror or witness, see *id.*, p. 102.

For the fees of a private person for subpoenaing a witness, see *id.*, p. 101.

§ 5. Increased or double costs. In certain cases a defendant in whose favor judgment is rendered in an action in a justice's court may recover his ordinary costs, and one-half of the same in addition, or what is commonly called double costs.

To authorize the justice to award such costs in any case, the complaint must either demand judgment for a sum of money only, or to recover a chattel; and the defendant must not have joined in his answer with a person not entitled to such costs. In addition to this the following facts must exist:

1. The defendant must be or have been a public officer appointed or elected under the authority of the State, or a person specially appointed according to law to perform the duties of such an officer, and the action must have been brought by reason of an act done by him by vir-

Treble costs.

tue of his office, or an alleged omission by him to do an act which it was his official duty to perform ; or,

2. The action must have been brought against a defendant by reason of an act done by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment ; or,

3. The action must have been brought against the defendant, for taking a distress, making a sale, or doing any other act by or under color of authority of a statute of the State. Vol. 1, p. 64, §§ 3079, 3258. And see *Porter v. Cobb*, 25 Hun, 184.

Section 3259 of the Code of Civil Procedure given in connection with the section above cited is not made applicable to justices' courts.

A party who is entitled to double costs may waive his right to them by the mode of presenting his defense. If an officer or other person, who is entitled to double costs, is sued jointly with others, and he answers jointly instead of separately, he will lose his right to double costs, although the verdict is in favor of all the defendants. *Wales v. Hart*, 2 Cow. 426 ; *Bradley v. Fay*, 18 How. 481.

A party who is sued in a justice's court as a public officer is entitled to double costs if he succeeds in his defense ; and if the fact that he is such an officer does not sufficiently appear from the pleadings, the justice may, before rendering judgment, and in the presence of the parties, hear the evidence of the defendant as to that fact, and as to his right to double costs. *Fuller v. Wilcox*, 19 Wend. 351. If the justice should allow too large sum by way of double costs, this would not be a ground of reversal. *Ib.* The remedy, in such a case, is by an action for the recovery of such amount as is illegally collected. *Ib.* But even if the court had power to reverse a judgment for the allowance of illegal fees, it would not be sufficient to show merely that the sum allowed was greater than the ordinary sum specified by statute, because the intendment would be that there were foreign witnesses, or the like, which would be legally taxable notwithstanding the judgment might be for more than \$5 cost. *Ib.* After a justice has once taxed the costs in an action, and entered up a judgment for the damages and costs, it is too late for him then to alter the amount either by increasing or reducing the same. *Dauchy v. Brown*, 41 Barb. 555.

§ 6. Treble costs. In a few cases, under some special statutory provision, a defendant may be entitled to recover treble costs.

Thus, when a person is sued for putting in execution the provisions of the statute in relation to brokers and peddlers, or for doing any matter or thing pursuant to its provisions, and the plaintiff does not succeed

In the justice's court of Albany. — Where the people are a party.

in the suit, the defendant is entitled to recover treble costs. See 1 R. S. 576, 577, §§ 8-12.

In *Patchin v. Parkhurst*, 9 Wend. 443, it was held that treble costs means common costs, and seventy-five per cent of that amount added thereto. But in the more recent case of *Walker v. Burnham*, 7 How. 55, it was held that the term "treble costs" is to be understood literally and the costs are to be actually trebled.

§ 7. **In the justice's court of Albany.** In the justice's court of the city of Albany no costs or fees are allowed for services rendered by the court or by a justice in any civil *action* therein; but in all civil actions in which an issue of fact is tried the prevailing party is allowed an attorney's fee by way of indemnity for his expenses. The amount so allowed depends upon the amount involved in the action, which is estimated upon the recovery, when the plaintiff is the successful party, and upon the amount claimed in the complaint, when the judgment is in favor of the defendant. This fee is included in the judgment, as in actions in the Supreme Court. Vol. 1, p. 179, § 2.

§ 8. **Where the people are a party.** Where costs are awarded against the people of the State in an action or a special proceeding brought by a public officer, pursuant to any provision of law, and the proceedings have not been stayed, by appeal or otherwise, the controller must draw his warrant upon the treasurer, for the payment of the costs, out of any money in the treasury, appropriated for that purpose, upon the production to him of an exemplified copy of the judgment, or order awarding the costs, and, where the amount is not fixed thereby, of a taxed bill of costs; accompanied, in either case, with a certificate of the attorney-general, to the effect that the action or special proceeding was brought pursuant to law. The fees of the clerk, for the exemplified copy, must be certified thereupon by him, and included in the warrant. Code of Civil Pro., § 3241.

Where an action is brought, in the name of the people of the State, upon the relation of a private corporation or individual, as prescribed in section 1986 of this act, a judgment, awarding costs to the defendant, must award them against the relator, in the first instance; and against the people, only in case an execution, issued thereupon against the property of the relator, is returned unsatisfied. *Id.*, § 3242.

In an action or a special proceeding, brought in the name of the people of the State, to recover money or property, or to establish a right or claim, for the benefit of a county, city, town, or village, costs shall not be awarded against the people; but, where they are awarded to the

In actions by executors, etc. — In actions by a transferee, etc. — Security for costs.

defendant, they must be awarded against the body for whose benefit the action or special proceeding was brought. Id., § 3243.

§ 9. **In actions by executors, administrators, etc.** In an action brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of this act; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid by the party personally, for mismanagement or bad faith in the prosecution or defense of the action. Id., § 3246.

§ 10. **In actions by a transferee, etc.** Where an action is brought in the name of another, by a transferee of the cause of action, or by any other person, who is beneficially interested therein; or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action; the transferee, or other person so interested, is liable for cost, in the like cases, and to the same extent, as if he was the plaintiff; and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them. Except in a case where he could not have been lawfully directed to pay costs, personally, if he had been a party, as prescribed in the last section, his disobedience to the order is a contempt of court. But this section does not apply to a case where the person so beneficially interested is the attorney or counsel for the plaintiff, if his only beneficial interest consists of a right to a portion of the sum or property recovered, as compensation for his services in the action. Id., § 3247.

§ 11. **Security for costs.** As a general rule a justice has no power to make an order for security for costs. *Payne v. Hathaway*, 4 N. Y. Leg. Obs. 21; *Mellen v. Hutchins*, 8 Abb. N. C. 228. And a County Court cannot require security for costs to be filed in an action commenced in a court not of record. Ib.

But when an action is brought by a society in its own name to recover a penalty for a violation of the game laws, security for the costs of the action must be given by the plaintiff. Laws of 1879, chap. 534, § 33.

CHAPTER VIII.

EXECUTION.

SECTION 1. Nature of the mandate. In practice, an execution is the act of carrying into effect the final judgment of a court, or other jurisdiction. But the term is usually applied to the instrument employed; and an execution is generally understood to be the judicial writ or process which is founded upon a judgment obtained in a civil action, and issued by the court, or its officers, in behalf of the party recovering such judgment, for the purpose of obtaining the satisfaction or full benefit of it. Every execution is deemed the process of the court from which it is issued.

§ 2. **Kinds of execution.** In justice's court there are three kinds of execution, one against property, one against the person, and one for the delivery of the possession of a chattel with or without damages for withholding the same.

§ 3. **Forms and requisites of executions.** An execution issued by a justice of the peace must be signed by him, and must be entirely filled up at the time when it is delivered to an officer to be executed so as to have no blank in its date, or otherwise. If it is not so signed and filled up when delivered to be executed it is absolutely void. Vol. 1, p. 83, § 3136. It must be directed generally to any constable of the county. It must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the name of the justice by whom the judgment was rendered; and it must be made returnable to the justice within sixty days after its date. Id., p. 48, § 3025. If it is issued upon a judgment for a sum of money, it must specify in the body thereof the sum recovered, and the sum actually due upon the judgment at the date of the execution, and except in a case where special provision is otherwise made by law, it must substantially require the constable to satisfy the judgment, together with his fees, out of the personal property of the judgment debtor within the county not exempt from levy and sale by virtue of an execution, and to bring the money before the justice by the return day of the execution, to be rendered by the justice to the party who recovered the judgment. Id., § 3026. These are the requirements of an ordinary execution against the property of the judgment debtor.

Forms and requisites of executions.

Execution against property.

FULTON COUNTY, }
 Town of Johnstown, } ss. :

The People of the State of New York, to any constable of said county, greeting :

WHEREAS, judgment was rendered on the 26th day of July, 1882, before me, the undersigned, as justice of the peace, in favor of John Doe, plaintiff, against Richard Roe, defendant, for \$146.84, damages, and \$4.46, costs, and there is actually due upon said judgment at the date of this execution the sum of \$151.30, damages and costs, with interest from the 26th day of July, 1882:

These are, therefore, to require you, the said constable, to satisfy the said judgment, together with your fees,* out of the personal property of the judgment debtor within the county, not exempt from levy and sale by virtue of an execution;* and to bring the money before me, as such justice, by the return day of this execution, to be rendered by me, as such justice, to the party who recovered the said judgment.†

This execution is returnable to me, the said justice, within sixty days after its date.

Dated at the town of JOHNSTOWN, this 27th day of July, 1882.

RICHARD MURRAY, *Justice of the Peace.*

When the judgment was rendered against a defendant whose property was attached, but who was not personally served with the summons in the action and did not appear therein, the execution issued on such judgment should be in the form above given of an execution against property, except that the matter included between the * * should be omitted and the following matter should be substituted in its place: "out of the property attached by virtue of the warrant of attachment issued in the action against the property of said defendant." See vol. 1, p. 17, § 2918.

Where an execution issues against the person of the judgment debtor, it must, in addition to the direction contained in an execution against property, command the constable, if sufficient personal property cannot be found to satisfy the judgment, to arrest the judgment debtor, and to convey him to the jail of the county, there to remain until he pays the judgment, or is discharged according to law. Id., p. 48, § 3026.

Execution against the person.

(Proceed as in the form of an execution against property to the † then add)

And you, the said constable, are also commanded, if sufficient personal property cannot be found to satisfy the judgment, to arrest the judgment debtor and to convey him to the jail of the county, there to remain until he pays judgment, or is discharged according to law.

Forms and requisites of executions.

This execution is returnable to me, the said justice, within sixty days after its date.

Dated at the town of JOHNSTOWN, this 27th day of July, 1882.

RICHARD MURRAY, *Justice of the Peace.*

When the execution issues upon a judgment rendered in an action to recover a penalty or forfeiture given by a statute of the State, the justice must indorse upon the execution a reference to the statute creating the penalty in the following form "according to the provisions of," etc., adding such description of the statute as will identify it with convenient certainty, and also specifying the section, if the statute gives penalties or forfeitures in different sections for different acts or omissions. Vol. 1, p. 48, §§ 1897, 3026. The following form of an indorsement of an execution upon a judgment for a penalty for a violation of the game laws may serve as a guide.

Indorsement of execution in action for penalty.

According to the provisions of section 1 of chapter 534, of the Laws of 1879, entitled "An act for the preservation of moose, wild deer, birds, fish and other game."

Where the execution is issued on a judgment rendered against joint debtors, some of whom were not served with the summons, it must be in form against all the defendants, but the justice must indorse upon it a direction to the constable, containing the name of each defendant not summoned, not to enforce the execution against the person of a defendant so named, if the execution is against the person of the defendants, or if against property, not to enforce it against any property of a defendant so named, which is not owned by him jointly with the other defendants who were summoned, or with some of them. See id., p. 46, §§ 3020, 1934, 1935.

Form of indorsement.

To any constable executing the within mandate :

The defendant A. B., within named, was not served with the summons in this action ; and you are, therefore, directed not to enforce this execution against any property of the said A. B., not owned by him jointly with the other defendants who were summoned, or with some of them.

Dated August 12, 1882.

J. D., *Justice of the Peace.*

An execution for the delivery of the possession of a chattel to the prevailing party, and for the damages recovered by him must be to the general effect of an execution issued in a like case upon a judgment of the Supreme Court, except that it must be directed generally to any constable of the county ; and that the direction to satisfy a sum of

Forms and requisites of executions.

money out of the property of the judgment debtor must be in the form prescribed for the direction of an execution issued by a justice upon a judgment for a sum of money. Vol. 1, p. 52, § 3038.

Execution in replevin.

FULTON COUNTY, }
Town of Johnstown, } ss.:

The People of the State of New York to any constable of said county :

WHEREAS, judgment has been rendered by me, the undersigned justice of the peace, on the 26th day of July, 1882, in an action in which John Doe was plaintiff and Richard Roe was defendant, that said plaintiff recover of said defendant, Richard Roe, the possession of the chattels described as follows, viz.:

(*Describe the chattels*) or the sum of (*stating the value as fixed*) dollars in case a delivery thereof could not be had, and further that said plaintiff recover (*state amount of damages*) dollars damages, together with the costs of the action, viz. : \$

You are, therefore, hereby commanded to deliver the above described chattels to the said plaintiff, John Doe, if the same can be found within your county, and in case a delivery thereof cannot be had, then to satisfy the said sum of \$ so awarded, with interest thereon, together with your fees, and the said amount of \$ damages and \$ costs, out of the personal property of the said Richard Roe, defendant, within the said county of Fulton not exempt from levy and sale by virtue of an execution, and to bring the money before me, at my office, by the return day of this execution, to be rendered by me to the party who recovered said judgment. And you are further commanded to return this execution to me at my office, within sixty days after the date thereof.

Dated at the said town of JOHNSTOWN, this 27th day of July, 1882.

RICHARD MURRAY, *Justice of the Peace.*

The execution need not state facts necessary to give the justice jurisdiction of the action in which the judgment upon which it is issued is entered. *Field v. Parker*, 4 Hun, 342. But the judgment and execution must describe the party whose property is sought to be taken, and it is not enough that the right man is made to pay the debt. *Farnham v. Hildreth*, 32 Barb. 277; *Cole v. Hindson*, 6 Term Rep. 234. And, therefore, a judgment and execution against *Freeman Hildreth* will not authorize a sale of the property of *Truman Hildreth*, although the latter was the party actually intended. *Ib.* The constable or sheriff is not authorized to execute the process against the person or property of any one but the individual named in it. *Ib.* Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer after judgment and execution. *Ib.* So, where an execution is issued against the person, the name of the de-

When and by whom issued.

fendant must be correctly stated, and it will not be any defense that the party arrested was the person actually intended, unless he is also the party named in the process. *Griswold v. Sedgwick*, 1 Wend. 126; S. C., 6 Cow. 456; *Miller v. Foley*, 28 Barb. 630; *Scott v. Ely*, 4 Wend. 555; *Mead v. Haws*, 7 Cow. 332.

§ 4. **When and by whom issued.** A justice of the peace who has rendered a judgment in an action may, at any time within five years after its entry, issue an execution thereupon, if he is still in office, unless the judgment has been docketed in the county clerk's office. Vol. 1, p. 48, § 3024. After an execution has been issued by the justice within the period above limited, and has been returned wholly or partly unsatisfied, he may, at any time within five years after the judgment was rendered, issue a new execution or renew the former execution, even though his term of office has expired. *Id.*, p. 49, § 3027. So, if the term of office of a justice expires before an execution is issued upon a judgment rendered by him, he may nevertheless issue an execution thereon at any time within five years from the time the judgment was rendered, subject, however, in other respects, to the provisions as to issuing executions on justices' judgments. Laws of 1879, chap. 305, § 1.

The statute does not provide for the issuing of an execution on a justice's judgment after five years from its rendition; and if no execution is issued within that time the only remedy would seem to be by suing upon the judgment, and renewing it.

An execution, issued by a justice of the peace, upon a judgment rendered by him, will be entirely void if issued more than five years after its rendition. *Bates v. James*, 3 Duer, 45, 53; *Morse v. Gould*, 11 N. Y. 285.

After the death of the plaintiff in an action, no execution can be legally issued upon the judgment. *Bellinger v. Ford*, 21 Barb. 311; *Thurston v. King*, 1 Abb. 126; *Wheeler v. Dakin*, 12 How. 537; *Jay v. Martine*, 2 Duer, 654. The remedy is to sue over upon the judgment, in the name of the proper person, and then issue execution upon that judgment. *Ib.*; *Ireland v. Litchfield*, 22 How. 178. If an execution is issued after the death of the plaintiff, upon the application of persons not appearing to have any interest or authority in the matter, and it does not appear that the judgment has been assigned, or that there are any personal representatives of the plaintiff, the execution will be held to be void. *Bellinger v. Ford*, 21 Barb. 311. And see S. C., 14 *id.* 250. After the death of the defendant in an action, no execution can be legally issued by the justice against his property.

Delivery of execution to officer. — Who to execute.

Griswold v. Stewart, 4 Cow. 457; *Bennet v. Davis*, 3 id. 68. And see *Gerry v. Post*, 13 How. 122; *Frink v. Morrison*, 13 Abb. 80. And it may be stated as a general rule, without exception, that where there is but a single plaintiff and a single defendant, and either of the parties dies after the rendition of the judgment, no execution can be issued by the justice on such judgment. Where there are several defendants, and one of them dies after judgment, an execution may be issued in form against all of the defendants, and enforced against the property of the living defendants, but not against that of the deceased party. *Day v. Rice*, 19 Wend. 644. So, where one of several plaintiffs dies, there is the same, if not stronger reasons for allowing the survivors to obtain and enforce an execution against the defendants.

An action lies against a party who wrongfully takes out an execution on a judgment which he knows has been paid and satisfied, if the property of the defendant is taken and sold upon it, and it is not necessary to allege or prove malice in order to maintain the action. *Brown v. Feeter*, 7 Wend. 301.

§ 5. **Delivery of execution to officer.** In legal strictness, it is the duty of the party in whose favor judgment is rendered to demand an execution, and to deliver it to the officer for execution by him. The justice does not usually issue an execution upon a judgment rendered by him unless he has received instructions to that effect, either before or after the rendition of the judgment. If a claim is left with a justice for collection, he will then issue execution upon the judgment without further instructions, since the leaving of the claim is equivalent to such directions. The duties of the justice, in relation to the delivery of an execution to an officer, is the same as that in relation to other kinds of process.

§ 6. **Who to execute.** When a justice's execution is offered to any constable of the county in which it was issued, it is his duty to accept and diligently to execute it by complying with its commands. The general provisions of the Code relating to the duty of an officer to execute and return a mandate apply to executions issued by a justice. See vol. 1, p. 109, § 102. The constable must execute the process in person, and cannot act by deputy. *Id.*, p. 87, § 3157; *Downs v. McGlynn*, 2 Hilt. 14; S. C., 6 Abb. 241. He may, however, require the sheriff to execute it if he has reason to apprehend resistance. Vol. 1, p. 88, § 3158. And the justice may, in a proper case, deputize a private person to execute it. *Id.*, p. 87, § 3156.

Neither a sheriff nor a constable is permitted to execute final process in his own favor; and, therefore, neither of them can serve an

Effect of delivering execution to the constable. — Property exempt from levy, etc.

execution in his own favor by levying upon property and selling it. *Carpenter v. Stillwell*, 11 N. Y. 61, 67; *Mills v. Young*, 23 Wend. 314.

§ 7. **Effect of delivering an execution to the constable.** The goods and chattels of a judgment debtor, not exempt by express provision of law from levy and sale by virtue of an execution, and his other personal property which is expressly declared by law to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer to whom an execution against property is delivered, bound by the execution from the time of the delivery thereof to the proper officer to be executed, but not before. Vol. 1, p. 50, § 1405. But the title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer to be executed. *Id.*, p. 51, § 1409. When an execution is delivered to an officer with directions to do nothing but hold it for further orders, such delivery creates no lien upon the property of the judgment debtor. During the time the execution is so held, the officer is the mere agent of the plaintiff and the execution is dormant. *Smith v. Erwin*, 77 N. Y. 466.

§ 8. **Property exempt from levy and sale.** The general rule is that all goods and chattels of the party against whom an execution has been issued may be levied upon and sold, unless they are specifically exempted therefrom by statute, or by some rule of the common law. The statute exempting certain specified articles will be found in a preceding volume. Vol. 1, pp. 49, 50, §§ 1389-1394.

The evident object of the statute is to place the articles exempted beyond the power of the creditor, or of the officer who holds the execution. The object itself is a humane one, and the courts construe the statute favorably and liberally for the purpose of giving it full effect. *Carpenter v. Harrington*, 25 Wend. 370; *Hall v. Penney*, 11 id. 44; *Griffin v. Sutherland*, 14 Barb. 456; *Shaw v. Davis*, 55 id. 389; *Smith v. Slade*, 57 id. 637; *Cantrell v. Connor*, 6 Daly, 224; *Stewart v. Brown*, 37 N. Y. 350; *Becker v. Becker*, 47 Barb. 497.

It must be remembered, that *prima facie* all personal property is liable to execution, and that the right to exemption is a statutory privilege. *Baker v. Brintnall*, 52 Barb. 188; S. C., 5 Abb. (N. S.) 253; *Dains v. Prosser*, 32 Barb. 290; *Turner v. Borthwick*, 20 Hun, 119, 122.

There are certain articles of personal property which are *abso-*

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lately exempt from levy and sale by virtue of an execution when owned by a householder, or a woman. These articles are enumerated in section 1390 of the Code of Civil Procedure. Vol. 1, p. 49. There are certain other articles of personal property which are equally exempt from levy and sale by virtue of an execution, when owned by a householder, a woman, or a person having a family for whom he provides, *unless* the execution is issued upon a judgment recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase-money of exempt property. These articles are enumerated in section 1391 of the Code of Civil Procedure. Id., pp. 49, 50. When the judgment upon which the execution issues was recovered wholly for work performed in the family as a domestic, or for the purchase-price of exempt property, the articles enumerated in section 1390 of the Code are still exempt from levy and sale under the execution, while those enumerated in section 1391 are not, as the latter are, in such cases, excepted from the protection of the statute. See *Snyder v. Davis*, 47 How. 147; S. C., 1 Hun, 350; 3 N. Y. Sup. Ct. 596; *Cole v. Stevens*, 9 Barb. 676; S. C., 6 How. 424; *Craft v. Curtiss*, 25 id. 163; *Davis v. Peabody*, 10 Barb. 91. For example, if the judgment recovered against a householder is upon a demand for the purchase-price of a cook stove, an execution issued upon such judgment cannot be levied upon the beds and beddings necessary for the judgment debtor and his family, nor upon the stove itself. *Ib.* On the other hand, if an execution is issued upon a judgment recovered for the purchase-price of a cow, it may be levied upon the horse, harness, wagon and sleigh of the judgment debtor, if he is the owner of such property, or upon any other property enumerated in section 1391 of the Code. See *Snyder v. Davis*, 1 Hun, 350.

If a creditor would enforce his claim for the purchase-money by levying upon exempt property, he must enforce the claim separately. For if he takes a judgment which is founded upon such claim, and also founded upon another claim which cannot be enforced against exempt property, he will lose all right to levy upon the property sold. *Hickox v. Fay*, 36 Barb. 9. By uniting both claims in a single judgment, where one claim would authorize the taking of exempt property and the other would not, the creditor bars himself from taking any exempt property to satisfy his judgment either in whole or in part. *Ib.*

Spinning wheels, looms, and stoves, put up or kept for use, as well as a sewing machine, are exempt articles. Vol. 1, p. 49. So of the

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family Bible, family pictures, and school books, and the family library, if not above \$50 in value. *Ib.*

It has been held that medical books, which are necessary to a physician or surgeon, are exempt as a part of his family library. *Robinson's Case*, 3 Abb. 466. The same principle would exempt the books of any professional person, if they were necessary to a proper discharge of the duties of his profession, and if they did not exceed \$50 in value.

The statute expressly exempts ten sheep with their fleeces, and the cloth or wool manufactured therefrom. And the courts hold that the yarn or cloth which may be manufactured from the fleeces of the sheep shall be exempt, although the owner of such yarn or cloth is not the owner of any sheep. *Hall v. Penney*, 11 Wend. 44. The object of the legislature was to exempt as much wool, or the articles manufactured from it, as could be obtained from the fleeces of ten sheep, and that object will be carried into effect by exempting such yarn or cloth, etc. *Ib.*

There may be cases in which such yarn or cloth would not be exempted from levy and sale upon an execution. If the party claiming the exemption should intentionally reduce or convert all his property into money, or chases in action, except exempt articles, it has been held that it would be a proper question for a jury whether the act was not done for the purpose of hindering and delaying creditors, and if they found that such was the case, they should find for the creditor by sustaining the levy. *Brackett v. Watkins*, 21 Wend. 68.

If a householder owns a cow and ten sheep, there will also be exempt as much hay as will be necessary to keep them through the next foddering season after the hay is harvested. *Farrell v. Higley*, Hill & Denio, 87. This principle exempts as much hay as may be necessary to winter such cow and sheep, and until the pasturing season commences. *Ib.* The statute also exempts as much pork, beef, fish, flour and vegetables as may be necessary to keep the family until the next annual period for laying up such provisions. *Ib.* The statute does not limit the quantity to such an amount as may be sufficient for sixty days, but exempts all such articles of food as may be necessary for the season, if they were actually laid in for family use. *Ib.* No more fuel is exempt than sufficient to last sixty days. *Ib.*

Potatoes which have been planted for family use are as much exempt from execution while growing as they are after they have been dug and put up for family use. *Carpenter v. Herrington*, 25 Wend. 370. And vegetables which have been actually provided for family

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use will not lose their exempt character by the fact that the judgment debtor is taking them to market to sell or exchange for articles of prime necessity in his family or even to obtain means to pay his taxes. *Shaw v. Davis*, 55 Barb. 389.

Where a widow lives with her infant children, and provides for them, a milch cow kept and used by her for the use of the family is exempt from any execution issued against her. *Brigham v. Bush*, 33 Barb. 586.

The necessary wearing apparel of every judgment debtor is exempt from execution, while in actual use, whether he is a householder or not; and the fact that his clothes are temporarily off of his person, as when asleep in bed, will not render them liable to be seized on execution. *Bumpus v. Maynard*, 38 Barb. 626. And see *Sunbolz v. Alford*, 3 Mees. & Wels. 248.

If a party claims that wearing apparel is exempt because he is a householder, he must establish the fact that he is a householder. *Bowne v. Witt*, 19 Wend. 475. An adult person who resides with his step-mother, and transacts her business, is not a householder or a member of her family within the statute as to exemptions of clothing. *Ib.* In the case last cited, the action was for taking the plaintiff's cloak, which he claimed was exempt because he was a householder; but the question whether it was exempt as necessary wearing apparel was not made in the case, except as connected with the question whether he was a householder.

A person having and providing for a household is a "householder" within the statute allowing exemption from levy and sale under execution. *Griffin v. Sutherland*, 14 Barb. 456; *Cantrell v. Connor*, 6 Daly, 224; S. C., 51 How. 45. And the term "householder" is not confined to one who is actually keeping house, but extends also to one who has temporarily given up housekeeping, and is boarding, and has furniture on storage. *Ib.* A man and his wife who live together alone, and have no children, are a family. So if a man and his daughter live together, the wife and mother being dead, they constitute a family. *Cox v. Stafford*, 14 How. 519. The head of a family who has left the State, leaving his wife and children living together, is a householder. *Woodward v. Murray*, 18 Johns. 400. And one who rents a house and keeps boarders and servants is a householder, although he has no wife or children. *Hutchinson v. Chamberlin*, 11 N. Y. Leg. Obs. 248. A woman who keeps a house of ill fame may nevertheless be a householder within the meaning of the statute. *Bowman v. Quackenboss*, 3 Code R. 17.

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The necessary tools and implements of a mechanic, and necessary working tools owned by a householder, are exempt from execution if they do not exceed in value the sum fixed by law. The decisions of the courts have settled, in some instances, what articles are to be considered "tools" within the meaning of the statute.

The surgical instruments of a physician and surgeon are exempt from execution, on the ground that they are "tools," if he is a householder and supports a family. *Robinson's Case*, 3 Abb. 466. But a threshing machine is not exempt, on the ground that it is a "working tool," under the act of 1842 and its amendments. *Ford v. Johnson*, 34 Barb. 364. A printing press is not a "tool," within the statute. *Buckingham v. Billings*, 13 Mass. 82. Neither are printing types and forms. *Danforth v. Woodward*, 10 Pick. 423. Nor is a portable machine, called a "billy and jenny," which is used for manufacturing cloth, a tool. *Kilburn v. Deming*, 2 Vt. 404. And the rule is the same as to a mill-saw belonging to a saw-mill. *Bachelder v. Shapleigh*, 1 Fairf. 135. Although a team is exempt, in certain cases, the decisions of the court have not been entirely harmonious upon the question what shall constitute a team. The courts have held that a "team" consists of one or more horses with their harness and the vehicle to which they are customarily attached for use. *Hutchins v. Chamberlin*, 11 N. Y. Leg. Obs. 248. And it has also been held that a horse or other animal, trained and used by the judgment debtor for his work or service, is a working team, under the statute, without its being associated with any harness or trappings, or other articles of property. *Finnin v. Malloy*, 1 Jones & Sp. 382.

The horse of a practicing country physician, whose patients reside at too great a distance for him to visit them on foot, is a necessary team within the meaning of the statute. *Wheeler v. Cropsey*, 5 How. 288. In determining whether the team is necessary, it is entirely immaterial whether the debtor has or has not other means to pay the debt, because the exemption does not depend upon the pecuniary ability of the debtor. *Ib.*; *Smith v. Slade*, 57 Barb. 637; *Wilcox v. Hawley*, 31 N. Y. 648. The law was intended for the benefit of all persons to whom a team is necessary in the successful or convenient prosecution of their business in their calling or profession. *Ib.* So, when the defendant is a carman, and is a householder, having a family for which he provides, his horse, harness and cart will be exempt as a team, although there is but one horse. *Harthouse v. Rikers*, 1 Duer, 606. A buggy wagon used by a practicing physician in his professional

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business is exempt from execution. *Van Buren v. Loper*, 29 Barb. 388; *Eastman v. Caswell*, 8 How. 75.

A single horse may be considered as a team within the meaning of the statute, where it is kept and used as such. *Lockwood v. Younglove*, 27 Barb. 505; *Cogsdill v. Brown*, 5 Hun, 341. And where the debtor has only one horse, but he hires another horse to work with it, and the two make up the team which he usually works, his own horse will be exempt, if within the value limited by the statute. *Ib.*

It is not necessary that the defendant should be the sole owner of a horse as a condition of his exemption, for if the defendant is merely a part owner of a horse used as a team, or as a part of a double team, such horse is exempt when belonging to a householder, etc. *Radcliff v. Wood*, 25 Barb. 52; *Hoyt v. Van Alstyne*, 15 id. 571. A wagon is not of itself alone exempt from execution; but it may become a part of a team where it is customarily used in connection with a horse or horses, and harness, and in such case it may be exempt. *Brown v. Davis*, 9 Hun, 43; *Dains v. Prosser*, 32 Barb. 290; *Morse v. Keyes*, 6 How. 18, is overruled.

A tow line used for the purpose of towing canal boats by a span of horses is a part of the team and exempt from execution. *Fields v. Moul*, 15 Abb. 6. It is no answer to the claim of exemption that the article is new and has never been applied to the use for which it was purchased, and for which it had been prepared by the owner. *Ib.* Food for a team for ninety days is exempt.

A very great number and variety of articles are exempt from execution, under the general denomination of necessary household furniture. Two questions may arise in relation to the meaning of these words. One of them is, are the articles necessary? and the other, are the articles properly household furniture? In most cases there will not be any great difficulty in determining either of the questions; but in others there may be quite a difference of opinion. Whether articles conceded to be household furniture are necessary is a question of fact; but whether the articles claimed to be exempt are such as fall within the definition of the statute, has in most of the cases been treated as a question of law. A clock, if necessary, is exempt; and the reason which exempts that may be equally available to render a watch exempt. If the defendant has no clock, and a time-piece is necessary to the proper carrying on of his business, and it is used for that purpose, it is exempt, when owned by a householder, etc. *Bitting v. Vandenburg*, 17 How. 80. A clock may be a necessary article of household furniture, but that fact must be shown by the party claiming the exemption,

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and it is a question of fact which will be concluded by the verdict of a jury. *Wilson v. Ellis*, 1 Denio, 462.

A party who claims that certain articles are exempt from execution, on the ground that they are necessary, must prove affirmatively that his claim is well founded. *Griffin v. Sutherland*, 14 Barb. 456; *Willson v. Ellis*, 1 Denio, 462; *Dains v. Prosser*, 32 Barb. 290; *Baker v. Brintnall*, 52 id. 188; S. C., 5 Abb. (N. S.) 253; *Smith v. Slade*, 57 Barb. 637. It is not enough to show that an article is convenient or useful in a family, unless the jury, or the justice in their place, is satisfied that the article is also necessary. *Van Sickler v. Jacobs*, 14 Johns. 434; *Willson v. Ellis*, 1 Denio, 462. Upon the question whether the article is necessary, the decision of the justice, or the finding of a jury, is conclusive. *Ib.*

So, the party claiming that property is exempt, must show affirmatively that it does not exceed in value the sum fixed by the statute. *Dains v. Prosser*, 32 Barb. 290. If a wagon is claimed to be exempt because it is a part of a team, it must be proved that the wagon, harness and horses do not altogether exceed \$250 in value. *Ib.* If there is no proof as to the value of the articles in the aggregate, nor of the value of the separate parts, the exemption of the wagon will be disallowed. *Ib.* A team will be exempt, whatever the number of horses may be, if their value does not exceed the statutory limit. *Wilcox v. Hawley*, 31 N. Y. 648. It is sufficient for a party claiming the exemption of his horse from sale on execution, to show that the horse constituted his team; that he is a householder, and that his household furniture, working tools and team, do not in the aggregate, exceed the sum of \$250. *Ib.* The exemption provided by the statute is not exclusively for the benefit of the owner of the property; it is intended mainly for the benefit of the family for which he provides. *Ib.* In determining whether a team is necessary for the execution debtor, it is entirely immaterial whether the debtor has more or less property than the amount limited by statute; and, therefore, it is not competent to show that shortly before a horse was levied on the debtor had disposed of two other horses, worth \$200, and that the avails were transferred to his wife, and that she held them at the time of the levy. *Ib.*

Where an action is brought by a party to recover damages for taking and selling household furniture which is claimed to be exempt from execution, the plaintiff must show the quality, quantity and value of such furniture which is left after the sale made by the defendant, and it must be made to appear affirmatively that the amount of property

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allowed by law, as exempt, was not left after the sale. *Tuttle v. Buck*, 41 Barb. 417. The evidence ought to show that the property sold was exempt, and its value. *Ib.* Until evidence is given as to the value of the furniture left to the defendant after the execution sale, there will be no question of fact as to the exemption, and no sufficient proof to warrant a finding in favor of the plaintiff, that the property sold was exempt property. *Ib.*

If the exemption is claimed on the ground that the plaintiff is a householder, the burden of proof is on him to show that fact. *Griffin v. Sutherland*, 14 Barb. 456. The fact whether a party is or is not a householder must be proved by competent evidence, and cannot be proved by reputation or hearsay. *Eastman v. Caswell*, 8 How. 75.

Jurors are frequently at a loss how to decide upon the matter of exemption so far as it relates to the question whether the article is a necessary one. And no better exposition of the law or of the practice can be found than that furnished by SANDFORD, J., in *Dickerson v. Van Tine*, 1 Sandf. 724, 730. In speaking of the Revised Statutes, and of the act of 1842, as to exempt property, which corresponds with section 1391 of the present Code, he said: "The principal difficulty arises under the Revised Statutes; though under the act of 1842 there may be a great choice in respect of the condition and state of repair of the furniture, and its being more or less salable. In respect of both statutes, I think that what is *necessary* for the householder and his family is to be determined by circumstances. When the six chairs, the table, and like articles enumerated, which are specified and set apart, are such as the debtor had in common use in his family before his failure, and were reasonable and proper for him and them, in respect to their station in life, I do not believe that a sound construction of the law requires that he should be deprived of such articles, and put upon taking such inferior chairs and table, as he and they had not been accustomed to use. I would not suffer a debtor to cover, under these exemptions, extravagant or expensive articles of luxury, or such as may be believed he has bought with a view to screen his effects from his creditors; nor would I add to the misfortunes of his family, by saying to them, in effect, that they were no longer worthy of filling their usual seats, or eating from their accustomed table. The same principle should guide in determining what is necessary household furniture, under the act of 1842." Where the debtor has several articles of the class allowed as exempt property, he may elect which of the articles he will retain, so long as the articles retained do not exceed in value the sum prescribed by the statute. *Seaman v.*

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Luce, 23 Barb. 240; *Brown v. Davis*, 9 Hun, 43; *Twynam v. Swart*, 4 Lans. 263; *Finnin v. Malloy*, 1 Jones & Sp. 382; *Lockwood v. Younglove*, 27 Barb. 506, 508. In the last case the court said: "But where one or more animals, or articles of a particular kind, or a particular quantity in value out of several kinds are exempt, and the debtor has a larger number or quantity in value, as some one must determine which shall be taken and what left, it is but reasonable that the debtor should determine which he will claim as exempt. The statute giving this exemption is for the benefit of families, from motives of public policy, and it has repeatedly been held to confer a personal privilege upon the debtor, the benefit of which he may waive altogether, or insist upon, as he may elect. He may waive his privilege as to every article but one, and insist upon it as to that article, if it belongs to the kind or class of exempt property. This shows, I think, that the right of choice necessarily belongs to the debtor." But, while the debtor may elect which articles he will retain as exempt, this does not prevent the officer from making a levy upon all of the articles. He is not bound to consult the judgment debtor as to what part of his property is exempt before levy thereon, but may take all of the debtor's property if not notified of the exemption. *Twynam v. Swart*, 4 Lans. 263. And after this is done the defendant is bound, within a reasonable time, to notify the officer which articles will be retained as exempt property. *Ib.*; *Brooks v. Hathaway*, 8 Hun, 290; *Seaman v. Luce*, 23 Barb. 240. If the debtor is present at the time of the levy he may make his election and give the officer notice at once, and this will be sufficient. *Ib.* If he is present at the levy, and does not then claim that the property is exempt, he cannot afterward claim that the *levy* was unlawful and sue the officer to recover damages therefor. *Turner v. Borthwick*, 20 Hun, 119. It has been held that where an officer seizes all the property of a debtor, with a knowledge that part of it is exempt from such seizure, he cannot justify his acts on the ground that the debtor omitted to designate a particular portion of the property as not subject to execution or attachment. *Frost v. Mott*, 34 N. Y. 253; *Cantrell v. Connor*, 6 Daly, 224. How far this doctrine is in conflict with that of the cases above cited is for the justice and practitioner to determine.

The right to claim property as exempt is a mere personal privilege, of which no one but the debtor can avail himself. A mere naked bailee of the property, who has it in his possession for the purposes of the bailment, as in the case of an agistor of sheep, cannot maintain an action in his own name for taking the property on the ground that they were

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exempt from levy and sale on an execution issued against the bailor. *Mickles v. Tousley*, 1 Cow. 114. So, where an officer has levied upon property which is converted by the defendant, the latter is not permitted, in an action against him by the officer, to show that the property was exempt from levy under the execution held by the officer, because that exemption cannot be urged by any person except the defendant in such execution. *Earl v. Camp*, 16 Wend. 563. A general assignee of the judgment debtor cannot set up the claim of exemption, if he stood by at the officer's sale of the property, and made no objection at that time. *Smith v. Hill*, 22 Barb. 656. And, independently of that, the claim of exemption cannot be made by any one but the debtor. *Ib.* The right to claim a homestead as exempt property is also a personal privilege available to the debtor alone. *Smith v. Brackett*, 36 Barb. 571; *Allen v. Cook*, 26 id. 374. But it has been held, that where personal property is exempt from seizure and sale upon execution in the life-time of the judgment debtor, it continues exempt after his death for the benefit of his widow, who continues to reside in the house formerly occupied by the deceased husband, with her minor children. *Becker v. Becker*, 47 Barb. 497.

Where a party, whose property had been levied on by execution, objected to the sale, on the ground that the property was exempt from execution, but he afterward turned out the property to the officer to be sold at a future day, it was held that the acts of the defendant in the execution amounted to nothing more than a waiver of the exemption, for the purpose of gaining time, and that the act of the officer in selling the property was done under a claim of property given by law, instead of an authority given by the defendant, and that a sale of the property was such an abuse of the process as rendered the officer a trespasser from the beginning. *Carnwick v. Myers*, 14 Barb. 9. And see vol. 2, p. 490.

Where the judgment debtor is a woman she is entitled to the same exemptions from levy and sale by virtue of an execution, subject to the same exceptions as prescribed in sections 1390 and 1391 of the Code, in case of a householder. Vol. 1, p. 50, § 1392.

The right of action to recover damages, or damages awarded by a judgment for taking or injuring personal property exempt by law from levy and sale under an execution, are exempt for one year after the collection thereof, from levy and sale by virtue of an execution, and from seizure in any other legal proceeding. *Id.*, § 1394. The pay and bounty of a non-commissioned officer, musician or private in the military or naval service of the United States; a land warrant, pension,

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or other reward granted by the United States, or by a State, for military or naval services; a sword, horse, medal, emblem or device of any kind, presented as a testimonial for services rendered in the military or naval service of the United States; and the uniform, arms, and equipments, which were used by a person in that service, are also exempt from levy and sale by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding. *Id.*, § 1393.

§ 9. **Property liable to seizure upon execution.** An execution issued by a justice of the peace can be levied upon personal property only. As a general rule all the personal property of the judgment debtor is liable to levy and sale under an execution issued upon the judgment against him. The exception in favor of exempt property is, as has been shown, purely statutory, and to be of any avail must be claimed by the judgment debtor. *Ante*, 866.

Choses in action, though assignable, are not liable to levy and sale upon an execution; and, therefore, a promissory note is not a subject of seizure and sale on execution. *Ingalls v. Lord*, 1 Cow. 240. So of shares in a public library, or shares of bank stock. *Denton v. Livingston*, 9 Johns. 96, 100. And the same rule applies to bills of exchange, bonds, or other choses in action of whatever nature. *Bogert v. Perry*, 17 Johns. 351; *Ransom v. Miner*, 3 Sandf. 692.

Every kind of growing crop which is raised by means of annual cultivation, such as corn, oats, rye, wheat, potatoes and the like, may be levied upon and sold by virtue of a justice's execution. But, whenever the crop is not one produced by annual cultivation, such as grass growing, hops growing upon the vines, fruit growing upon the trees, and the like, it is not considered personal property, but a part of the real estate upon which it is growing, and, therefore, it cannot be taken or sold on a justice's execution. See vol. 2, p. 279. Such articles, however, may be severed from the soil, and when that is done, then they become personal property and may be levied upon like any other goods and chattels. There are numerous articles which are denominated fixtures, and when they belong to the owner of the land on which they are placed, they cannot, as a general rule, be levied upon or sold by virtue of a justice's execution. But if the articles do not belong to the owner of the land, and the owner of them is legally entitled to remove them at any time, they are treated as personal property, and may generally be levied upon and sold as such on execution. See numerous cases collected, vol. 2, pp. 226-238.

Current money of the United States is subject to levy. Vol. 1, p. 51, § 1410. So are bills or other evidences of debt, belonging to the

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judgment debtor, which were issued by a moneyed corporation to circulate as money; and so are bonds or other instruments for the payment of money, belonging to the judgment debtor, which were executed and issued by a government, State, county, public officer, or municipal or other corporation, and are in terms negotiable, or payable to the bearer or holder. *Id.*, § 1411.

The interest of the judgment debtor in personal property, lawfully pledged for the payment of money on the performance of a contract or agreement, may be sold in the hands of the pledgee, if the property is subject to levy. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions upon which the judgment debtor could obtain possession thereof. But this does not apply to property of which the judgment debtor is unconditionally entitled to the possession. *Id.*, § 1412. The purchaser cannot have such possession until he redeems it from the pledgee, who is entitled to the possession until his claim is satisfied. *Stief v. Hart*, 1 N. Y. 20; *Bakewell v. Ellsworth*, 6 Hill, 484. Where goods and chattels have been mortgaged, and the mortgagor has any interest in the mortgaged property, such interest may be levied upon and sold upon an execution. Vol. 1, p. 277. If the title to such property has become perfect and absolute in the mortgagee, or if the mortgage has become forfeited and the mortgagor has no interest greater than the equity of redemption, the property may be levied upon and sold by virtue of an execution issued against the mortgagee. *Id.*, p. 295. But it cannot be levied upon and sold by virtue of an execution issued against the mortgagor. *Champlin v. Johnson*, 39 Barb. 606; *Farrell v. Hildreth*, 38 *id.* 178. There are cases in which creditors may have mortgaged property levied on upon an execution issued against the mortgagor in those cases in which the mortgage has not been properly filed, or the possession of the property has remained unchanged. Vol. 1, p. 292.

Where goods and chattels belong to several different persons, as tenants in common, and an execution is issued against the property of one of these persons, it may be levied upon the joint property of all the parties, and the interest of the party against whom the execution was issued may be sold. The purchaser, however, will acquire nothing more than the interest of the judgment debtor, even though the officer should assume to sell the property as the exclusive property of the judgment debtor. *Fiero v. Betts*, 2 Barb. 633; *Mersereau v. Norton*, 15 Johns. 179. But, notwithstanding such sale will not trans-

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fer any title except that of the debtor against whom the execution is issued, yet the sale of the entire property is such an abuse of the process by the officer as to subject him to an action of trespass for the wrongful act. *Waddell v. Cook*, 2 Hill, 47, and note *a*; *Dinehart v. Wilson*, 15 Barb. 595; *Walsh v. Adams*, 3 Denio, 125; *Bates v. James*, 3 Duer, 45. If such a sale is directed by the plaintiff in the execution, he will also be liable as a trespasser. *Ib.*; *Underhill v. Reinor*, 2 Hilt. 319. As to what persons are tenants in common, see vol. 1, pp. 504, 513, 514.

Where one of several defendants, named in an execution, is a partner in a firm, his interest in the partnership property may be levied upon and sold on such execution. And, for that purpose, the constable may levy upon the partnership property and sell the interest belonging to such judgment debtor. *Eighth Nat. B'k of the city of New York v. Fitch*, 49 N. Y. 539, 543; *Smith v. Orser*, 42 id. 132; *Marshall v. McGregor*, 59 Barb. 519, 524; *Phillips v. Cook*, 24 Wend. 389; *Scrugham v. Carter*, 12 id. 131. Upon such a sale, the purchaser becomes a tenant in common with the remaining partners. *Ib.* The constable is not liable to an action of trespass for delivering the property sold to the vendee. *Ib.* But if he should sell the whole property as that of the judgment debtor, instead of limiting the sale to the interest of such debtor, the officer would be liable to an action of trespass or trover. *Walsh v. Adams*, 3 Denio, 125; *Waddell v. Cook*, 2 Hill, 47; *Bates v. James*, 3 Duer, 45; *Ryder v. Gilbert*, 16 Hun, 163, 166.

Although a purchaser of the interest of a partner succeeds to his rights to the partnership property, it is still to be remembered that such purchaser takes the property subject to all the rights of the other partners, and subject to an accounting with them, and also subject to the claims of the creditors of the firm to the partnership property. *Phillips v. Cook*, 24 Wend. 389; *Walsh v. Adams*, 3 Denio, 125; *Eighth Nat. B'k of the city of New York v. Fitch*, 49 N. Y. 539, 543; *Ryder v. Gilbert*, 16 Hun, 163, 165, 166; *Morss v. Gleason*, 64 N. Y. 204; *Menagh v. Whitwell*, 52 id. 146, 158.

If an execution is issued against one of two partners, and the constable levies upon the firm property and sells it as the exclusive property of such debtor, the other partner may maintain an action of trover against the officer to recover the value of one-half of the goods, which he is entitled to recover as the measure of damages without regard to the debts of the firm or the state of the copartnership accounts. *Walsh v. Adams*, 3 Denio, 125.

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As to the rights of husband and wife, when an execution is issued against either of them, see vol. 2, pp. 300-311.

Where an execution is issued against joint debtors, the statute provides for the mode of its execution, and as to the property which may be levied upon. Vol. 1, p. 46, §§ 1934, 1935. So it also provides for the case of executions issued in actions commenced by attachments, and in which there was not a personal service of the process in which case no levy can be made upon any property but that attached. *Id.*, p. 17, § 2918.

Where property is sold upon condition that the title is not to pass until the payment of the purchase-price, the title of the unpaid vendor is superior to that of a judgment or execution creditor. Vol. 2, pp. 25-36.

Where a sheriff or constable receives money, in coin, in payment of an execution which he holds in his hands in favor of the plaintiff in the execution, and he has, at the same time, another execution which has been issued against the plaintiff, upon which he is not able to find any property to satisfy, except the money which he thus holds, he cannot, by virtue of the execution against the plaintiff, levy upon such money and apply it to the payment of the latter execution. *Muscott v. Woolworth*, 14 How. 477; *Baker v. Kenworthy*, 41 N. Y. 215; *Adams v. Welsh*, 11 Jones & Sp. 52; *Turner v. Fendall*, 1 Cranch, 117. And see *Dubois v. Dubois*, 6 Cow. 494. But where the property of the defendant in the execution is levied upon and sold by virtue of an execution, and there is a surplus after the payment of such execution, such surplus may be levied upon and sold to satisfy any other execution against the defendant which may be delivered to the officer before the surplus money is paid over to such defendant. *Wheeler v. Smith*, 11 Barb. 345. And in such a case it does not make any difference whether the second execution is delivered to the officer before or after the sale on the first execution. *Ib.*

When a sheriff has made a valid levy under an execution, and taken the property into his possession, a constable, to whom an execution against the same defendant is subsequently issued by a justice of the peace, cannot make any levy on such property, nor can he sell the same subject to the levy made by the sheriff. *Seymour v. Newton*, 17 Hun, 30. Nor can goods, levied on by a constable under a justice's execution, be taken in execution by a sheriff. *Marsh v. Lawrence*, 4 Cow. 461. An execution issued by a justice of the peace, or a warrant of attachment granted in an action before him, if actually levied, has pref-

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erence over another execution issued out of any court, which has not been previously levied. Vol. 1, p. 54, § 1408.

§ 10. **The levy, when, where and how made.** When an execution is regular in form and valid on its face, it is the duty of the officer to execute it according to the commands therein contained, and in pursuance of legal rules.

The law allows a constable sixty days within which to collect an execution, and therefore he may levy upon the defendant's property at any time within the sixty days, provided the levy and sale can all be completed within such sixty days. The statute expressly forbids a constable from levying upon property, or from selling it, after the return day of the execution, unless it has been duly renewed, or from doing any act under a renewed execution after the expiration of the time for which it has been renewed. *Id.*, p. 53, § 3040. His process also requires him to return it in sixty days after its date.

If a constable levies upon property after the return day of the execution, he will be liable as a trespasser. *Vail v. Lewis*, 4 Johns. 450. And see *Hathaway v. Howell*, 54 N. Y. 97; *Ross v. Campbell*, 19 Hun, 615; *Walker v. Henry*, 85 N. Y. 130. And if the levy is made by the direction of the plaintiff in the execution, both the plaintiff and the officer will be trespassers. *Vail v. Lewis*, 4 Johns. 450.

If a constable has two executions against the same defendant, and one of them has priority over the other, and he levies a part of the amount of the prior execution, and after the return day of that process he levies upon other property, the money made on the second levy must be applied on the junior execution. *Slingerland v. Swart*, 13 Johns. 255.

There may be cases in which a constable will not have sixty days within which to collect and return the money. If the execution should be issued to the plaintiff, and then retained by him for some time before its delivery to the constable, the officer will be required to do what he does under the process before its return day. It is evident that the officer would have as many days less than sixty in which to make the money as there were days intervening between its date and the time when the officer received it.

The levy may be made by any constable of the county in which the execution is issued and in which the justice resides. And the officer may execute the process by levying upon the property of the defendant wherever it may be found in such county. *Mills v. Kennedy*, 1 Johns. 502.

When a constable receives an execution his plain duty is to collect

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it, if possible. But however clear the duty may be, there is frequently a serious difficulty in determining the manner in which he shall perform it. He must first be certain that the property levied upon is such as is liable by law to be taken upon the execution which he holds. But even if the property is of that class which is liable to seizure and sale on execution, there may be several persons who are interested in it, and the officer may not feel quite certain as to the proper course to be pursued. And when both of the preceding difficulties have been obviated, he must still be careful that his mode of making the levy is in accordance with the rules of law.

There are sometimes difficulties in the way of obeying the mandates of the process. If the property of the defendant in the execution is in his own dwelling-house, neither a constable nor a sheriff can lawfully enter the house to levy upon it. The door of the house need not be locked for the purpose of protecting it from levy; and if such door is merely latched, it will be a trespass in the officer to unlatch it and enter the house without the consent of the occupant. *Curtis v. Hubbard*, 1 Hill, 336; S. C., 4 id. 437. See, also, *People v. Hubbard*, 24 Wend. 369. The absence of the owner or occupant at the time of the wrongful entry by the officer will not make any difference; and the act will be as much a trespass as though he had been present and forbidden the officer's entry. *Ib.* Such owner or occupant may lawfully resist a constable or a sheriff if he attempts to make such unlawful levy. *Ib.* And even a guest in the house will be justified in resisting or aiding in the resistance to the officer's acts, provided no unnecessary force is used. *Ib.* If, however, the officer once gains a lawful and peaceful entrance into the house, and he properly commences the execution of his process, he may continue and complete his levy. And if he leaves the house and the property after commencing an inventory of articles levied on, he may return the next day and complete it; and if the owner of the house then refuses him admittance for that purpose, he may lawfully force the doors and enter the house, and complete his levy. *Glover v. Whittenhall*, 6 Hill, 597. So, if the officer gains lawful admission through the outer door of the house, he may afterward lawfully break open the inner doors for the purpose of executing his process. *Lee v. Gansel*, Cowp. 1. So, after gaining a peaceful and lawful entrance into the house, he may also break open cupboards, chests, trunks, and the like, if that is necessary for the purpose of getting at the property. *Ib.*; *Hutchison v. Birch*, 4 Taunt. 619, 625. But the officer will not be justified in a wanton injury or destruction of property; and, if the owner should offer to unlock or open the doors,

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trunks, etc., the officer would be a trespasser for breaking them after that. *Ib.* This protection of property does not extend to any building but a dwelling-house and its curtilage; and if the goods are in a store, shop, barn, or other building of a similar character, the officer may lawfully break open the doors and make a levy. *Haggerty v. Wilber*, 16 Johns. 287. So, where the goods of the defendant in the execution are in the house of a third person, they will not be protected there, if such third person refuses to open the house on the lawful demand of the officer, who comes with a legal process to make a levy upon it. *Semayne's Case*, 5 Coke, 93, a; *Cook v. Birt*, 5 Taunt. 765, 770. But the officer enters at his peril, for if the defendant's goods are not there, the officer will be a trespasser. *Ib.*; *Johnson v. Leigh*, 6 Taunt. 246.

What acts will constitute a valid levy under an execution is not now a matter of doubt. If the officer takes the property into his actual possession and custody, by removing it from the premises or possession of the defendant in the execution, there could not be any doubt as to the existence of a levy. But such acts are not essential to the making of a valid levy, as the cases cited will show. In the first place, to constitute a valid levy upon personal property, the officer must assume dominion over the property, and have it within his power, and subject to his immediate seizure. *Price v. Shippis*, 16 Barb. 585; *Green v. Burke*, 23 Wend. 490; *Roth v. Wells*, 29 N. Y. 471.

"In order to constitute a valid levy, as to third persons, the goods must not only be within the view of the officer, but must be subjected to his control. He 'must take actual possession,' which, although the goods are present, can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and interested in the question. A levy cannot rest in a mere undivulged intention to seize property. Something more is required; there must be possessory acts to indicate a levy, or it must be asserted by word of mouth, so that what is thus done by the officer, if not justified by the process in his hands, will make him a trespasser." *Camp v. Chamberlain*, 5 Denio, 198, 202, 203, BEARDSLEY, Ch. J.; *Rodgers v. Bonner*, 45 N. Y. 379, 382; *Bond v. Willet*, 1 Abb. Ct. App. 165; S. C., 31 N. Y. 102; 29 How. 47; 1 Keyes, 377.

Where an officer is instructed to keep the levy a secret from the defendant in the execution, which is done, and the property is not taken by the officer, but is subsequently sold by the defendant to a purchaser in good faith, the latter will hold the property in preference to the officer. *Price v. Shippis*, 16 Barb. 585.

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So, when an officer does not see the property intended to be levied upon, but merely sits on his horse, or in his carriage in the road, and takes a memorandum of the property as it is named over by the defendant in the execution, but without any knowledge what property the defendant had at the time, or where such property was at that time, this, although it may be treated as a valid levy as against the judgment debtor, will not be sufficient to affect the rights of a subsequent *bona fide* purchaser from such judgment debtor. *Dresser v. Ainsworth*, 9 Barb. 620, 629.

So, making an actual levy upon a part of the defendant's property, and then including in the inventory other property not in view of the officer, is not such a levy as to give priority to the levy over an actual levy, subsequently made under another execution by another officer. *Ray v. Harcourt*, 19 Wend. 495.

In the last case a part of the property in question was a mile and a half distant, and the residue about two miles and a half from the officer at the time of making a levy.

So, where an officer went on to the farm of the defendant in the execution, and made a levy on his property, a part of which was in a field where the officer was at the time with the defendant, and in sight, and another part of the property, being a yoke of oxen, were in another lot on the same farm, eighty rods distant, but not seen by reason of an intervening hill, the levy as to the oxen was held invalid as against a *bona fide* purchaser of them from the defendant in the execution. *Van Wyck v. Pine*, 2 Hill, 666; *Bond v. Willet*, 29 How. 47.

It is not necessary, however, that there should be a manual interference with the property in order to constitute a valid levy. It is sufficient if the property is present, and subject to the control of the officer having the execution, and that he then openly and publicly states that he levies upon the property, and asserts his authority over it by virtue of such process and levy. *Barker v. Binninger*, 14 N. Y. 270; *Green v. Burke*, 23 Wend. 490; *Connah v. Hale*, id. 462; *Bond v. Willet*, 29 How. 47; S. C., 1 Abb. Ct. App. 165; 31 N. Y. 102; 1 Keyes, 377; *Elias v. Farley*, 2 Abb. Ct. App. 11; S. C., 3 Keyes, 398; 5 Abb. (N. S.) 39; 2 Trans. App. 116; *Dean v. Campbell*, 19 Hun, 534.

Where personal property is taken by virtue of a justice's attachment, the lien continues until judgment can be rendered, and an execution thereon issued; but if the creditor desires to continue his lien after that time, he must procure an execution and have it levied upon the attached property within a reasonable time, or he will risk the loss of his

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lien. *Sterling v. Welcome*, 20 Wend. 238. In such a case the execution is no lien upon the property until an actual levy upon it. *Ib.* And the levy must be made within the county in which the justice issuing the execution resides.

The whole matter in relation to a levy may be summed up thus: It is the duty of the officer to levy promptly; and in making such levy his acts must be public, positive and unequivocal, showing an intention on his part to subject the property to the process which it is his duty to execute. In doing this it may sometimes be necessary to remove the property levied upon. In other cases there may not be any necessity for its removal. But whether it is removed or not, the officer must indorse upon the execution the time of making the levy. Vol. 1, p. 50, § 3029. But a failure to do so will not invalidate the levy. *Havens v. Gordon*, 5 Hun, 178. It is also the usual and correct practice to make an inventory of the property levied upon, and to do it at the time of making the levy. But an omission to do this will not invalidate the levy, because an inventory is not, in strictness, essential to the validity of a levy. *Watts v. Cleveland*, 3 E. D. Smith, 553.

The officer ought always to levy upon sufficient property to satisfy the execution, if so much property can be found; and yet he ought not to take an unreasonable quantity of property, since the object of the law is to secure the debt with as little inconvenience as possible to the debtor. But the law does not impose any restriction as to the amount of property which may be taken, nor does it require that all of the property which is taken shall be levied upon at the same time. *Denvrey v. Fox*, 22 Barb. 522. And even though an officer were to levy upon property sufficient to satisfy an execution, and he should then levy upon other property at a different and subsequent time, and sell that to satisfy the execution, this would not be sufficient ground to sustain an action of trespass against the officer for making the second levy. *Ib.* The remedy against an officer in such a case would be for an excessive levy. *Ib.* To constitute a levy the officer must undoubtedly see the goods, and they must be within his power, at least so far as to assert title to them in the presence of those who may be opposed to the execution of the process; but it is never necessary that the debtor's consent should be obtained, or that he should acquiesce in the levy. *Artisans' Bank v. Treadwell*, 34 Barb. 553. If an officer should wantonly make an excessive levy, the execution debtor would have a remedy by an action on the case. *Dezell v. Odell*, 3 Hill, 215.

Disposition of goods after levy.

Form of indorsement by constable of a levy.

By virtue of the within execution, I have levied on two red cows, one bay mare, the property of the defendant, etc., this 28th day of April, 1865.

JAMES PIERSON, *Constable.*

Same, where an inventory is attached.

By virtue of the within execution, I have, this 28th day of April, 1865, levied on the goods and chattels of the defendant, mentioned in the annexed inventory.

JAMES PIERSON, *Constable.*

Form of an inventory to be attached.

An inventory of goods and chattels this day levied upon and taken into my custody, by virtue of the annexed execution :

One red cow,	One stack of hay,
Ten sheep,	Ten common chairs,
Three hogs,	One sofa.

JAMES PIERSON, *Constable.*

§ 11. **Disposition of goods after levy.** It has been already seen, *ante*, 884, that an officer on making a levy is not bound to remove the goods, but may leave them in the defendant's possession ; and if he does this without security it is at his own risk. The usual practice, however, is for the officer to take a receipt for the goods and chattels levied on, with an agreement to deliver it to the officer on demand, or to pay the amount of the execution. This receipt is usually signed by some friend of the defendant, and the property is then left in the possession of the defendant until such time as may be appointed for its sale. The liabilities of a receptor have been pointed out elsewhere. Vol. 1, p. 662.

Form of receipt for goods levied upon.

JUSTICE'S COURT.

Daniel Stewart	}
<i>agst.</i>	
Peter L. Frederick.	

Execution issued by Peter W. Plantz, one of the justices of the peace of the county of Fulton, for.....	\$175 00
Constable's fees for collecting.....	2 50
	\$177 50

Under and by virtue of the execution above described, James Pierson, a constable of the county of Fulton, has levied upon the following goods and chattels, the property of the said Peter L. Frederick, viz.: (*Enumerate or describe the articles.*) Received this 28th day of April,

 Rights and liabilities of constable after levy.

1865, of the said James Pierson, the goods and chattels above-mentioned, which I promise to deliver to him at any time when he shall demand the same, at the dwelling-house (or barn or other agreed place) of the above-named Peter L. Frederick, in the town of Mayfield, in the county of Fulton; or, in default thereof, I do hereby agree and promise to pay him the amount of the said execution, with the said costs and fees for the collection thereof.

BRADFORD T. SIMMONS.

The constable may specify in the receipt the time and place for the delivery of the property levied upon, and the receiptor will then be bound to comply with its terms. But no action will lie against the receiptor until a proper demand of the property has been made. And in an action against him it will be a good defense to show that the property has been taken from him by the rightful owner. *Harvey v. Lane*, 12 Wend. 563.

§ 12. **Rights and liabilities of constable after levy.** After making a levy upon goods, it is the duty of the constable to exercise proper care for their safety. And if they are injured, he may maintain an action against the wrong-doer. He is not regarded as an insurer of the goods, though he will be held responsible if they are lost through his own neglect, or from that of others to whom he may have intrusted their keeping. *Browning v. Hanford*, 5 Hill, 588; S. C., 5 Denio, 586; *Moore v. Westervelt*, 27 N. Y. 234; S. C., 25 How. 277.

Where an execution is levied upon the goods in a store, it is a continuing levy which will cover goods purchased by the judgment debtor, at a time subsequent to the levy, and during the life of the execution, and placed in the same store, if such goods are of the same general description as those levied on, and have been purchased to supply the place of those sold by the debtor, after such levy, or as an addition to the original stock. *Roth v. Wells*, 41 Barb. 194; S. C. affirmed, 29 N. Y. 471.

And where goods have thus been levied upon, if the debtor removes or sells a portion of them, and he then substitutes others of a similar description in their place, the property thus substituted takes the place of that which was sold or removed, and becomes subject to the lien of the execution without any new levy. *Ib.* And if the debtor, when called upon under such circumstances, refuses to designate the property which he claims is not covered by the levy, he will be estopped from subsequently maintaining an action against the officer for the value of the property taken by him under the execution. *Ib.*

A sheriff who levies upon goods under an execution, as the property of the defendant therein, may, when he discovers that the goods be-

Effect of a levy.

long to another person, relinquish the levy, and return the execution, no goods found. *Blivin v. Bleakley*, 23 How. 124. But if an action is brought against the officer for a false return to the execution, the burden of showing property out of the defendant in the execution is thrown upon him, when the good faith of the return is put in controversy. *Ib.*

Where a sheriff levies upon property which cannot be immediately removed or reduced to possession, as upon growing crops of grain, it will be sufficient to make the levy openly and publicly, and the sale may then be deferred until the time for harvesting. *Whipple v. Foot*, 2 Johns. 418.

§ 13. **Effect of a levy.** It has been held, in some of the older cases, that the mere act of levying upon sufficient personal property to satisfy the execution amounts to a satisfaction or extinguishment of the judgment on which it was issued, unless the property was fraudulently withdrawn, by the defendant, from the possession of the officer. But such is not the present rule; and although the levy may cover property sufficient to satisfy the execution, yet if it fails to produce a satisfaction in fact, without any fault on the part of the plaintiff, he may proceed to obtain satisfaction by a new levy upon other goods. A mere levy upon sufficient goods and chattels to satisfy an execution, where nothing more is done by the officer than to make the levy, will never amount to a satisfaction of the judgment. *People v. Hopson*, 1 Denio, 574, 578; *Waddell v. Elmendorf*, 5 id. 447. A mere levy neither gives any thing to the creditor nor takes any thing from the debtor. It does not divest a title; it only creates a lien upon the property. It frequently happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor, or is defeated by his misconduct; and in such cases there is no reason for holding that the judgment is satisfied. *Ib.*

If property is sold upon an execution issued upon a justice's judgment, and the execution is returned satisfied, but the defendant subsequently sues the plaintiff in the execution, and recovers the value of the property sold, on the ground that it was exempt by law from execution, the plaintiff may sue and recover a new judgment, and then issue execution thereon and collect the amount. *Piper v. Elwood*, 4 Denio, 165. A justice has no power to strike out the return on the execution and then issue a new one, and, therefore, an action upon the judgment is the appropriate remedy. *Ib.* A mere levy upon property sufficient to satisfy an execution will not amount to a satisfaction of the judgment, although the officer remains in possession of the goods

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for a day and a half, when he abandons the levy, and leaves the goods in the defendant's possession, on the ground that the plaintiff refused to indemnify him. *Radde v. Whitney*, 4 E. D. Smith, 378.

So, where a levy was made by a constable who was at the time a minor, and he abandoned the levy to relieve himself from the consequences of his unlawful act in taking upon himself the duties of the office while under age, this was held not to be a satisfaction of the judgment, although the value of the property levied upon was equal to the amount of the judgment. *Green v. Burke*, 23 Wend. 490. Where the debtor has neither paid the debt nor been deprived of his property, a mere levy upon his property will not amount to a satisfaction of the judgment. *Peck v. Tiffany*, 2 N. Y. 451. But where an officer levies an execution upon property sufficient to satisfy it, and through his negligence or misconduct the property is lost, destroyed or disposed of, so that the defendant is deprived of the benefit thereof, it is a satisfaction of the judgment, and the plaintiff must seek his remedy against the officer. *Ib.* Where goods and chattels are levied upon by virtue of an execution, the levy will inure to the benefit of any other execution which is subsequently delivered to the officer during the life of the first execution, and without making any new levy under the latter execution. *Ib.*; *Birdseye v. Ray*, 4 Hill, 160; *Cresson v. Stout*, 17 Johns. 116; *Russell v. Gibbs*, 4 Cow. 390; *Jones v. Atherton*, 7 Taunt. 56.

§ 14. **Sale of chattels under execution.** After a constable has levied upon the goods and chattels of the defendant, or the party against whom the execution has been issued, the latter may prevent further proceedings by paying the amount levied to the officer; and this will be deemed a good payment to the plaintiff, or to the party entitled to it. *Jackson v. Law*, 5 Cow. 248. If the money is not paid, it is the duty of the constable to proceed immediately in the matter of making a sale.

A constable who has levied upon goods and chattels is not permitted to advance his own money for the payment of the plaintiff, and then to retain a right to subsequently enforce the execution upon the property for his own benefit. *Reed v. Pruyn*, 7 Johns. 426. Nor can he take a bond, or other security, from the defendant, and retain the execution in his hands, and use it afterward to enforce the payment of the money advanced by him. *Ib.*; *Sherman v. Boyce*, 15 Johns. 443; *Carpenter v. Stilwell*, 11 N. Y. 61, 67; *Bigelow v. Provost*, 5 Hill, 566. Nor can he deliver the goods to the plaintiff in satisfaction of his debt, but

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they must be sold, and so much of the avails paid over to him as will satisfy his execution. *Thomson v. Clerk*, Cro. Eliz. 504.

The statute requires the constable who takes personal property into his custody by virtue of an execution to immediately post conspicuously in at least three places of the city or town in which the property was taken, written or printed notices, signed by him, describing the property, and specifying the place within the same city or town where, and the time, not less than six days after the posting, when it will be exposed for sale. Vol. 1, p. 50, § 3029.

Constable's notice of sale.

By virtue of an execution (*or several executions*) issued from a justice's court, against the property of Richard Roe, I have seized, and taken (*name the articles with particularity*), which I will expose to sale at public vendue, to the highest bidder, on the 10th day of May, 1865, at ten o'clock in the forenoon, at the dwelling-house (*or barn*) of said Richard Roe, in the town of Broadalbin.

Dated *May 4*, 1865. GARRET VAN VRANKEN, *Constable*.

The sale must be made at the time and place fixed by the notice, unless the sale is for some cause postponed. The constable having an execution to collect may postpone the sale thereon from time to time as he may deem proper, except that he cannot extend the time beyond the return day of the process. This right of postponement may be exercised at any time before the sale is complete; and, therefore, postponement will be regular and legal, although it may have been made after the sale has been commenced by receiving bids on the property. *Tinkom v. Purdy*, 5 Johns. 345. Such postponement may be to a different place from that specified in the notice, and a sale completed at the adjourned place will be valid if there is no fraud or abuse of the process. *Ib.*

If the officer finds that a sale at the time advertised cannot take place, without producing a great sacrifice of property and that no injury can result to the plaintiff from the delay, it is his duty to postpone the sale. *McDonald v. Neilson*, 2 Cow. 140, 190, 191. He is bound to take all lawful and necessary measures to secure the sum which he is directed to levy; but as to the time, manner, and place of sale, he is vested with a sound discretion. *Ib.* The sale, however, must not be out of the town in which the goods and chattels were taken, when the execution is issued by a justice of the peace.

A postponement to be regular should be made at the time and place of sale. The object to be attained by allowing the postponement is to

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prevent a sacrifice of the property when the officer ascertains that a fair price cannot be obtained by the absence of bidders or other cause; and ordinarily this can be ascertained only at the time and place of sale. If a sale can be postponed before the day of sale, which is extremely doubtful, the prior notice of sale must be treated as abandoned, and a new notice must be given for the full time fixed by the statute. *Fredrick v. Wheelock*, 3 N. Y. Sup. Ct. 210. If a notice of postponement is once given, it cannot afterward be disregarded, and a valid sale of the property made on the day fixed in the original notice. Such a sale would be void, and the officer would be liable to the execution debtor for wrongful act. *Ib.*

A sale of property under an execution, whether made on the day designated in the notice of sale, or on a day to which the sale has been regularly postponed, must be made at public auction, between the hours of nine o'clock in the morning and sunset. Vol. 1, p. 50, § 1384. If made after sunset the sale will be void. *Carrick v. Myers*, 14 Barb. 9. It must be made upon some day before the time limited for the return of the execution, unless the execution has been renewed; and if the execution has been renewed the sale must take place before the expiration of the time for which it was renewed. Vol. 1, p. 53, § 3040. The sale must take place where the property is, and if the property is not present, but at a distance of several miles from the place of sale, such sale will be void. *Cresson v. Stout*, 17 Johns. 116. The property must, as a general rule, be present at the sale, and it ought to be pointed out so that bidders may examine and inspect the articles to be sold. *Warring v. Loomis*, 4 Barb. 484. The articles ought to be so specifically pointed out and designated that the purchaser knows precisely what particular article or articles he is purchasing. *Ib.* Where a constable levied upon thirteen sheep, generally, and on the day of the sale the sheep of the defendant, numbering some twenty-two, were all present and in a flock, and the officer offered thirteen of them for sale, without designating which, and in reply to the question of a bidder as to which sheep he sold, he replied, "the best, the fattest of them," it was held that no title passed to sheep thus sold. *Ib.* In such a case the purchaser does not acquire any right to select thirteen sheep out of the flock, and he will be liable in trover for their value if he does so. *Ib.*

An officer who makes a judicial sale must separate the property he sells from the mass of property with which it is mixed, or the title will not pass. *Stevens v. Eno*, 10 Barb. 95. The officer has no right to leave any question to be settled between the purchaser and the defend-

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ant in the execution as to what property was sold, nor to leave unsettled any question as to the quantity purchased by the bidder. *Ib.* Where hay is put up into a stack an officer cannot sell a specified number of pounds of it, as it stands in the stack, and reserving a right to the purchaser to separate it at a future time. *Ib.* And if the purchaser subsequently takes any portion of the hay he will be a trespasser, for the reason that the sale is entirely void. *Ib.*

The statute declares that personal property must be offered for sale in such lots and parcels as are calculated to bring the highest price; and that it shall not be offered for sale unless it is present, and within the view of those attending the sale, except where the officer is expressly authorized by the statute to sell property not in his possession. Vol. 1, p. 51, § 1428. See *Tugwell v. Bussing*, 2 Hun, 160.

Where personal property consisting of several articles is sold on an execution, subject to a chattel mortgage, the whole ought to be sold in one parcel. *Tift v. Barton*, 4 Denio, 171. And see *Manning v. Monaghan*, 23 N. Y. 539. And where the property so sold consisted of a great many articles, which were at different places in the buildings and fields, upon the defendant's farm, so that the whole of them could not readily be brought at one time within view of the officer, it was held that he ought first to declare and point out to the bidders the property to be sold, and that he might then sell the whole together on the premises, although it should not all be at once within his view. *Ib.* So there may be other cases in which the party need not be within the actual view of the bidder at the time of the sale. Where the property in a printing and publishing establishment was sold under an execution, and a part of the articles consisted of stereotype plates, which were not actually in view at the time of the sale, but were in a vault connected with the building, and in a separate room, which was open, and the plates readily accessible for examination by any person wishing to see them, it was held that the sale might be made by exhibiting impressions from the plates, especially when it appeared that this was the usual mode of selling them, and that they would be likely to suffer injury from handling. *Bruce v. Westervelt*, 2 E. D. Smith, 440.

Where property is sold under an execution, and a part of it is present at the sale, while the remainder is absent therefrom, the sale will be valid as to that part which was present, although it may be void as to that which is absent. *Linnendoll v. Doe*, 14 Johns. 222.

If no bidders attend the sale the officer ought to postpone it, and he should then give notice to the plaintiff of that fact, and of the time and place to which the sale has been adjourned. In that case it is the

Sale of chattels under execution.

duty of the plaintiff to attend the sale and bid on the property himself, and if he neglects or refuses to do so, and no other bidders attend, the officer may return that the goods remain on hand for want of bidders. The rule is the same where the property cannot be sold except at a great sacrifice. And if an officer should sell goods at a very great sacrifice, he would be liable to an action in favor of the injured party whose property was thus sacrificed. *Knightley v. Birch*, 3 Camp. 521.

If an officer should sell property worth \$300 or \$400, for the sum of \$75, and an action was brought against him for damages, it would be no legal excuse or defense to show that the property was sold to the highest bidder. *Ib.*

A sale upon an execution will pass no greater title to the purchaser than the defendant in the execution has in the same property. *Snedeker v. Snedeker*, 18 Hun, 355; *Farrant v. Thompson*, 5 Barn. & Aid. 826. In the case last cited it appeared that certain mill machinery, together with a mill, had been demised to a tenant for a certain term, and that he, without the permission of his landlord, had severed the machinery from the mill, and that it had been afterward seized by an officer under an execution and sold by him, and it was held that no title to the property passed to the vendee, and that the landlord might maintain trover for the machinery, even during the continuance of the term. *Ib.* See, also, the cases cited in the note to *Morley v. Attenborough*, 3 Exch. 500, 514. See also vol. 2, p. 943. It is the duty of the officer to sell property enough to satisfy the execution held by him; but if he sells property sufficient to satisfy the execution, and he then sells other property, he will be liable in trover for the excess of property thus sold. *Batchelor v. Vyse*, 4 Moore & Scott, 552; *Aldred v. Constable*, 6 Q. B. 370; *Stead v. Gascoigne*, 8 Taunt. 527. As to the effect which the statute of frauds has upon sales, see vol. 2, pp. 110-128. Where a sale is made at auction the contract is not complete until the bid is accepted, by striking off the article to the purchaser; and at any time before this is done the bidder may retract his offer, which will terminate the contract. *Payne v. Cave*, 3 Term Rep. 148. The bid is a mere proposition by one party, and it cannot form a contract until it is accepted by the other. *Ib.* If, however, the goods are actually struck off to the bidder, before the bid is retracted, the sale is then complete, and the bidder is liable for the price. And if he refuses to accept and pay for them the officer may immediately put them up at auction and resell them to the highest bidder; and if there is a deficiency between the price bid by the first purchaser and the sum for which the goods sold on the resale, the first purchaser is liable for the difference.

Sales of chattels under execution.

Vol. 2, pp. 64, 345, 346. When the value of the goods sold exceeds the sum of \$50 the requirements of the statute of frauds must be observed. *Id.*, p. 110. A proper entry in the memorandum book of the sale will be sufficient; and so will a part payment or a part delivery of the same. *Ib.* But to prevent all questions the prudent course will be to require a written, signed memorandum from the purchaser, which may be brief, as in the following form:

Memorandum of sale of goods, etc.

IN JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.	}	Before HARLEY BARTLETT, Esq., <i>Justice.</i>
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May 2, 1865, William Vail bought of Jacob Lawyer, constable, at auction, on an execution issued in this action,

One bay horse..... \$150 00

WILLIAM VAIL.

The memorandum may also be signed by the officer, though this is not necessary, since the statute merely requires that it shall be signed by the party who is to be charged upon it. Vol. 2, pp. 110, 111. The plaintiff may purchase the goods at the sale; and in that case the officer may deliver them to him, without payment, and credit the amount to the defendant on the execution. *Nichols v. Ketcham*, 19 Johns. 84. But if the purchase amounts to more than the sum due on the execution the balance must be paid over to the officer, who must return it to the defendant. *Ib.*

A plaintiff who bids off goods which are sold on an execution in his own favor need not pay the money in ordinary cases; and yet, if there is a dispute between him and other execution creditors, as to who is entitled to the money arising from the sale, the constable may refuse to accept his bid, or to deliver the property to him until the money is paid; and if payment is refused he may resell the property. *Russell v. Gibbs*, 5 Cow. 390, 396.

But if the property is sold and delivered to the plaintiff by the officer he cannot maintain an action for the price bid, if the plaintiff can show that the money legally belongs to him. *Ib.*

The right and interest of the pledgor of goods and chattels cannot be sold on an execution, unless they are present and within the view of those attending the sale. *Bakewell v. Ellsworth*, 6 Hill, 484; *Stief v. Hart*, 1 N. Y. 20. Where such right and interest have been levied upon, the officer may take actual possession of the chattels, and hold

Execution in replevin actions.

them until he sells. *Ib.* But after the sale, the pledgee is entitled to the possession of them, which he may retain until the purchaser redeems them. *Ib.*

§ 15. **Execution in replevin actions.** The execution itself points out the constable's duty when the action was for the recovery of the possession of personal property. See form, *ante*, 863. If the property is in possession of the successful party at the time of rendering the judgment, there will not be any need of a clause in the execution directing a return or delivery of the property to that party. The execution will be sufficient in that case, if it directs the collection of the damages and costs awarded by the judgment. If the plaintiff succeeds in the action, and the property is in the possession of the defendant in pursuance of the law permitting him to retain it by giving a bond, the officer should demand the property of the defendant. If the demand is complied with, the officer will take the property and deliver it to the plaintiff. If the property is in the possession of the defendant, and it is in a place where the officer may lawfully take it, he should promptly take it into his possession and return it to the plaintiff.

For the purpose of taking possession of a chattel by virtue of an execution in an action of replevin, the powers of the constable are the same as upon a requisition to replevy a chattel. Vol. 1, p. 25, § 1732. If the chattel is concealed in a building or inclosure, the constable must publicly demand its delivery. If it is not delivered pursuant to the demand, he must cause the building or inclosure to be broken open, and must take the chattel into his possession. *Id.*, p. 20, § 1701. The powers of a constable acting under a requisition to replevy have been sufficiently pointed out. *Ante*, 212.

If the specific property is delivered to the officer, and the execution also directs the collection of damages and costs, he must then levy upon the defendant's property and make the amount as in ordinary cases. If the plaintiff has taken the property on his replevin proceedings, and has retained them since that time until the rendition of the judgment, and such judgment is in favor of the defendant for a return of the property to him, the practice, as to the right to break buildings, and the like will be the same as where the plaintiff has an execution for the return of the property.

Whether the officer may arrest and imprison the judgment debtor under an execution issued upon a judgment rendered by a justice of the peace in an action to recover a chattel, depends upon the form of the execution, and the ability of the officer to find sufficient property of the judgment debtor to satisfy it. If the execution commands the

Execution against the person.

constable, if sufficient personal property cannot be found to satisfy the judgment, to arrest the judgment debtor, and to convey him to the jail of the county, there to remain until he pays the judgment or is discharged according to law, the officer must execute the mandate according to its commands.

To authorize a justice of the peace to issue an execution against a judgment debtor in an action to recover a chattel three things must concur :

1. The judgment debtor must be a male person ;

2. The chattel, to recover which the action was brought, must have been embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent or broker or other person in a fiduciary capacity ; and

3. An order of arrest must have been granted and executed in the action. See vol. 1, p. 48, § 3026 ; id., p. 52, § 3038 ; id., p. 23, § 1373. Unless these three things concur no execution against the person of the judgment-debtor can be issued in an action to recover a chattel.

§ 16. **Execution against the person.** The Code does not authorize a justice of the peace to issue an execution against the person of a female upon a judgment rendered by him in any civil action. It authorizes that form of execution against male persons only. Id., p. 48, § 3026. The cases in which an execution may issue against the person of a judgment debtor in an action to recover a chattel have been noticed in the preceding section. An execution against the person may also issue in an action to recover a fine or penalty, or to recover damages for a personal injury ; an injury to property including the wrongful taking, detention or conversion of personal property, misconduct or neglect in office, or in a professional employment, fraud or deceit. In either of these actions an execution issues against the person of the judgment debtor, as of course, whether an order of arrest was granted in the action or not. Such an execution will also issue in an action brought to recover for money received, where it appears that the money was received by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment ; or by a factor, agent, broker or other person in a fiduciary capacity, but not unless an order of arrest has been granted and executed in the action. Id., p. 48, § 3026. But, even where the defendant is liable to imprisonment upon an execution, he cannot be arrested if he has sufficient property liable to execution, which is within reach of the officer if he chose to levy upon it. Upon receiv-

Execution against the person.

ing such an execution, the first duty of the officer is to search for goods and chattels upon which to levy and make the amount required by the execution. *Hollister v. Johnson*, 4 Wend. 639. If there is sufficient property available to satisfy the execution, the officer has no right to arrest and imprison the defendant, and any such arrest would subject him to an action for a false imprisonment. *Ib.* If an officer, without searching or inquiring for property, proceeds at once to arrest the defendant, and it is shown that the defendant had property in his open and visible possession at the time, which was liable to execution, the officer will be liable for making the arrest. *Ib.*

The acts or declarations of the defendant may, in some cases, relieve an officer from searching for property, as where he informs the officer that he has no property upon which a levy can be made, and if the officer takes him at his word, and in good faith arrests him for want of property on which to levy, the defendant will be estopped from questioning the legality of the arrest. *Ib.*; *White v. Ashton*, 51 N. Y. 280, 286.

A constable has, in all cases, a reasonable time to search for property before he is bound to arrest the defendant, and if he acts in good faith he will not incur any responsibility by omitting to take the body until such search can be made. *Hollister v. Johnson*, 4 Wend. 639. But where an officer has an execution for the arrest of a party, he is bound to use all reasonable endeavors to execute it, and he should, at the least, go to the residence of such party to find him, and if, instead of this, he relies upon the vague information which he may happen to obtain from mere casual inquiries in the streets, he does it at the peril of being liable for a false return, where he returns that the defendant could not be found, when the fact is really otherwise. *Hinman v. Borden*, 10 Wend. 367.

The general rules relating to arrests upon an order of arrest are equally applicable to an execution. *Ante*, 156 to 162.

If the defendant is arrested upon the execution, and it is not then paid, it is the duty of the officer to take the body of the defendant and convey him to the common jail of the county, and to deliver him to the keeper thereof. Vol. 1, p. 51, § 3032. If the plaintiff is defeated in an action of tort, and the cause of action is such that he might have imprisoned the defendant, in case he had been successful, the defendant is, in that case, entitled to an execution against the person of the plaintiff. *Keeler v. Clark*, 18 Abb. 154; *Miller v. Scherder*, 2 N. Y. 262; *Kloppenbergh v. Neefus*, 4 Sandf. 655; *Catlin v. Adirondack Co.*, 20 Hun, 19; *Brown v. Brockett*, 55 How. 32.

Execution against the person.

It was held at Special Term in a case arising under the old Code that in courts of record there may be cases in which the defendant cannot issue an execution against a plaintiff who has been defeated in an action of replevin. *Purchase v. Bellows*, 23 How. 421. But in that case the defendant could not have been arrested upon the execution if the judgment had been against him; and unless he could, there would be no reason why he should be entitled to arrest the plaintiff. The effect of taking the body of a party in execution is, as a general rule, a satisfaction of the judgment so long as the imprisonment continues. The judgment is not thereby absolutely extinguished but the imprisonment bars the creditor from all other remedy for the collection of the debt while the debtor is in custody. After the imprisonment is at an end the statute in certain cases revives the remedy of the creditor against the property of the judgment debtor. See vol. 1, p. 52, § 3037. But while it continues no other or different satisfaction can be obtained. The same consequences follow for the time being, as from an actual satisfaction. *Koenig v. Steckel*, 58 N. Y. 475. And see *Cooper v. Bigalow*, 1 Cow. 56; *Sunderland v. Loder*, 5 Wend. 58; *Wakeman v. Lyon*, 9 id. 241; *Chapman v. Hatt*, 11 id. 41. If, however, the defendant escape, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property. *McGuinty v. Herrick*, 5 Wend. 240; *Wesson v. Chamberlain*, 3 N. Y. 331.

For a joint trespass, committed by two persons, the party injured has his election to prosecute both in one action, or to sue them separately; and in the latter case, if he recovers, he has the further election which damages he will collect, in either of the actions. *Kasson v. People*, 44 Barb. 347. If he elects to sue the wrong-doers separately, and recovers in both actions, and then sues out an execution upon one of the judgments upon which the defendant is committed to jail, and then the assignee of both judgments gives a written direction to the sheriff to discharge that defendant from custody, the imprisonment of such defendant and his discharge therefrom by the assignee will operate to discharge not only the judgment upon which such defendant was charged in execution, but also the judgment against the other joint trespasser; and the remedy upon both judgments is gone. *Ib.* In such a case, the plaintiff in the judgments is entitled to but one satisfaction for the injury he has sustained by the trespass committed by the defendants in the two judgments; and he has that satisfaction by

Discharge of imprisoned debtor. — Claim of property by a third person.

the imprisonment of one of them, and by discharging him therefrom. *Ib.* And see *Vidrard v. Fradneburg*, 53 How. 339; *Bonesteel v. Garlinghouse*, 60 Barb. 338; vol. 2, p. 750.

§ 17. **Discharge of imprisoned debtor.** If a person committed to jail by virtue of an execution issued by a justice of the peace, or out of the municipal court of Buffalo, or by virtue of an execution issued by a county clerk on a transcript of a judgment recovered before a justice of the peace, or in the said municipal court of Buffalo, has a family within the State for which he provides, he must be discharged, after remaining in custody, either with or without being admitted to the jail liberties, thirty days; otherwise he must be discharged after so remaining sixty days. Code Civil Pro., § 3033, as amended in 1883. But to procure such discharge he must make and deliver to the sheriff or jailer an affidavit stating the facts which entitle him to his discharge. Vol. 1 p. 5 § 3034.

Form of affidavit to obtain discharge from jail.

JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.	}	Before PETER W. PLANTZ, Esq., <i>Justice</i> .
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FULTON COUNTY, ss.:

Richard Roe, the above-named defendant, being duly sworn, says that he has a family in this State for which he provides (*or that he has no family*), and that he is not a freeholder, and that he has remained in prison in the jail of said county (*or on the liberties of the jail, etc.*), thirty (*or sixty*) days, on an execution issued in the above action.

Sworn before me this *4th* }
day of May, 1865, }

RICHARD ROE.

PETER W. PLANTZ, *Justice of the Peace*.

Upon receipt of this affidavit, the sheriff or jailor must forthwith discharge the prisoner from his custody. *Ib.*

§ 18. **Claim of property by a third person.** In serving an execution, the constable ought to be careful not to levy upon the goods of any person other than the one named in the process; for, if he seizes the goods of a stranger, he will be liable to an action of trespass. Vol. 2, pp. 546, 547; *Van Antwerp v. Newman*, 2 Cow. 543; *Ackworth v. Kempe*, Doug. 40.

If the officer has reasonable grounds for doubting whether the property seized belongs to the debtor, or if the goods are claimed by another person, he is bound, if no indemnity be tendered by the creditor,

Claim of property by a third person.

to call and impanel a jury and try the title. *Farr v. Newman*, 4 Term Rep. 633; *Platt v. Sherry*, 7 Wend. 236, 238; *Townsend v. Phillips*, 10 Johns. 98. If the jury find that the goods are not the debtor's the execution may be returned, *no goods found*; and the constable is justified in making that return, unless an indemnity be then tendered by the creditor; and in case it is, the constable is bound to proceed and sell, notwithstanding the finding of the jury. *Curtis v. Patterson*, 8 Cow. 65; *Van Cleeef v. Fleet*, 15 Johns. 147. The creditor, however, is not bound to tender a bond of indemnity until after the jury have passed upon the question of title. *Ib.* And the officer acts at his peril in making a return of *no goods found*, under any other circumstances; and if sued for a false return, the burden is upon him to show property out of the defendant, by thus proving his return true. *Ib.*; *Magne v. Seymour*, 5 Wend. 309-311. If the jury find that the goods levied on are the debtor's, the constable must proceed and sell, and the verdict will protect him from vindictive damages. *Townsend v. Phillips*, 10 Johns. 98.

Where goods are in the hands and under the control of the defendant in the execution, and they are pointed out as his property to the constable, by the creditor, the constable is bound to levy upon them without an indemnity; and if he neglects to do so, and if the goods are afterward removed beyond his reach by the defendant in the execution, he will be answerable to the creditor for his neglect. *Williams v. Lowndes*, 1 Hall, 579; *Camp v. Chamberlain*, 5 Denio, 198, 203. But if, after a levy, a claim to the goods is interposed by a third person, the constable should proceed to call a jury, as has been already explained. *Ib.* The necessity for calling a jury may be dispensed with by taking a bond of indemnity from the creditor in the first instance, if he is willing to give it. Such a bond is valid although executed before any levy has been made on the property. *Chamberlain v. Beller*, 18 N. Y. 115. And it would be equally valid though not given until after the levy and sale. *Westervelt v. Frost*, 1 Abb. 74.

If the bond is given for the purpose of indemnifying against the consequences of a known trespass, the bond will be illegal and void. Vol. 1, pp. 253, 670.

Where a claim of property is interposed by a third person, and the constable determines to call a jury to try the title, he ought to summon six competent legal jurors for that purpose. And when that has been done, he should give notice to the claimant of the property, the

Claim of property by a third person.

plaintiff and the defendant in the execution, of the time and place of hearing. The notice may be in the following form :

Notice of trial of claim to property.

(*Title of action.*)

Take notice, that A. B. makes claim to the property levied upon by me under an execution issued by Peter W. Plantz, Esq., a justice of the peace of Fulton county, in favor of John Doe against Richard Roe, and that I shall proceed to try the claim of the said A. B. before a jury to be summoned by me for that purpose, on the 25th day of April, 1865, at one o'clock, P. M., at the public house kept by Rodney H. Johnson, Esq., in the village of Johnstown.

Yours, etc., JAMES PIERSON, *Constable.*

To A. B., *Claimant*; JOHN DOE, *Plaintiff*; RICHARD ROE, *Defendant.*

This notice may be served by delivering a copy of it to each of the parties interested ; and a service by reading it would be equally valid. Yet, as a matter of careful practice, it will be best to serve it by copy.

There is no rule of law which prescribes any particular time for the notice ; but the proper practice will be to give all the parties interested a reasonable and timely notice so that they may have a full and fair opportunity of being present.

After the jurors have convened at the time and place fixed for the hearing, the constable should administer an oath to each of the jurors. The oath may be in the following form :

Oath to jurors on claim of property.

You and each of you do swear that you will well and truly try the claim of A. B. to the property levied on by me, James Pierson, a constable of Fulton county, under the execution in favor of John Doe against Richard Roe, and true inquisition make according to the evidence. So help you God.

The attendance of the witnesses may be enforced by a subpoena issued by the justice who issued the execution. The subpoena may be in the usual form, except that it must be modified as to the person before whom the witnesses are to appear. After the witnesses have appeared under the subpoena, or voluntarily, at the request of any of the parties, they are sworn before giving their evidence. The constable may administer this oath, which may be in the following form :

Oath to witness.

You do swear that the evidence you shall give to the jury, touching the claim of A. B. to the property levied upon by me, James Pierson,

Claim of property by a third person.

a constable of Fulton county, under the execution in favor of John Doe against Richard Roe, shall be the truth, the whole truth, and nothing but the truth. So help you God.

After the witnesses are sworn they are examined in the usual manner. The several parties interested may appear by counsel, and the issue will be tried much as a cause is usually litigated. After hearing the evidence, the jury ought to deliberate alone by themselves, as in other jury trials, and after they have agreed upon question of title, they should reduce their finding to the form of an inquisition, in which they should state in whom they found the property to be. The inquisition should be sealed, and signed by the jurors finding it, and also by the constable before whom it was taken.

Inquisition of jury upon claim to property

(Title of action.)

We, whose names are hereto signed, being a jury summoned and sworn by James Pierson, a constable of Fulton county, to try the claim of A. B. to the property levied on by the said constable under an execution in favor of John Doe, and against Richard Roe, to-wit, one piano forte, etc., etc., do say upon our oath that the title to said property is (*or is not*) in the said A. B.

Witness our hands and seals, on, etc., at. etc.

Jurors.

Jurors.

[L. S.]
[L. S.]
[L. S.]

[L. S.]
[L. S.]
[L. S.]

JAMES PIERSON,

A constable of Fulton County.

Form of bond of indemnity to constable.

Know all men by these presents, That we, Daniel Stewart and Daniel Edwards, are held and firmly bound unto James Pierson, a constable of the county of Fulton, in the penal sum of \$400 (*or double the value of the goods*), to be paid to the said James Pierson, or to his certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals.

Dated the *25th day of April*, 1865.*

WHEREAS, the said James Pierson, as constable aforesaid, by virtue of a certain execution, issued by Peter W. Plantz, Esq., one of the justices of the peace of said county, against Richard Roe, in favor of the said Daniel Stewart, for \$200, damages and costs, has seized, or is about to levy the said execution upon one certain bay horse, with a wagon and harness, now or lately in the possession of the said Richard Roe, with intent to sell the same, in order to satisfy the said execution:

Now, therefore, the condition of this obligation is such, that if the said Daniel Stewart shall, at all times and forever hereafter, keep the said

Priority of executions.

James Pierson harmless and indemnified of, from and against all damages, costs, charges, trouble and expense, of what nature soever, which he may be put to, sustain or suffer, by reason of such levy and sale, or either of them, then this obligation to be void, or otherwise of force

Sealed and delivered {	DANIEL STEWART. [L. s.]
in presence of {	DANIEL EDWARDS. [L. s.]
PETER W. PLANTZ.	

If the case is one in which a jury has been called to try the title, and they have found the title of the property to be in the claimant, but the plaintiff still insists upon a sale of the property, he may do so, and then the form of the bond will be varied accordingly.

In such a case, the form of the bond will be like the last one down to the * ; and then insert the following recital and condition :

Condition where jury has tried title.

WHEREAS, the said James Pierson, as constable as aforesaid, by virtue of a certain execution issued by Peter W. Plantz, Esq., one of the justices of the peace of said county, against Richard Roe, in favor of the said Daniel Stewart, for \$200, damages and costs ; and WHEREAS, the said James Pierson, as such constable, did levy upon certain goods and chattels, under such execution, supposed by him to belong to the said defendant, but which were claimed by A. B., and a jury duly called for that purpose having found that the title to the said property was in the said claimant, and the said plaintiff refusing to assent that such property be released from such levy, but insisting that the said constable should retain such levy under his execution, and that he should sell the property :

Now, therefore, etc., as in the preceding form to the end.

§ 19. **Priority of executions.** An execution issued out of a court not of record, or a warrant of attachment granted in an action pending in a court not of record, if actually levied, has preference over another execution issued out of any court, of record or not of record, which has not been previously levied. Vol. 1, p. 54, § 1408.

Where several executions are delivered to a constable at different times, and before he has made a levy under any of them, the executions will be entitled to priority, according to the time and order of delivery and though a levy may be first made upon the last execution, and the property sold thereon, yet the constable will be bound to pay over the proceeds to the plaintiff in the first execution, or enough of them to satisfy it, if the amount is sufficient for that purpose. *Camp v. Chamberlain*, 5 Denio, 199 ; *Rowe v. Richardson*, 5 Barb. 385. A sale upon the execution last delivered will be entirely valid, and pass the title of the property to the purchaser. *Ib.* But the money received upon the sale must be applied on the execution first received ; and if the officer

Priority of executions.

neglects or refuses so to apply it, but, on the other hand, pays it to the plaintiff in the last execution, such officer will be liable to the plaintiff in the first execution for the amount due upon his execution, if the proceeds of the sale amounted to so much, or to the extent of the sum received where that is less than the execution. *Lemon v. Statts*, 1 Cow. 592; *Marsh v. Lawrence*, 4 id. 461; *Sanford v. Roosa*, 12 Johns. 162.

Where two judgments, one larger and one smaller, are rendered in favor of different plaintiffs, against the same defendant, and docketed at the same time and executions upon both judgments are simultaneously delivered to a constable for execution, and upon a sale of the property there is not sufficient money to pay both judgments, the constable must apply the money equally upon the two executions until the smaller one is satisfied, and then apply the residue upon the larger execution. *Campbell v. Ruger*, 1 Cow. 215.

Where a constable receives an execution against an individual member of a partnership, upon which he levies upon the partnership property, but before the sale thereof another execution against all of the members of the firm is delivered to him, he must apply the proceeds of the sale of the partnership property in satisfaction of the execution against all the partners, notwithstanding such execution was last received. *Dunham v. Murdock*, 2 Wend. 553; *Crane v. French*, 1 id. 311; *Ryder v. Gilbert*, 16 Hun, 163; *Eighth Nat. Bank City of New York v. Fitch*, 49 N. Y. 539.

A party may first deliver his execution to a constable, and he may secure the advantage of a previous levy upon the defendant's property and yet, he may, by his acts or language, forfeit or lose the priority thus gained.

The statute makes it the duty of the constable to give immediate notice of the sale of property after he has made a levy, and to sell it as soon as it may conveniently be done. A mere delay on the part of the officer, on his own motion, without any direction or sanction by the plaintiff, will not affect the priority of the execution as against subsequent executions coming into the officer's hands, or into the hands of another officer. *Russell v. Gibbs*, 5 Cow. 390; *Herkimer Co. Bank v. Brown*, 6 Hill, 232; *Benjamin v. Smith*, 12 Wend. 404. If the plaintiff is not chargeable with any thing more than mere acquiescence in the delay, and he has neither said or done any thing to encourage it, his execution will not lose its priority. *Ib.* But if the plaintiff himself interferes and directs a delay in the sale, he will, in many cases,

Return of the execution.

render his execution dormant, or postpone all rights under it to the claims of other subsequent execution creditors.

Where goods are levied upon by an officer, and the plaintiff in the execution directs him to leave them in the possession of the defendant therein, and they are thus left in his possession for a year, and then another execution in favor of another creditor is delivered to the officer, the latter execution will have priority. *Storm v. Woods*, 11 Johns. 110. So, where the plaintiff, at the time of delivering his execution to an officer, directs him to levy upon the property of the defendant, but to do nothing until ordered unless crowded by younger executions, but by no means to let the execution lose its preference, this will render the execution dormant as against a subsequent execution, if the officer follows the instructions, and does nothing but make an inventory of the property under his levy. *Kellogg v. Griffin*, 17 Johns. 274. So, where a levy has been made by an officer, if the plaintiff directs him not to proceed to sell the property unless forced to do so by subsequent executions, and the officer delays the sale until subsequent executions, in favor of other parties, are delivered to him, the first execution will lose its priority, and it will be considered dormant as to the latter. *Kimball v. Munger*, 2 Hill, 364. So, where a levy has been made upon an execution, and the plaintiff then directs the officer to delay proceedings until further notice, which the officer accordingly does, this will render the execution dormant as against junior executions, if the order for delay is not revoked until the latter executions have been delivered to the officer. *Knower v. Barnard*, 5 Hill, 377.

So, where the plaintiff, after issuing his execution, directs the officer to make a levy for the mere purpose of securing a preference; and also instructs him to leave the property in the possession of the defendant after levy, such execution will be dormant as against subsequent executions in favor of other creditors, where they are delivered to the officer before such instructions are revoked. *Dunderdale v. Sauvvestre*, 13 Abb. 116.

A direction by the plaintiff to the officer to make a levy, but to keep it secret from the defendant, will render the levy void as against a *bona fide* purchaser from the defendant. *Price v. Shippis*, 16 Barb. 585. And where an execution would be deemed dormant as against a judgment creditor it will be held to be fraudulent as against a subsequent *bona fide* purchaser. *Ball v. Shell*, 21 Wend. 222.

§ 20. **Return of the execution.** A constable having in his hands an execution against a judgment debtor, must return it to the justice, and pay to him the amount of the judgment, with interest, or so much

Return of the execution.

of it as has been collected, and return the surplus, if any, to the person from whose property it was collected. Vol. 1, p. 51, § 3031. If the constable fails to return an execution, issued upon a judgment for a sum of money, within five days after the return day, the party in whose favor the execution was issued may recover, in an action against the constable, the amount of the execution, with interest from the time the judgment was rendered. So if the constable fails to return an execution issued upon a judgment for the delivery of the possession of a chattel within five days after the return day, the party in whose favor the execution issued may recover, in an action against the constable, the value of the chattel as specified in the judgment, together with the damages and costs awarded thereby, and interest from the time the judgment was rendered. Id., p. 52, § 3039.

In an action for not returning an execution within the prescribed time, it is no defense to show that the constable to whom it was delivered afterward delivered it to another constable, who collected the money thereon, and offered it to the plaintiff upon his deducting a sum which he promised in case the money was collected. *Downs v. McGlynn*, 2 Hilt. 14; S. C., 6 Abb. 241.

A mere neglect to return the execution in due time is sufficient to render the constable and his sureties liable to an action; it is not necessary to show that any moneys were collected by the officer. *Sloan v. Case*, 10 Wend. 370. And see *Moore v. Smith*, 10 How. 361. But before a plaintiff can recover against a constable and his sureties, for not returning an execution, it must be shown that the judgment was valid, and that the justice who issued such execution had jurisdiction of both the defendant and of the subject-matter of the action. *Westbrook v. Douglass*, 21 Barb. 602; *Cornell v. Barnes*, 7 Hill, 35.

The Code provides that where money, collected by a constable upon an execution, is not paid over by him according to law, any person entitled thereto may maintain an action in his own name upon the instrument of security given by the constable and his sureties; and may recover therein the sum so collected, with interest from the time it was collected. Vol. 1, p. 53, § 3041.

The fact that the term of office of the constable expired between the receipt of the execution and the return day will not change or affect his duty in respect to the service of the execution, or affect his liability or that of his sureties for his acts or omissions thereunder. Id., § 3042.

A mere consent by the plaintiff in an execution, given without consideration, that the constable who had collected the money thereon

Return of the execution.

might retain it a short time for a temporary purpose, will not discharge the constable's sureties from liability. *Boice v. Main*, 4 Denio, 55.

An action does not lie against a constable for not paying over money collected by him on a justice's execution, where it is shown that he has been sued and a recovery had against him for selling the property, by the sale of which the money collected by him was made, where such recovery is equal to the amount of the execution, or exceeds that sum. *Newland v. Baker*, 21 Wend. 264. And the action cannot be maintained, even though the plaintiff in the execution executed a bond of indemnity to the constable, on the delivery of the execution to him, and notwithstanding the constable has brought an action upon such bond. *Ib.*

If property is sold for the purpose of satisfying an execution, and there is a surplus left after paying the execution and costs, the constable must return such surplus to the defendant in the execution. But no action can be sustained against the officer before the return day of the execution, where no demand has been made of the money. *Bortel v. Ostrander*, 15 How. 572.

An action against a constable for not paying over money collected under an execution, or upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty, except an escape, must be brought within three years from the time the cause of action accrued. Vol. 1, p. 112, § 383.

The statute declares that an execution shall have sixty days to run, and the justice has no power to make it returnable in a less time. *Spencer v. Cuyler*, 17 How. 157; S. C., 9 Abb. 382.

No constable can be compelled to return an execution before its return day. *Ib.*; *Morange v. Edwards*, 1 E. D. Smith, 414. He may, however, return it at any time within the sixty days, either where he has made the debt, or where he is satisfied that there is no property; though, if he returns it unsatisfied, he does it at his own risk. *Ib.*

Execution satisfied.

I have levied the within sum of the goods and chattels of the within-named Richard Roe, as I am within commanded.

Dated, etc.

JAMES PIERSON, *Constable*.

Part satisfied, and commitment for residue.

I have levied \$50, part of the sum within mentioned, of the goods and chattels of the within-named Richard Roe, and, for want of further goods or chattels of the defendant, I have taken the body of the defendant and committed him to the jail of the county.

Dated, etc.

J. P., *Constable*.

Renewal of executions.

Commitment generally.

I could find no goods or chattels of the within-named Richard Roe, whereon to levy, and I have, therefore, taken his body and committed him to the jail of the county.

Dated, etc.

J. P., *Constable*.

No goods or body to be found.

I could not find either goods or chattels, or the body of the defendant, within the county.

Dated, etc.

J. P., *Constable*.

Part satisfied, and no goods or body as to residue.

I have levied \$50, a part of the sum within mentioned, of the goods and chattels of the within-named Richard Roe, and no more goods or chattels, or the body to be found.

Dated, etc.

J. P., *Constable*.

Levy, and goods unsold for want of bidders.

I have levied upon one bay horse, the property of the within-named Richard Roe, which remains in my hands, unsold for want of bidders.

Dated, etc.

J. P., *Constable*.

§ 21. **Renewal of executions.** The statute makes ample provisions for the renewal of executions. Vol. 1, p. 49, § 3027. So there may be a new or further execution issued in a proper case. *Ib.*

Before a justice renews an execution for the collection of either the whole or a part of the judgment, he should require a proper return from the constable, in which it should appear whether the officer has collected any thing, and if he has, then the amount should be stated in the return.

Where a part of the execution has been collected, and the execution is renewed for the residue, the indorsement of renewal ought to express the sum due on the execution. *Ib.*

If the indorsement, however, clearly shows how much is due, it will be sufficient, although it does not in terms specify the amount. And where an execution was issued by a justice of the peace, upon which the plaintiff acknowledged the receipt of a specified sum, by indorsing the amount thereon, and dating the receipt on the day when the money was received, and the justice subsequently renewed the execution by an indorsement below the receipt, in the following form: "I hereby renew the within execution," and dated and signed the renewal, this was held to be a sufficient compliance with the statute. *Ostrander v. Walker*, 2 Hill, 329. In such a case the renewal is, in legal effect, a renewal for the amount unpaid. *Ib.*

Constable's rights to fees, etc.

Where a constable has levied upon property sufficient to satisfy an execution, and he has returned that the property remains on hand for want of bidders, the justice may renew such execution on the last day which it has to run, and the renewal will retain the lien of the previous levy. *Chapman v. Fuller*, 7 Barb. 70. A justice may renew an execution after its return day, and from time to time as the plaintiff may desire it done. *Visger v. Ward*, 1 Wend. 551.

And so a justice may renew an execution while it remains unsatisfied, notwithstanding there was a levy upon sufficient property to satisfy it, and the property is held under the levy, when there is not sufficient time to advertise and sell the property before the return day. *People v. Hopson*, 1 Denio, 574.

A justice of the peace whose term of office has expired may renew an execution issued upon a judgment rendered by him, if he does so within five years after the judgment was rendered. Vol. 1, p. 49, § 3027; Laws of 1879, chap. 305.

Form of general renewal of execution.

The within execution renewed.

Dated May 5, 1865.

PETER W. PLANTZ, *Justice of the Peace*.

Renewal where a part has been paid and collected.

The within execution renewed for \$100, with interest from this date. May 5, 1865.

PETER W. PLANTZ, *Justice of the Peace*.

§ 22. **Constable's rights to fees, etc.** A constable who has not made a levy, or done any other act under an execution, is not entitled to any fees or poundage thereon. *Rathbun v. Woodworth*, 1 How. 151. But where a levy has been actually made, the officer's right to poundage attaches on the whole amount directed to be levied; and he will not be deprived of his right merely because the judgment is satisfied without a sale of the property, nor by reason of any arrangement between the parties, nor because the property was incumbered beyond its value by prior liens or claims. *Ib.*; *Parsons v. Bowdoin*, 17 Wend. 14; *Hildreth v. Ellice*, 1 Caines, 192. So, an officer is entitled to poundage on serving an execution against the body of the defendant, even though the execution should be unproductive by reason of the defendant's subsequent discharge under an insolvent law. *Adams v. Hopkins*, 5 Johns. 252.

The officer's fees, on an execution, are no part of the judgment, but are merely an incident to it; and if the judgment is satisfied by an arrange-

Constable's rights to fees, etc.

ment between the parties, the officer cannot subsequently proceed and sell the defendant's property for the mere purpose of collecting his fees; his remedy is against the plaintiff in the execution. *Jackson v. Anderson*, 4 Wend. 474; *Craft v. Merrill*, 14 N. Y. 456; *Bank of Whitehall v. Weed*, 8 How. 104.

CHAPTER IX.

AMENDMENTS.

SECTION 1. General principles and provisions. In the course of proceedings in an action, from its commencement to its termination, mistakes, errors and omissions are liable to occur, which do not affect the substantial rights of either party, or go to the merits of the action, but merely violate some rule of pleading or of practice. The ample power conferred upon the courts, from the lowest to the highest, to correct such mistakes, errors and omissions, is an important feature of the system of practice inaugurated or perpetuated by the Code. Where the correction of a mistake is important, and justice will be promoted by an amendment, the Code gives full power to remedy the defect; and where the mistake is unimportant, the Code requires the court to disregard it.

“The court may upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice and on such terms as it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of the party, or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting an allegation material to the case; or where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceeding to the facts proved. And in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.” Vol. 1, p. 122, § 723. This section of the Code is made applicable to justices’ courts. Id., p. 172, § 3347, subd. 6. It is permissive in form, so far as it relates to the power to amend; but when the allowance of an amendment would be in the furtherance of justice, and a proper application for leave to amend his process, pleading or proceeding is made by a party at a proper time, and in a case within the spirit of the section cited, the power to permit the amendment, upon terms or otherwise, as may be just, is as clearly a duty as if the language of the statute was in the form of a command. *Wood v. Shultis*, 4 Hun, 309; S. C., 6 N. Y. Sup. Ct. (T. & C.) 557; *Walsh v. Cornett*, 17 Hun, 27.

§ 2. **Amendment of process, etc.** One of the well-settled rules on the subject of amendments is that a justice’s court possesses all the

Amendment of process, etc.

necessary powers of amendment that are possessed by courts of record. *Fulton v. Heaton*, 1 Barb. 552; *Brace v. Benson*, 10 Wend. 214, 215. Another rule is that justices are required to allow amendments liberally in all cases where justice demands it, especially where the rights of the opposite party will not thereby be put in jeopardy. *Ib.* When nothing but the given name of a plaintiff is inserted in a summons, the justice may amend it by inserting the surname, as where the name of the plaintiff was Corydon Stanton, and the summons at the time of the service contained the name Corydon alone, but the justice inserted the word Stanton, on the return day, and this was held proper. *Stanton v. Leland*, 4 E. D. Smith, 88. So, where the summons served contained the name of the plaintiff as Joseph S. Keeler, it was held that the summons might be amended on the return day by striking out the word "Joseph" and inserting the word "Jasper." *Brace v. Benson*, 10 Wend. 213. It has been held that where the name of one of several plaintiffs was inserted by mistake, the court had power to strike it out. *Agreda v. Faulberg*, 3 E. D. Smith, 179. But it has also been held that a justice has no power to amend the process or pleadings, in an action on a joint contract against two or more defendants, by striking out the name of one defendant and rendering judgment against one defendant and in favor of the other. *Webster v. Hopkins*, 11 How. 140. So in an action for a tort it has been held that if an amendment is allowed by striking out the name of one of two plaintiffs, the justice has no power to amend by restoring the party as a plaintiff, at a subsequent day, if the amendment is objected to by the defendant. *Gates v. Ward*, 17 Barb. 424. But see *Lowber v. Childs*, 2 E. D. Smith, 577.

The power to amend a summons by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, has been already noticed. *Ante*, 110. Where a party has been sued under a fictitious name, the real name being unknown, the court has power to amend the summons by inserting the true name of the party whenever it is discovered. Vol. 1, p. 7, § 2884.

Where the date of a summons is incorrectly stated by mistake, the justice may amend the process by stating the true date, and this may be done either before or after the service or return of the process. *Bradbury v. Van Nostrand*, 45 Barb. 194; *Arnold v. Maltby*, 4 Denio, 498. So, too, it may be overlooked or disregarded without any amendment. *Ib.*

An attachment may be amended, even after its service and return, by inserting the amount of the plaintiff's demand as stated in his affi-

Amendment of pleadings.

davit for procuring the process. *Near v. Van Alstyne*, 14 Wend. 230.

A justice has power to permit a constable to amend his return to a summons; and the refusal of the defendant to appear on the return day will not deprive the justice of this right. *Perry v. Tynen*, 22 Barb. 137. So he has power to permit a constable to amend his return to an attachment, or of the inventory. *Churchill v. Marsh*, 4 E. D. Smith, 369.

§ 3. **Amendment of pleadings.** The Code makes ample provision for the amendment of the pleadings, whether before the trial, during the trial, or upon appeal. Vol. 1, p. 27, § 2944; id., p. 122, § 723. The only limit to the power of amending a pleading, *upon the trial*, is that a new cause of action shall not be brought in by amendment. *Reeder v. Sayre*, 70 N. Y. 180. An amendment of a complaint will not be permitted *upon the trial* where it changes the entire nature of the action, as from an action in tort to one founded upon contract. *Ransom v. Whitmore*, 39 Barb. 104; *Whitcomb v. Hungerford*, 42 id. 177. But at any time *before* the trial, while both parties are present in court, the justice may permit an amendment of the complaint which in effect substitutes one form of action for another. *Bigelow v. Dunn*, 53 Barb. 570; S. C., 36 How. 120. If, however, the plaintiff at the time of joining issue sets forth a cause of action against the defendant upon contract and the cause is then adjourned, he cannot, upon the failure of the defendant to appear upon the adjourned day, amend his complaint so as to set up a cause of action for a tort. *Gilmore v. Barnett*, 20 Hun, 514; *Birdsall v. Fuller*, 11 id. 204. So, where a cause has been tried until the plaintiff has rested his case which he fails to sustain, the plaintiff cannot be permitted to amend his complaint by adding a new and different cause of action. *Waldheim v. Sichel*, 1 Hilt. 45.

Where the pleading is demurred to, and the pleading is held to be defective, an order to amend such pleading is a matter of course. *Ante*, 343.

Where an amendment is asked for the purpose of interposing a strict defense, such as the statute of limitations, the courts have sometimes refused to allow the amendment. *Osgood v. Whittlesey*, 20 How. 72; *Wolcott v. McFarlan*, 6 Hill, 227; *Halligan v. Golden*, 1 Wend. 302.

So, too, it has been held that the defense of usury must be interposed at the joining of issue, and that it will not be allowed to be set up by

Amendment of verdict and judgment.

way of an amendment. *Lovett v. Cowman*, 6 Hill, 223; *Parish v. Corlies*, 1 Daly, 274.

But the recent cases do not make any discrimination as to the nature of the defense, if it is a legal bar to the action. And, where the amendment is allowed for the furtherance of justice, the party amending may interpose the statute of limitations, or usury, or illegality, as well as any other defense. *Sheldon v. Adams*, 41 Barb. 54. And see *Bank of Kinderhook v. Gifford*, 40 id. 659; *Union Nat. Bank v. Bassett*, 3 Abb. (N. S.) 359; *Gilchrist v. Gilchrist's Executors*, 44 How. 317; *Barnett v. Meyer*, 10 Hun, 109; *Catlin v. Gunter*, 11 N. Y. 368; *Leonard v. Foster*, 7 Hun, 464.

The right of a defendant to set up new matter in his answer by way of amendment is absolute, and the justice has no discretion about it. *Ryan v. Lewis*, 3 Hun, 429. And in the case last cited the court said that a judicial officer who should refuse leave to a party to amend, when it is apparent that the application is made in good faith, and is absolutely necessary for the protection of his rights, ought to be indicted or removed from office.

The allowance of amendments is a matter of discretion in some cases, and where an amendment, if allowed, would cause an injury to the opposite party, a refusal to permit the amendment cannot be reviewed on an appeal. *Tattersall v. Hass*, 1 Hilt. 56. In the case just cited a justice refused to permit the defendant to amend by introducing a new defense at the trial, which, if it had been allowed, would have operated as a surprise upon the plaintiff. But when the leave to amend is a strict legal right, or where the refusal of leave to amend would be a gross abuse of discretion, the aggrieved party has his remedy by way of appeal. *Ryan v. Lewis*, 3 Hun, 429.

It is not proper for a justice, in a case before him, to volunteer and make amendments of the pleadings, which are not asked for by either party. *Loyd v. Fox*, 1 E. D. Smith, 101.

§ 4. **Amendment of verdict and judgment.** The power to correct or amend a verdict has been mentioned. *Ante*, 744. So the power of the justice to reduce or increase the judgment, or to change it materially, has been sufficiently explained already. *Ante*, 745.

Where an action sounding in tort is commenced for the conversion of a promissory note, and the pleadings are framed accordingly, and the suit is tried as an action of tort, it is too late for the plaintiff, after an appeal, to ask the complaint to be amended, and that the suit be regarded as an action to recover the avails of the note as money had and received. *Andrews v. Bond*, 16 Barb. 633.

Amendment of bonds or undertakings.

If, however, there is a mere misdescription of a cause of action arising upon a contract, as where a plaintiff sues for use and occupation, when he should have declared in covenant upon a lease, the appellate court will not interfere with the determination of the question in the court below. *Bedford v. Terhune*, 27 How. 422.

When amendments are allowed by an appellate court, it will be done for the purpose of sustaining the judgment appealed from, and not for the purpose of rendering it erroneous. *Englis v. Furniss*, 3 Abb. 82. When the power to grant an amendment exists, but the court refuses to grant the amendment on the ground of its doubt of the power to allow it, the refusal will be error if the amendment would have been granted but for such doubt. *Russell v. Conn*, 20 N. Y. 81; *Beach v. Chamberlain*, 3 Wend. 366; *Packer v. French*, Hill & Denio, 103.

§ 5. **Amendment of bonds or undertakings.** Where a bond or undertaking is required by statute to be given by a person to entitle him to a right or privilege, or to take a proceeding, and one is given which substantially conforms to the form required by statute, and does not vary therefrom to the prejudice of the party to whom or for whose benefit it is given, it is sufficient; and if defective, the justice authorized to receive it or to entertain a proceeding in consequence thereof may, on the application of the persons who executed it, amend it accordingly; and it is thereupon valid from the time of its execution. Vol. 1, p. 122, §§ 729, 730.

PART VIII.

APPEALS.

CHAPTER I.

THE PRACTICE ON APPEALS.

SECTION 1. General principles relating to appeals. The only mode of reviewing a judgment rendered by a justice of the peace in a civil action is by an appeal, as prescribed in title 8 of chapter 19 of the Code of Civil Procedure. Vol. 1, p. 54, § 3044. See *City of Buffalo v. Schliefer*, 25 Hun, 275.

Kinds of appeal. In one respect, appeals may all be said to be included in a single class, or that it is effected in all cases by a notice. But, when the object of an appeal is considered, they may be divided into several classes, viz.: 1. When the appellant desires to review the proceedings and judgment upon the facts appearing on the face of the return; 2. When he desires to set aside the proceedings or judgment for error in fact; 3. When he desires relief from a default taken against him; 4. When he desires to review some order made by the court below; 5. When he desires to have the advantage of a new trial in the County Court; or, 6. Where the appeal is taken from some summary or special proceeding.

There are some peculiarities in the practice in relation to each of these separate classes of appeals, and the various classes will each receive a proper notice in the course of this chapter.

Who may appeal. An appeal may be taken by any party aggrieved by the judgment. Vol. 1, p. 54, § 3045. Where there are but two parties, a plaintiff and a defendant, no doubt can arise as to the right of either of them to appeal from a judgment rendered against him in favor of the other party. So where there are several plaintiffs and several defendants, and a judgment is rendered against all the plaintiffs or all the defendants, any one of such parties may take an appeal from the judgment without joining with him in the appeal his co-plaintiffs or co-defendants. *Mattison v. Jones*, 9 How. 152; *Brown v. Richardson*, 4 Rob. 603. There are numerous instances in which but one of several defendants has any valid ground of appeal. If an action of trespass is brought against two defendants, there may be a plain case made out

Who may appeal.

against one of them, and as to the other, there may not be any thing like a legal case proved; and yet a judgment may be rendered against both defendants. In such a case, it is entirely evident that one party would be "aggrieved," while the other might not have any just cause of complaint. Upon such a state of facts, there can be no doubt that the aggrieved party may bring and sustain an appeal without joining the other defendant. *Mattison v. Jones*, 9 How. 154.

There may be instances, too, in actions arising upon contract in which the same rule would prevail, as in the case of a judgment against the maker and indorser of a negotiable promissory note. If a case was proved against the maker, but not against the indorser, and judgment was rendered against both, there can be no doubt that the indorser might bring his appeal without joining the maker.

The taking of an appeal by one or more co-plaintiffs or co-defendants does not prevent the other plaintiffs or defendants from appealing from the same judgment. *Brown v. Richardson*, 4 Rob. 603. It is not necessary that a judgment should be rendered against the party appealing to entitle him to sustain an appeal, for a party may reverse a judgment rendered in his own favor where he is injured or aggrieved by it. *Parker v. Newland*, 1 Hill, 87. Where a justice improperly excludes evidence offered by a plaintiff, who, in consequence thereof, recovers judgment for less than he would have been entitled to if the evidence had been admitted, such plaintiff may bring an appeal and reverse the judgment. *Bissell v. Marshall*, 6 Johns. 100.

But a party will not be permitted to reverse a judgment in his own favor for errors committed by the court below, unless such error is a cause of injury, or legally "aggrieves" him. *Hughes v. Stickney*, 13 Wend. 280; *Williams v. Gwyn*, 2 Saund. 46.

A plaintiff who has been nonsuited in the court below, at his own request, cannot reverse the judgment, upon an appeal, even though questions of law were decided against him by the court, and notwithstanding the nonsuit was submitted to with the avowed purpose of reviewing these decisions on the appeal. *O'Dougherty v. Aldrich*, 5 Denio, 385.

When no cross-appeal is taken by the respondent, he cannot take any advantage of an error committed to his prejudice in the court below, nor will it be a ground of reversal in his behalf, although such error clearly appears from the return on the appeal brought by the appellant. *Robbins v. Codman*, 4 E. D. Smith, 316; *Glassner v. Wheaton*, 2 id. 352; *Beach v. Cooke*, 28 N. Y. 508.

The right of appeal is not restricted to the party against whom the

From what judgments an appeal lies.

judgment is rendered, and both parties may appeal from the same judgment. Both appeals will be heard together and a single judgment rendered. *Jones v. Owen*, 5 Hun, 339.

Where a party is sued by a fictitious name, and a judgment is rendered against him by such name, he may, notwithstanding, bring an appeal in his true name. *McCabe v. Doe*, 2 E. D. Smith, 64. But one who is not a party to an action, but a mere stranger to it, cannot bring an appeal. *E. B. v. E. C. B.*, 8 Abb. 44; *Matter of Bristol*, 16 id. 397; *Martin v. Kanouse*, 2 id. 390. The legal representatives of a deceased party to an action will be included in the term "aggrieved party," and they may, therefore, bring an appeal in those cases where the deceased party could have done so had he survived. *Beach v. Gregory*, 2 Abb. 209; *Martin v. Kanouse*, id. 392. If a party entitled to take an appeal dies before the expiration of the time within which the appeal may be taken, the court may allow it to be taken by the heir, devisee, or personal representative of the decedent, at any time within four months after his death. Code of Civil Pro., § 785. See id., § 3347, as amended in 1882.

The party or person appealing is designated as the appellant, and the adverse party as the respondent. Id., § 1295.

From what judgments an appeal lies. An appeal lies from judgments rendered by justices of the peace, by justices' courts in the cities, by the District Courts of the city of New York, or by the General Term of the Marine Court of that city. To what court the appeal must be taken will be explained hereafter.

The general rule is that no appeal will lie before the judgment in the court below is complete and perfect. As illustrative of this, it has been held that an appeal would not lie from a judgment of nonsuit, where no costs were awarded to the plaintiff. *Monnell v. Weller*, 2 Johns. 8; *Nellis v. Turner*, 4 Denio, 553; *Haulenbeck v. Gillies*, 7 Abb. 421; S. C., 2 Hilt. 239.

But if a judgment of nonsuit is improperly granted, and it is entered with costs against the plaintiff, an appeal will lie to reverse such judgment. *Smith v. Sutts*, 2 Johns. 9. And where a justice is about to nonsuit a plaintiff for a defect in his proofs, the defendant cannot prevent a review of the judgment on an appeal by asking to have the judgment entered without costs; and if judgment of nonsuit is entered against the plaintiff, with costs, an appeal lies from the judgment. *Nellis v. Tucker*, 5 Denio, 82.

If a County Court should order a judgment of nonsuit, an appeal would lie from it, even though no costs were awarded on the record.

From what judgment an appeal lies.

Lovell v. Evertson, 11 Johns. 52. The reason assigned is that the plaintiff is aggrieved by being defeated of his right of action, and by being deprived of his costs for prosecuting it. *Ib.* And there is no reason why the same rule should not prevail in relation to judgments rendered in justices' courts.

Where a judgment of nonsuit is rendered with costs, on account of the want of jurisdiction by the justice by reason of his relationship to one of the parties, such judgment may be appealed from, and will be reversible. *Edwards v. Russell*, 21 Wend. 63; *Randall v. Hall*, Hill & Denio, 239; *ante*, p. 54.

When a justice renders a judgment which is void on account of his want of jurisdiction of the subject-matter of the action, an appeal will lie to reverse such judgment. *Striker v. Mott*, 6 Wend. 465. In such a case it is no answer to the appeal to say that the judgment is void, and that it, therefore, need not be reversed. *Ib.* But where a party procures a judgment to be rendered in his own favor, which is void for want of jurisdiction, he will not be permitted to reverse it on appeal for the irregularity in procuring it. *Fairbanks v. Corlies*, 3 E. D. Smith, 582; S. C., 1 Abb. 150. It is only the party who is aggrieved that is allowed to bring the appeal or reverse the judgment. *Ib.*

Where a justice renders a judgment in an action of which he has no jurisdiction over the subject-matter, and an appeal is brought in a case in which a new trial would ordinarily be proper, the County Court ought to refuse to entertain the cause or to render any judgment therein. *Malone v. Clark*, 2 Hill, 658.

It is not necessary that the action should have been a litigated one to entitle the defendant to appeal; for if the judgment against him is a final one, he may appeal even though he did not, at any time, appear in the action in the court below, nor object to the introduction of illegal evidence. *Ante*, 757. So where there is no jurisdiction over the person of the defendant, and a judgment is rendered against him in his absence, he may appeal from the judgment and reverse it. *Willins v. Wheeler*, 28 Barb. 669; *Fitch v. Devlin*, 15 id. 47. So where a judgment is rendered against a defendant, in his absence, before the expiration of the time allowed for appearance, on the false statement of the plaintiff that the defendant did not intend to appear, an appeal lies to reverse such judgment. *Beach v. McCann*, 1 Hilt. 256.

When a judgment is rendered by a justice of the peace in a civil action of which he has jurisdiction, an appeal lies from it without any

Appeal to what court. — Time within which to appeal.

reference to the nature of the action, whether it arose upon contract or for a tort. And this rule includes every class of civil actions of which a justice may take cognizance. It does not make any difference whether the judgment was entered upon an issue of law or upon an issue of fact, for an appeal lies in either case.

An appeal may be taken from an order determining a claim to surplus moneys remaining after the sale of animals seized in special proceedings against estrays; vol. 1, p. 70, § 3095; or from an order determining a demand for the return of the possession of such animals; id., p. 72, § 3102; or from a final order made upon a petition in such proceedings; id., p. 73, § 3104; or from a final order made in summary proceedings to recover real property. Id., p. 165, § 2260; *Spraker v. Cook*, 16 N. Y. 567, 574; *Deuel v. Rust*, 24 Barb. 438; *Williams v. Bigelow*, 11 How. 83. So a judgment rendered by a justice of the peace, in an action to enforce a lien under the mechanics' lien law, is also appealable. *People v. Judge of Rensselaer Co.*, 13 How. 398, 401, and cases there cited.

Appeal to what court. The Code provides that where the judgment to be reviewed was rendered by a justice of the peace of the city of Buffalo, the appeal must be to the Superior Court of that city; and in every other case it must be to the County Court of the county where the judgment was rendered. Vol. 1, p. 54, § 3045. It also provides that an appeal from a judgment rendered in the District Court of the city of New York may be taken to the Court of Common Pleas for that city and county. Id., p. 90, § 3213.

Time within which to appeal. As a general rule an appeal from a judgment rendered by a justice of the peace must be taken within twenty days after the entry of the judgment in the justice's docket. Id., p. 55, § 3046. To this rule there are two exceptions. If the defendant appeals from a judgment rendered in an action wherein he did not appear, and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment, but not after the expiration of five years from the entry of judgment. Ib. So if the party entitled to take the appeal has died before the expiration of the time within which the appeal may be taken, the court may allow it to be taken by the heir, devisee, or personal representative of the decedent, at any time within four months after his death. Code of Civil Procedure, § 785. This section of the Code was made applicable to all courts by the amendment of section 3347 of that act in 1882.

Time within which to appeal.

An appeal from an order determining a claim to surplus moneys in special proceedings against estrays must be taken within ten days after the making of the order. Vol. 1, p. 70, § 3095. An appeal from an order determining a demand for the return of the possession of the estrays may be made at any time before the final order in the special proceeding is made. Id., p. 72, § 3102. And an appeal from the final order made in such proceedings may be taken within ten days after such order is made. Id., p. 73, § 3104. An appeal from a final order in a summary proceeding to recover the possession of land must be taken within the same time as an appeal from a judgment rendered by a justice of the peace. Id., p. 165, § 2260.

An appeal must be brought within the time allowed for that purpose, or the right to appeal will be lost. *Figaniere v. Jackson*, 2 Abb. 286; S. C., 4 E. D. Smith, 477; *Seymour v. Judd*, 2 N. Y. 464. When a statute fixes a time within which an appeal may be taken, the court has no power to extend that time and allow an appeal to be taken after that time has expired. *Salles v. Butler*, 27 N. Y. 638. The service of a notice of appeal after the expiration of the statutory time is wholly ineffectual to give the party serving it any standing in the appellate court. *Young v. Whitcomb*, 46 Barb. 615. And an appearance for the sole purpose of moving to dismiss the appeal will not cure the defect. *Seymour v. Judd*, 2 N. Y. 464. But if a written admission of due service of the notice of appeal is given, this will be a waiver of the objection that the notice was not served in due time. *Struver v. Ocean Ins. Co.*, 9 Abb. 23. And if the appellant reasonably and in good faith serves the notice of appeal upon either the justice or the respondent, but omits, through mistake, inadvertence or excusable neglect, to serve it upon the other, the appellate court, upon proof by affidavit of the facts, may in its discretion permit the omission to be supplied upon such terms as justice requires. Vol. 1, p. 55, § 3049.

Where a judgment was rendered upon process which was not personally served, and the plaintiff desires to limit the time for appealing, he ought to serve a notice upon the defendant for that purpose.

The notice ought to be in writing, and to be served by delivering a copy thereof to the defendant personally. Care ought to be taken to note the time of making such service, so that due proof may be made of the time when the service was made.

Appeal, how taken.

Form of notice.

JUSTICE'S COURT.

John Doe agst. Richard Roe.

To RICHARD ROE, *defendant* :

You will take notice that, on the 20th day of July, 1865, I recovered a judgment against you, before Richardson P. Clark, Esq., a justice of the peace, of Johnstown, Fulton county, for the sum of \$150 damages, and \$5 costs.

Dated *July 20*, 1865.

JOHN DOE, *Plaintiff*.

Appeal, how taken. An appeal is taken by serving upon the justice by whom the judgment was rendered, and upon the respondent, a written notice of appeal signed by the appellant or his attorney in the appellate court. Vol. 1, p. 55, § 3046, as amended in 1882. The form and requisites of this notice, and the mode in which it must be served will be noticed in the next section.

In order to perfect the appeal, it is necessary not only that the notice be served on the justice, and on the adverse party, but also that the costs of the action included in the judgment, and the justice's fee of \$2 for making the return be paid to the justice at the time of the service of the notice of appeal on him. *Id.*, § 3047; *Southard v. Philips*, 7 Hun, 18; *Eldridge v. Underhill*, 17 *id.* 241; *Thomas v. Thomas*, 18 *id.* 481. Under the Revised Statutes also, the non-payment of the costs and fees in due time deprived the appellant of his right to appeal. *Ex parte Stevens*, 6 Cow. 69; *People v. Dutchess Com. Pleas*, 7 *id.* 487; *People v. Saratoga Com. Pleas*, 1 Wend. 287. And the amount must have been paid in money, and merely crediting the justice with the amount of his fee was held not to be such a payment as would sustain an appeal. *Ex parte La Farge*, 6 Cow. 61. Under the Code of 1849 the payment of the justice's fees at the time of taking the appeal, or at any specified time, was not required, and the appeal could be made effectual if the appellant could obtain the justice's return, although the fee for making it was not paid. *Van Heusen v. Kirkpatrick*, 5 How. 422.

By an amendment of the Code in 1851, the appellant was required to pay the costs recovered against him in the court below, and the justice's fee for making the return, at the time of the service of the notice of appeal, and this provision continued to be a part of the old Code until its repeal, and the adoption of the present Code of Civil Procedure. It also forms a part of section 3047 of the present Code. Under the

Appeal, how taken.

Code of Procedure it was held that to render effectual an appeal to the County Court from a judgment of a justice's court, the respondent's costs included therein must be paid, and the justice's fees must be paid, or relinquished by him, within twenty days from the rendition of the judgment; and that if they were not so paid the appeal would be dismissed. *Thomas v. Thomas*, 18 Hun, 481. It was held that the payment of the fees for making the return was jurisdictional, and that without it no appeal could be perfected. *Southard v. Philips*, 7 Hun, 18; *Eldridge v. Underhill*, 17 id. 241. It was also held that the justice might waive payment of his fees for the return, for that sum belonged to him, and he had the right to give it away if he chose; but that the costs included in the judgment belonged to the respondent, and the justice could not by any act of his waive or cut off the respondent's right to their payment as a condition to a valid appeal. *Thomas v. Thomas*, 18 Hun, 481. It was also held that payment of such costs and justice's fee after the time limited, and after notice of a motion to dismiss the appeal, would not cure the defect. *Eldridge v. Underhill*, 17 Hun, 241. Under the present, as under the former Code, the payment of such costs and fee is necessary to perfect the appeal; but a failure to make such payment at the time of serving the notice of appeal, or within twenty days after the rendition of the judgment from which the appeal is taken, is not necessarily fatal to the appeal, if the notice of appeal was served in due season and in good faith, and the appellant can show by affidavit to the appellate court that he omitted to make such payment through mistake, inadvertence or excusable neglect. Upon proof of these facts by affidavit, the appellate court may, in its discretion, permit the omission to be supplied upon such terms as justice requires. Vol. 1, p. 55, § 3049. The remedy of the justice in case the appellant fails to pay his fees for making the return is to make no return. The remedy of the respondent for the failure of the appellant to make payment of such fees or the costs included in the judgment is to move to dismiss the appeal, limiting his appearance in the action to the purposes of that motion. See *Griswold v. Van Deusen*, 2 E. D. Smith, 178; *Van Heusen v. Kirkpatrick*, 5 How. 422; *Southard v. Philips*, 7 Hun, 18; *Eldridge v. Underhill*, 17 id. 241; *Thomas v. Thomas*, 18 id. 481. The remedy of the appellant in either case is to apply to the appellate court upon an affidavit setting up all the facts, and upon notice to the respondent, for an order permitting him to make the payment *nunc pro tunc*, under section 3049 of the Code of Civil Procedure.

The costs which may properly be included in the judgment consist

Appeal, how taken.

of the fees allowed by law for services necessarily rendered in the action at the request of the party entitled to costs, or paid by him as prescribed by law, and such other expenses as a party is entitled to include in his costs by express provision of law. Vol. 1, p. 62, § 3074. Payment of these fees may be required before the services are rendered, and should be paid at the close of the trial if not sooner demanded. A justice of the peace should insist upon the payment by each party of the costs chargeable to him, if for no other reason than to escape the imputation of so shaping his judgment that he may secure his costs. The theory of the Code is that the successful party may collect by execution from the adverse party the moneys which he has actually disbursed upon the trial up to the statutory limit. He may have paid these costs before judgment, so that if collected they would belong to him, yet if he appeals, as he may, from the judgment in his favor, the letter of the statute requires him to pay them again at the time of serving his notice of appeal. The only exception made by the statute to the requirement that the appellant shall pay the costs included in the judgment at the time of serving the notice is in case the justice is dead. It is probable, however, that a payment before service of the notice of appeal will be held a sufficient compliance with the statute. The costs paid to the justice by the appellant belong to the prevailing party before the justice and should be paid to him, without awaiting the result of the appeal. *Sherwood v. Travelers' Ins. Co.*, 23 Daily Reg., No. 121.

In certain cases, the appellant, to render his appeal effectual, must, at the time of serving the notice of appeal, give the undertaking required by section 3050 of the Code. This is necessary to render an appeal effectual when a new trial in the appellate court is demanded in the notice of appeal. Vol. 1, p. 61, § 3069. Under the old Code it was held that where the appellant was entitled to a new trial in the appellate court he must give security in order to perfect his appeal; and that without it the County Court obtained no jurisdiction. *Kuntz v. Licht*, 8 Hun, 14. It was also held that although the appellant might have demanded a new trial in the appellate court, yet if he took his appeal upon questions of law only, no undertaking need be given; and that an undertaking was required only where a new trial was to be had in the appellate court or a stay of execution on the judgment was desired. *Hallenbeck v. Company E*, 17 Hun, 234. Under the present Code an undertaking is necessary to perfect an appeal for a new trial in the appellate court, or to stay an execution upon the judgment appealed from; and the statute requires that

Appeal, how taken.

a copy of the undertaking, with notice of the delivery thereof, must be served with the notice of appeal, and in the like manner. Vol. 1, p. 56, § 3050. But if the appellant omits, through mistake, inadvertence, or excusable neglect, to serve his undertaking with the notice of trial, the appellate court may, upon proper proof of the facts, permit the omission to be supplied, upon such terms as justice requires. Id., p. 55, § 3049. If the undertaking is not given at the proper time, or at such other time as the court may direct upon a motion for leave to give the undertaking *nunc pro tunc*, the appeal may be dismissed upon a motion for that purpose. The requirements of the Code as to security to be furnished by the appellant will be noticed hereafter.

When an appeal is founded upon an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, it may be necessary to serve upon the adverse party affidavits establishing the error. So where an appeal is taken by a defendant who failed to appear before the justice either on the return day of the summons or on the adjourned day, it may be necessary to serve affidavits showing that manifest injustice has been done, and excusing the default. But the service of these affidavits is no part of the proceeding necessary to take an appeal. It is a proceeding on the appeal, like the service of a notice of argument.

An appeal from an order determining a demand for the return of the possession of an animal seized as an estray in the same manner as an appeal from the judgment of the justice in an action to recover a chattel, and the proceeding upon the appeal are the same except that the appeal is not effectual for any purpose unless the appellant procures from the county judge an order directing a stay of proceedings upon the petition, and a stay of the execution of the order appealed from, and files it with the justice within the time allowed for the appeal. This order may be granted or refused in the discretion of the county judge, or granted upon such terms, as to security or otherwise, as he thinks proper, and may be vacated or modified either absolutely, or, unless further security is given, in his discretion. The appeal may be taken at any time before the final order in the special proceeding is made; and the order directing the stay may be obtained at any time before such final order is made. Id., pp. 72, 73, §§ 3102, 3103. The appeal may be taken by the person making the demand, or by either party to the special proceeding. Ib.

An appeal from a final order made upon the petition in a special proceeding against estrays may be taken by the petitioner, or by the

Notice of appeal.

person answering within ten days after the order is made, in like manner as an appeal from the judgment of the justice in an action to recover a sum of money equal to the value of the animal or animals, and the proceedings thereupon are the same, except that if the appeal is taken by the person answering the petition, it is not effectual for any purpose unless the appellant files with the notice of appeal an order of the county judge, or if he is absent from the county, an order of a justice of the Supreme Court, reciting that the appeal has been perfected, and that security has been given thereupon and directing a stay of proceedings upon the final order appealed from, and that the possession of the animal or animals seized be delivered to the appellant. Vol. 1, p. 73, §§ 3104, 3105. The security required before this order can be made will be noticed hereafter.

An appeal may be taken from a final order made by a justice of the peace in a special proceeding to recover real property, within the same time and in the same manner as an appeal taken from a judgment rendered by a justice of the peace. Id., p. 165, § 2260. The mode of staying the issuing or execution of the warrant pending the appeal will be noticed hereafter.

§ 2. **Notice of appeal.** A notice of appeal must be in writing, and since the amendment of section 3046 of the Code of Civil Procedure, in 1882, must be subscribed either by the appellant or by his attorney in the appellate court. See *Gutbrecht v. Prospect Park, etc., R. R. Co.*, 28 Hun, 497. This amendment removes the doubt, formerly existing as to the power of an attorney for the appellant to sign a notice of appeal, as such attorney, where there was nothing in the case showing his authority to appear for the appellant. See *Andrews v. Long*, 19 Hun, 303; *Burrows v. Norton*, 2 id. 550; S. C., 48 How. 132; *Hall v. Sawyer*, 47 Barb. 116; *Bishop v. Van Vechten*, 62 How. 261. If the appellant desires a new trial in the appellate court, and is entitled to it as a matter of right, he should demand it in the notice of appeal. Vol. 1, p. 60, § 3068.

Under the old Code, the appellant was required to state in his notice of appeal the grounds upon which the appeal was founded; Code of Procedure, § 353; and to state in what particular or particulars he claimed that the judgment should have been more favorable to him; and if he claimed that the amount of the judgment was less favorable to him than it should have been, he was required to state what should have been its amount; and if he did not state in the notice of appeal in what particular or particulars he claimed the judgment should have been more favorable to him, he was not entitled to costs, unless the

 Notice of appeal.

judgment appealed from was wholly reversed. *Id.*, § 371. None of these provisions are retained in the present Code ; and the appellant is not required by that act to state in his notice of appeal the grounds upon which the appeal is founded, nor in what particular or particulars he claims that the judgment should have been more favorable to him. This change in the practice has rendered it unnecessary to review or even to cite the numerous conflicting decisions which arose under the former statute as to the mode of alleging error in the notice of appeal.

It has been the uniform practice to entitle the notice of appeal in the justice's court rather than in the appellate court. But in a decision of the Oneida County Court it was held that the notice of appeal is a mandate of the County Court, is properly entitled therein, and governed by the same general principles as other proceedings in a court of record. *Bishop v. Van Vechten*, 62 How. 261 ; S. C., 2 McCarty's Civil Pro. Rep. 28. The Code does not authorize or permit any change in the title of the action or special proceeding until "after an appeal is taken." Code of Civil Pro., § 1295. And it can hardly be said that an appeal has been taken before the notice of appeal has been served.

The notice of appeal may be in the following form :

Notice of appeal.

JUSTICE'S COURT.

Andrew McLeod <i>agst.</i> Patrick Burns.	}
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To PETER PETERSON, Esq., *Justice of the Peace*, and ANDREW McLEOD,
Plaintiff :

GENTLEMEN : Take notice, that the above-named defendant, Patrick Burns, hereby appeals to the County Court of the county of Montgomery from a judgment rendered against him in favor of the plaintiff in this action by said justice, within the county aforesaid, on the 21st day of August, 1882, for damages, \$104, and costs, \$7. *The appellant demands a new trial in the appellate court.*

Dated at FONDA the 23d day of August, 1882.

Yours, etc.,

(*Signature of appellant or his attorney.*)

If a new trial is not desired in the appellate court the demand included between the ** should be omitted ; and if the appeal is brought by one of several defendants the notice ought to state the name of the appealing party, as, for example, "take notice, that the defendant, Y. Z., hereby appeals," etc. If the notice of appeal is signed by the ap-

Amendment of the notice. — Service of the notice.

pellant's attorney it will be prudent, if not necessary, to add his office and post-office address.

The form above given may be easily modified so as to meet the requirements of a notice of appeal from an order made in special proceeding.

Amendment of the notice. Under the liberal provisions of section 3049 of the Code, the appellate court may allow an amendment to be made upon such terms as justice requires where the appellant has omitted to do any act necessary to perfect the appeal. Any act on the part of the appellant which constitutes a step in the proceeding to appeal and which evinces his intention in good faith to perfect and prosecute the appeal is a sufficient ground for an amendment. *Gutbrecht v. Prospect Park, etc., R. R. Co.*, 28 Hun, 497. And see *Burrows v. Norton*, 2 id. 550; *Sherman v. Wells*, 14 How. 522; *Jackson v. Fassitt*, 33 Barb. 645. The omission of an actual subscription of the notice may be cured by amendment. *Gutbrecht v. Prospect Park, etc., R. R. Co.*, 28 Hun, 497. Whether the County Court has power to amend a notice of appeal by adding a demand for a new trial in that court is not yet settled. It will be seen hereafter that the court may, in case of a demand for new trial to which the party is not entitled, disregard the demand, and hear the appeal upon the return. It would be clearly error to permit the appellant to change the nature of his appeal by adding a demand for a new trial when the effect of the amendment will be to deprive the respondent of his right to make an offer of judgment. See *Amos v. Bradley*, 15 N. Y. Week. Dig. 262. And it seems that the court will not permit an amendment of a notice of appeal when the effect of the amendment would be to permit the appellant to take a new appeal, after the statutory time had expired, which would call for a new return and bring up a new record. See *Lavelle v. Skelly*, 24 Hun, 642; S. C., 90 N. Y. 546.

Service of the notice. The notice of appeal must be served upon the justice by whom the judgment was rendered, and upon the respondent. Vol. 1, p. 55, § 3046. Duplicate notices must, therefore, be prepared for this purpose, and a copy made for office use. Service of the notice of appeal upon the justice must be made by delivering it to him personally, or to his clerk appointed pursuant to law; but if the justice is dead, or if neither he nor his clerk can, after reasonable diligence, be found within the county, service of the notice upon the justice may be made by delivering it to the clerk of the appellate court. Id., § 3047. Unless the justice is dead the appellant must, at the time of serving the notice, pay to the person to whom it is delivered the

Service of the notice.

costs of the action included in the judgment, and the sum of \$2 as the fee of the justice for making the return. *Ib.* See *ante*, 921.

Service of the notice of appeal upon the respondent may be made by delivering it, in any part of the State, to the respondent personally; or if he is a resident of the county, by leaving it at his residence with a person of suitable age and discretion; or if he is not a resident of the county, and the person who appeared as his attorney upon the trial is a resident of the county, it may be served upon the attorney, either personally or by leaving it at his residence with a person of suitable age and discretion. If service within the county cannot be made, with due diligence, upon the respondent personally, or in the manner above stated, it may be served upon him by delivering it to the clerk of the appellate court. Vol. 1, p. 55, § 3048.

Notice to one partner is notice to both; and if a notice of appeal is served upon one of two or more respondents, who are partners, the service will be sufficient. *Miller v. Perrine*, 1 Hun, 620; S. C., 4 N. Y. Sup. Ct. (T. & C.) 36.

Where the respondent is a resident of the county, it must be shown that due diligence was used, and that the respondent could not be found in the county, or a service upon his attorney or agent will be insufficient. *Duffy v. Morgan*, 2 Sandf. 631. In this case it was held that due diligence had not been shown. But see *Loescher v. Nordmeyer*, 13 How. 146; S. C., 3 Abb. 244.

To render the service of a notice of appeal effectual, the notice must be delivered absolutely, and if it is delivered to the attorney of the respondent, and then immediately received back with an understanding that efforts will be made to serve it upon the respondent, the service upon such attorney will be a nullity, even though the respondent should prove to be a non-resident of the county. *Earll v. Chapman*, 3 E. D. Smith, 216.

Where there is a regular clerk of a court, the service of a notice of appeal upon him is as valid as a service upon the justice who holds the court; and the service upon the clerk dispenses with any service upon the justice. *Irwin v. Muir*, 13 How. 409; S. C., 4 Abb. 133. And the rule is the same although there may be several justices of the court. *Ib.*

When the appellant has seasonably and in good faith served the notice of appeal upon either the justice or the respondent, but has omitted, through mistake, inadvertence or excusable neglect, to serve it upon the other, he may obtain leave to supply the omission on a proper application to the appellate court. Vol. 1, p. 55, § 3049.

§ 3. **Security on appeal.** Whether an appellant shall furnish security upon taking an appeal from a judgment or an order of a justice of the peace may depend upon the nature of the appeal, the nature of the proceeding or determination to be reviewed, or in some cases upon the discretion of the appellate court. When the appeal is taken from a judgment rendered by a justice of the peace, and a new trial is demanded in the appellate court, the appellant *must* furnish security, in order to render his appeal effectual. The security furnished must be in the form of the undertaking required to stay execution upon a judgment. *Id.*, p. 61, § 3069; *ante*, 923.

In other cases no security need be furnished by the appellant on taking an appeal from a judgment rendered by a justice of the peace in an action, unless he desires to stay execution upon the judgment. So when an appeal is taken from a final order made in a special proceeding to recover real property, an undertaking is necessary only when the appellant desires to stay the issuing or execution of the warrant. Vol. 1, p. 165. The mode of giving security upon an appeal in the several cases noticed will now be considered.

On an appeal from an order determining a demand for the return of the possession of an animal seized in a special proceeding against estrays, the question whether the appellant shall give security or not is left to the discretion of the county judge. *Id.*, p. 73, § 3103. On an appeal from a final order in such proceedings by the person answering the appellant must give an undertaking such as is required for the purpose of perfecting an appeal from a judgment and staying the execution thereof; and also an undertaking, in the same or another instrument, to the effect, that if the final order appealed from is affirmed, or if the appeal is dismissed, the appellant will pay all sums which the justice awards against him upon the hearing, after the determination of the appeal, not exceeding the amount specified in the instrument. *Id.*, § 3105.

§ 4. **Staying proceedings on appeal.** If the appellant desires a stay of execution upon a judgment appealed from, he must give a written undertaking, executed by one or more sureties, approved by the justice who rendered the judgment, or by a judge of the appellate court, to the effect, that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, the sureties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum specified in the undertaking, which must be at least \$100, and not less than twice the amount of the judgment;

Staying proceedings on appeal.

or if the judgment in the justice's court is for the recovery of a chattel, that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding or detention thereof. A copy of the undertaking with a notice of the delivery thereof must be served with the notice of appeal, and in like manner. *Id.*, p. 56, § 3050.

The appellant may or may not join in the execution of this undertaking at his election. *Id.*, p. 124, § 811.

Undertaking on an appeal from justice's court. — Money judgment.
JUSTICE'S COURT.

John Doe, plaintiff, <i>agst.</i> Richard Roe, defendant.

WHEREAS, on the 21st day of August, 1882, John Doe, the above named plaintiff, recovered a judgment against Richard Roe, the above-named defendant, in a justice's court of the county of Montgomery, before A. B., Esq., a justice of the peace in and for the county of Montgomery, for \$144.35 recovery, and \$4.95 costs. And the said Richard Roe, feeling aggrieved thereby, intends to appeal from the said judgment to the County Court of the county of Montgomery:

Now, therefore, we, C. D. and E. F., of the town of Mohawk, in the county of Montgomery, do hereby jointly and severally undertake that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partially unsatisfied, the said sureties will pay * the amount of the judgment or the portion thereof remaining unsatisfied, not exceeding \$300.

Dated the *24th day of August, 1882.*

(Signature of sureties.)

(Add justification, acknowledgment and approval.)

When the judgment appealed from is for the recovery of a chattel, the recitals in the above form should be modified according to the facts, and the condition of the undertaking should be modified by adding after the * "the sum fixed by that judgment as the value of the chattel, together with the damages awarded for the taking, withholding or detention thereof."

The notice of the delivery of the undertaking is usually indorsed upon the undertaking, and may be in the following form:

 Staying proceedings on appeal.

Notice of delivery to justice :

To JOHN DOE, *plaintiff and respondent :*

Take notice, that the within is a copy of an undertaking duly given, and delivered to the justice who rendered the judgment.

Dated this 24th day of August, 1882.

Yours, etc.,

Y. & V., *Appellant's attorneys.*

Office and post-office address, FONDA, N. Y.

It will be noticed that section 3050 of the Code of Civil Procedure expressly requires the approval of the undertaking by the justice who rendered the judgment, or by a judge of the appellate court; and also declares that section 1335 of that act applies to such an undertaking. Vol. 1, p. 56. Section 1335, was amended in 1882 by prefixing to the original section the words "it is not necessary that the undertaking should be approved." Probably by inadvertence, no corresponding change was made in section 3050, and the sections as they now stand are in direct conflict. A case is, therefore, presented of a provision of the Code, not contained in chapter 19, made applicable to proceedings before a justice of the peace, which is repugnant to a special provision of law regulating proceedings before him; and applying the rule laid down in section 3134 of that act, *id.*, p. 83, the repugnant matter, added by the amendment of 1882, is not to be deemed included in the provisions of section 1335 made applicable in the undertaking mentioned in section 3050. The undertaking must, therefore, be approved.

By deliverind the undertaking to the justice or his clerk, and serving a copy and notice of such delivery upon the respondent, the appellant will stay the issuing of an execution upon the judgment. But if the execution has already been issued, the appellant must procure and serve upon the officer holding the execution a copy of the undertaking, either certified by the justice or his clerk, or accompanied by an affidavit that it is a copy, and that the original has been duly filed. This will stay further proceedings upon the execution. *Id.*, p. 56, § 3051.

Form of certificate.

I, A. B., the justice before whom the judgment in the within-entitled action was rendered, do hereby certify that an appeal has been taken from said judgment; that an undertaking, conditioned as required by law, duly executed and approved, has been given by the appellant, and duly filed by me; and that I have compared the within

 Staying proceedings on appeal.

copy undertaking with the original so filed, and that it is a correct transcript therefrom, and of the whole of said original.

Dated this 24th day of August, 1882.

A. B., *Justice of the Peace.*

The original undertaking is usually delivered to the court below or to the clerk, where there is one; but where such service cannot be made by reason of the death of the justice, his removal from the country or from any other cause, the undertaking must then be filed with the clerk of the appellate court. *Id.*, p. 56, § 3052. Notice of such filing must then be given to the respondent or his attorney, in the same manner that notices of appeal are served. *Ib.*

Form of notice.

(Title of the cause)

To JOHN DOE, *plaintiff*:

You will take notice that the undertaking executed for the purpose of staying execution in the above-entitled action, on the appeal therein to the Montgomery County Court, was duly filed with S. J., Esq., clerk of Montgomery county on the 24th day of August, 1882.

(Signature of appellant or attorney.)

The filing of the undertaking with the clerk in such case has the same effect as the delivery thereof to the justice; and a copy thereof, certified by the county clerk, served upon the officer holding an execution, has the same effect as if it was certified by the justice. *Ib.*

Where an appellant desires a stay of execution upon the judgment in the court below, he must be careful to execute and deliver a proper undertaking in the manner prescribed by statute, for, until this is done, there will not be any stay of proceedings on the judgment by the court below. *Conway v. Hitchins*, 9 Barb. 378; *Onderdonk v. Emmons*, 2 Hilt. 504; S. C., 17 How. 545; 9 Abb. 187.

If a levy has been made by an officer, under an execution, before the execution and delivery of the undertaking required by law, the service of a duly certified copy thereof upon the officer will arrest the proceedings in the state they may be at the time of the service, but the levy is not thereby discharged, nor can the appellant require that the goods levied upon shall be returned to him before the appeal is disposed of. *Smith v. Allen*, 2 E. D. Smith, 259; *Rathbone v. Morris*, 9 Abb. 213; *In Matter of Berry*, 26 Barb. 55. And see *Bowman v. Cornell*, 39 *id.*, 71.

But the levy must be one which was made in good faith, and before security was given and approved. And where an execution

Staying proceedings on appeal.

was handed to an officer, but before a levy was made, the appellant served a proper undertaking upon the justice, and a copy thereof upon the plaintiff, but not upon the constable, whereupon the plaintiff directed the officer to make a levy, which was done, the court set the levy aside as fraudulent. *Jones v. McCarl*, 7 Abb. 418. And whenever an execution is issued and levied upon the appellant's property, after the service of a proper undertaking, the execution and levy will be set aside. *Jackson v. Smith*, 16 Abb. 201. If an undertaking is defective, the appellate court has power to allow an amendment, and will grant an order for that purpose in a proper case. *Wood v. Kelly*, 2 Hilt. 334. And see *Teall v. Van Wyck*, 10 Barb. 376. So the court may, in such a case, allow the filing of a further undertaking. *Sternhaus v. Schmidt*, 5 Abb. 66. The appellate court has no power to stay proceedings upon the judgment below, on any other grounds than those prescribed by the statute. *Hawkins v. Mayor of New York*, 5 Abb. 344.

On an appeal from an order determining a demand for the return of the possession of an animal seized in a special proceeding against estrays, the appellant must procure from the county judge an order directing a stay of the proceedings upon the petition, and a stay of the execution of the order appealed from, and file it with the justice within the time allowed for an appeal. This is essential to render the appeal effectual for any purpose. The order may be granted or refused in the discretion of the county judge, or granted upon such terms, as to security or otherwise, as he thinks proper; and it may be vacated or modified, either absolutely or in his discretion, as he thinks proper. Vol. 1, p. 73, § 3103. The Code makes no special provision as to the mode of applying to the county judge for an order staying proceedings upon the petition, and staying the execution of the order appealed from. The appellant should, in some manner, show to the county judge that a special proceeding is pending before the justice; the object of that proceeding; the proceedings had therein before the justice; the demand of the possession of the animals seized; the proceedings of the appellant at the time of making the demand; the order made by the justice thereupon; and every fact tending to show that the decision of the justice is erroneous. As the granting of the order is discretionary with the county judge, and is absolutely necessary to perfect the appeal, facts should be presented on the application for the order, showing at least a *prima facie* case for the review of the determination of the justice. These facts may be presented by affidavit or by an affidavit accompanied by a transcript of so much of the pro-

Staying proceedings on appeal.

ceedings before the justice as may be necessary to present the supposed error. Upon the facts, so presented, the county judge will make an order granting or refusing the stay, as in his judgment justice demands.

When a person, who has answered the petition, determines to appeal from a final order made in a special proceeding against estrays, one of the first steps toward the appeal is the preparation of the undertaking or undertakings prescribed by section 3105 of the Code of Civil Procedure. When only one undertaking is given it may be in the following form :

JUSTICE'S COURT.

In the Matter of the Petition of
C. D., for the sale of certain
animals seized as estrays, and
for the application of the pro-
ceeds of such sale.

} Before A. B., Esq., *Justice of the Peace.*

WHEREAS, on the 25th day of August, 1882, a final order was made by said justice in the above-entitled proceeding to the effect that (*state the substance of the order*) ; and

WHEREAS, the said E. F. intends to appeal from said order to the County Court of the county of Montgomery :

Now, therefore, we do jointly and severally undertake that if such appeal is dismissed, or, if judgment is rendered against the appellant in the appellate court, the said sureties will pay the amount of the judgment or the portion thereof remaining unsatisfied, not exceeding \$100 ; and also that if the final order appealed from is affirmed, or, if the appeal is dismissed, the appellant will pay all sums which the justice awards against him upon the hearing, after the determination of the appeal as prescribed in section 3106 of the Code of Civil Procedure, not exceeding the sum of dollars.

(*Signatures.*)

(*Add acknowledgment and justification.*)

The sum to be inserted in the blank left in the preceding form must be fixed by the judge to whom application is made for the order directing the stay. Vol. 1, p. 73, § 3105.

Order staying proceedings, etc.

(*Title of proceeding.*)

It appearing that E. F. intends to appeal to the County Court of the county of Montgomery from a final order made in the above-entitled proceeding on the 25th day of August, 1882, by A. B., a justice of the peace of the town of Mohawk in said county, and said appeal having been perfected, and security having been given thereupon as

Staying proceedings on appeal.

prescribed by section 3105 of the Code of Civil Procedure, on motion of Y. & V., attorneys for said appellants, it is

Ordered, That the proceedings upon said final order be and are hereby stayed until further order of said County Court, and that the animals seized in said proceeding be delivered to said appellant.

Dated *August 27*, 1882.

Z. W., *County Judge of Montgomery Co.*

This order must be filed with the justice with the notice of appeal, and the appellant is thereupon entitled to the immediate possession of the animals seized. *Id.*, pp. 73, 74, § 3105.

When the appellant desires to stay the issuing and execution of a warrant pending an appeal taken from a final order in a special proceeding to recover the possession of lands, which establishes that the lessee or tenant holds over after default in the payment of rent, he must, except in the city and county of New York, apply to the county judge for an order directing such stay. Such order can be made only upon the appellants giving the security required to perfect the appeal, and stay the execution of the order appealed from, and also an undertaking to the petitioner in a sum, and with sureties approved by the county judge, to the effect, that if, upon the appeal, a final determination is rendered against him, he will pay all rent accruing or to accrue upon the premises, or if there is no lease thereof, the value of the use and occupation of the premises, subsequent to the institution of the special proceeding. *Id.*, p. 165, § 2262.

Undertaking by tenant on appeal.

JUSTICE'S COURT.

In the Matter of the Petition of C. D., for the removal of E. F. from certain premises.	}	Before A. B., Esq., a <i>Justice of the Peace, etc.</i>
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WHEREAS, the above-named E. F. has appealed from a final order made by said justice in the above-entitled proceeding, on the 25th day of August, 1882, awarding the possession of the premises described in said petition to the petitioner:

Now, therefore, we, G. H. and I. J., of the town of Mohawk, in the county of Montgomery, do jointly and severally undertake in the sum of (*the amount fixed by the county judge*) dollars, that if the said appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, the said sureties will pay the amount of the judgment or the portion thereof remaining unsatisfied; and also that if upon said appeal a final determination is rendered against the appellant, he will pay* all rent accruing or to accrue upon said premises; subsequent to the institution of this special proceeding.

(*Date*)

(*Signatures.*)

Proceedings by respondent on receipt of notice and undertaking.

The undertaking must be acknowledged, and have the usual affidavit of justification attached, and must be approved by the county judge to whom the application is made for the stay of proceedings. The appellant need not join in the undertaking; and one surety will be sufficient unless the county judge requires two or more sureties.

Upon the execution of this undertaking, and its approval by the county judge, an order may be made staying the issuing and execution of the warrant for the removal of the tenant. The order may be in the following form :

Order staying issuing of warrant against tenant.

(Title of the proceeding.)

An appeal having been taken from a final order made by said justice in the above entitled proceeding on the 25th day of August, 1882, awarding delivery of possession to the premises described in the petition to said petitioner, and determining that the said E. F. holds over after default in the payment of rent, and the said E. F., having given the security prescribed by section 2262 of the Code of Civil Procedure, and the same having been duly approved, on motion of Y. & V., attorneys for said appellant, it is

Ordered, That the issuing and execution of the warrant for the removal of the appellant from said premises be and are hereby stayed until the determination of said appeal.

(Date)

(Signature of county judge.)

The sureties in an undertaking conditioned as required to stay an execution upon appeal remain liable for the ultimate disposition of the case, notwithstanding an intermediate judgment in favor of their principal. Thus if an appeal to the County Court results in a judgment in favor of the respondent, which judgment is reversed by the General Term of the Supreme Court, and the cause is then transferred to the Supreme Court, because of the disqualification of the county judge, and there tried, resulting in a judgment for the respondent, the sureties in the undertaking given on the appeal to the County Court will be liable for the amount of the final judgment, if the execution issued thereon is returned unsatisfied. *Humerton v. Hoy*, 65 N. Y. 380. In the absence of collusion or fraud the return of the sheriff will be conclusive upon the sureties. *Ib.*

§ 5. **Proceedings by respondent on receipt of notice and undertaking.** After the appellant has perfected his appeal, he has ordinarily no further duties to perform in the cause until the justice has filed his return, or the time limited for filing the return has elapsed and the justice is in default. But it is not so with the respondent. If the appellant has given an undertaking to stay execution on the

Proceedings by respondent on receipt of notice and undertaking.

judgment, the respondent should at once inquire whether the sureties in the undertaking are pecuniarily responsible, and able to answer to him for such costs as may accrue not only upon the appeal then pending, but also upon such further appeals as may be taken thereafter. If the sureties are not clearly responsible the attorney for the respondent should serve upon the appellant's attorney a written notice that he excepts to the sufficiency of the sureties. This must be done within ten days after service of a copy of the undertaking, and the notice that it has been filed or delivered to the justice. The effect of this notice is to compel the sureties in the undertaking given on taking the appeal, or other sureties in a new undertaking to the same effect, to justify before the justice or county judge within ten days thereafter, or in default of such justification, to deprive the appellant of the benefit of the undertaking given. When such notice has been served, the appellant's attorney must, within five days thereafter, give to the attorney for the respondent at least five days' notice of the time and place of justification. As the justification must take place within ten days from the service of the notice that the respondent excepts to the sufficiency of the sureties, the notice of justification must be served at least five days before that time or it will be too late. At the time and place specified in the notice the sureties in the original undertaking, or the sureties in the new undertaking, must appear and justify. The proceedings upon the justification are the same as upon the justification of sureties in an undertaking given by the plaintiff or defendant in an action to recover a chattel. These proceedings have been discussed in a preceding chapter, and the forms there given may readily be adapted to similar proceedings on appeal. See *ante*, 215. If the justice or county judge finds the sureties sufficient, he must indorse his allowance of them upon the undertaking, or a copy thereof, and notice of the allowance must be served upon the attorney for the respondent. If the appellant fails to procure the allowance of the sureties, the effect is the same as if no undertaking had been given. Vol. 1, p. 56, § 1335. The respondent may then issue an execution upon his judgment, if the judgment appealed from was in his favor; and, if the appeal was taken for a new trial in the appellate court, may move for a dismissal of the appeal for want of the undertaking required to render it effectual. If the appellant commits a fraud upon the court by procuring the allowance of an undertaking executed by an insolvent surety, knowing him to be insolvent, the appeal may be dismissed. *Elson v. Murray*, 27 Hun, 536.

When the judgment appealed from was rendered for a sum of money

Proceedings by respondent on receipt of notice and undertaking.

only, and a new trial is demanded in the appellate court, the respondent should at once make a careful examination of the whole case for the purpose of determining whether the judgment was too favorable to him, and whether, upon a new trial in the appellate court, it is possible, or even probable, that the verdict, report or decision will be more favorable to the appellant than the verdict or decision in the court below by the sum of \$10. This examination should be made carefully and impartially, for the liability of the respondent to pay the costs of the appeal may depend upon the correct determination of these questions and his proceedings thereon. If it should appear upon such examination that it is probable that the verdict, report or decision of the appellate court will be more favorable to the appellant than the decision of the court below, the respondent should promptly serve upon the appellant, or his attorney, a written offer to allow judgment to be rendered in the appellate court, in favor of the proper party for a specified sum. See vol. 1, p. 61, § 3070. If the notice of appeal was signed by the appellant in person, and he has not subsequently appeared in the cause by an attorney, the offer should be served upon the appellant, otherwise upon the attorney who signed the notice of appeal, or who has subsequently appeared for the appellant. See *Purvis v. Gray*, 39 How. 1; Code of Civ. Pro., §§ 799, 802.

The statute provides that the respondent may serve the offer "within fifteen days after service of the notice of appeal upon him, and before the return is filed." Vol. 1, p. 61, § 3070. This language is very obscure. The statute permits the justice to file his return after ten and within thirty days from the service of the notice of appeal and the payment of the costs included in the judgment and his fee for making the return. *Id.*, p. 57, § 3053. He may lawfully file his return upon the eleventh day after the day of service of the notice of appeal upon him, but not before that day. If he files his return upon the eleventh day, the respondent cannot take the full fifteen days in which to serve his offer, if the statute is to be construed literally, unless the notice of appeal was served upon the respondent before service was made upon the justice. The apparent intent of the statute is to allow the respondent ten days in any event in which to serve his offer, and five days additional time, if the return is not sooner filed. But the law does not require service of the notice of appeal to be made upon the justice and upon the respondent upon the same day, and the appellant, by an intentional delay in serving the notice upon the latter, may procure the lawful filing of the return before the respondent has any intimation that an appeal will be taken. The remedy of the respondent in such

Proceedings by respondent on receipt of notice and undertaking.

case is to apply to the appellate court under section 783 of the Code for an order permitting him to serve the offer within such time as the court may direct.

Form of offer of judgment.

FULTON COUNTY COURT.

Andrew McBeth, respondent, agst. James McDuff, appellant.	}
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The above-named respondent hereby offers to allow judgment to be rendered in his favor in this action in the County Court of Fulton county for the sum of \$100.

Dated *September 2*, 1882.

ANDREW McBETH, *Respondent*.

To JAMES McDUFF, *Appellant*.

If the appellant concludes to accept the offer he must serve upon the respondent or his attorney, within five days after the service of the offer, a written notice of acceptance, and must file it with an affidavit of service of the notice, with the clerk of the appellate court, who thereupon must enter judgment accordingly. Id., p. 61, § 3070.

Notice of acceptance.

FULTON COUNTY COURT.

Andrew McBeth, respondent, agst. James McDuff, appellant.	}
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SIR. Take notice that I hereby accept the offer of the respondent, dated the 2d day of September, 1882, to allow judgment to be rendered in his favor in this action in the County Court of Fulton county, for the sum of \$100.

Dated *September 5*, 1882.

Yours, etc.,

JAMES McDUFF, *Appellant*.

To Y. Z., *Attorney for the Respondent*; or

To ANDREW McBETH, *Respondent*.

If the offer is made and not accepted, it cannot be proved upon the trial. If the offer is not made, and the verdict, report, or decision upon the appeal is more favorable to the appellant by the sum of \$10 than the verdict or decision in the court below; or if the offer is made and not accepted, and the verdict, report, or decision upon the appeal is more favorable to the appellant by the sum of \$10 than the amount of the offer, the appellant is entitled to recover costs upon the appeal;

Return on appeal.

otherwise, the respondent is entitled to recover costs, vol. 1, p. 61, § 3070, unless he fails to recover any judgment in the action. See *Quick v. Wixon*, 27 Hun, 592. If the offer is accepted, the appellant is entitled to recover his costs in the court below, and his disbursements upon the appeal, including the costs and fee, if any, paid to the justice upon taking the appeal. But neither party is entitled to the costs upon the appeal. Vol. 1, p. 61, § 3070.

The form of a judgment upon the acceptance of an offer by the respondent, and the mode of taxing costs will be noticed hereafter.

If the case is one where the appellant is not entitled to or has not demanded a new trial in the appellate court, as provided in section 3068 of the Code, the respondent may, within twenty days of the service on him of the notice of appeal, serve upon the appellant or his attorney a written stipulation that the judgment appealed from may be reversed with \$5 costs and disbursements of the appeal, and thereafter no further steps can be taken in the appeal except to enter judgment in pursuance of the stipulation for its enforcement. Code of Civil Pro., § 3062, as amended by Laws of 1883, chap. 390.

The effect of this stipulation is to effectually put an end to the appeal and the liability to costs subsequent to the service of the stipulation. When this mode of procedure will be to the interest of the respondent will depend on the circumstances of each case.

Stipulation for reversal.

(*Title of the cause.*)

It is hereby stipulated by the respondent in the above-entitled appeal that the judgment from which said appeal is taken may be reversed with \$5 costs and disbursements of the appeal.

(*Date*)

(*Signature of respondent.*)

§ 6. **Return on appeal.** Whenever a notice of appeal is served upon a justice of the peace, and the costs included in the judgment appealed from with his fee for making a return are paid to him, he should at once enter in his docket-book the time of such service, and the amount paid to him by the appellant. Vol. 1, p. 85, § 3140. This entry will be his guide in fixing the time within which to make his return. The statute requires him to make his return after ten and within thirty days from the service of the notice of appeal and the payment of such costs and fee. Id., p. 57, § 3053. The justice should make and file his return within the thirty days allowed for that purpose, though a return filed by him after that time will be as valid as if filed within the time limited. See *Ex parte Kellogg*, 3 Cow. 372. He

Form and contents of the return.

should not file the return within ten days after the service of the notice of appeal upon him, as by so doing he may prejudice the right of the respondent to make an offer to allow judgment to be rendered in the appellate court for a specified sum. See vol. 1, p. 61, § 3070. On the other hand if he delays the filing of the return beyond the time limited he is liable to attachment. *Id.*, p. 57, § 3055. The fact that the justice has gone out of office since the rendition of the judgment appealed from, or has removed to another county of the State, will not free him from the duty of making the return, or from liability to attachment for an omission of that duty. *Id.*, §§ 3054, 3055. If the justice dies, becomes a lunatic, absconds, removes from the State, or otherwise becomes unable to make a return, the appellate court may receive affidavits, or examine witnesses as to the evidence and other proceedings taken, and the judgment rendered before the justice, and may determine the appeal as if a return had been duly made. *Id.*, § 3056.

Form and contents of the return. Except where the appellant is entitled to a new trial in the appellate court, and has demanded it in his notice of appeal, the return must contain all the proceedings before the justice, including the evidence and the judgment. *Id.*, § 3053. The justice should return all the evidence in the case; and if the return sets forth the evidence in detail, it will be presumed that he has done so, unless the contrary distinctly appears. *Orcutt v. Cahill*, 24 N. Y. 578; *Hance v. Cayuga and Susquehanna R. R. Co.*, 26 id 428.

The statute expressly requires that the justice shall return *all* the proceedings. It should appear from the return how the action was commenced, whether by a voluntary joining of issue without a summons; or by the service of a summons, and if by the latter, when the summons was issued, served and returned; the time and place of joining issue; the nature of the pleadings; the various adjournments; the time and place of trial; the evidence given and the disposition of the various questions and objections arising during such trial; the verdict of the jury, if any; the judgment and the time of its rendition; and the time when the appeal papers were served. The return is intended to be a complete and authentic report of all the material proceedings in the court below; and no return will be such as the law demands unless it complies with this requirement of the law.

A return will be defective when it does not make any reference to any process issued in the cause, nor mention any date of the appearance to the parties, or of the trial, but merely sets forth the pleadings and

Form and contents of the return.

the evidence, and that a judgment was rendered on a day specified. *Peters v. Diossy*, 3 E. D. Smith, 115.

The justice should return the pleadings or set forth copies of them. In *Roulston v. Mc Clelland*, 2 E. D. Smith, 60, 61, the court said: "The return in this case does not inform us of the nature of the action, what was the ground of complaint, nor what was the issue between the parties; and no arguments are submitted from which we can infer what was the precise point in contest before the court below.

"The justice appears to have rendered judgment against the defendant for the value of certain goods. We might, with great propriety, decline reviewing that judgment, where nothing is before us but the evidence in the cause, upon which the broad question is presented, whether that evidence would warrant *any judgment* against the defendant under any supposable state of the pleadings, or upon any possible issues between the parties. We are not willing to sanction such a precedent. The return is grossly imperfect, and a review of a case in appeal, without the pleadings before us, must, in general, be to a great extent a review founded in conjecture."

If a return does not state the substance of the pleadings, nor set them out, a copy of them ought to be annexed to it and referred to in such return. *Spring v. Baker*, 1 Hilt. 526. And see *Smith v. Van Brunt*, 2 E. D. Smith, 534.

Where a return shows that important questions were raised as to the admissibility of evidence in the court below, but it does not disclose what disposition was made of such questions, the appellate court may, and usually will, allow the appeal to stand over for the purpose of procuring a further return. *Matthews v. Fiestel*, 2 E. D. Smith, 91. And upon the coming in of such further return the court will render judgment upon the questions involved in the appeal. *Ib.*

A return ought to show what judgment, if any, was rendered in the court below, and if it omits to do this, the appeal will be dismissed. *Woodside v. Pender*, 2 E. D. Smith, 390. This, however, need not be done by any particular phraseology, for if the court can satisfactorily determine what judgment was rendered this will be sufficient. *Slaman v. Buckley*, 29 Barb. 289; *ante*, 835, 836.

The statutory provision that the evidence shall be returned requires that documentary evidence used on the trial below shall be returned as well as the oral evidence. *Ogden v. Sanderson*, 3 E. D. Smith, 167.

The proper way to furnish such evidence is by returning a true copy of the document with the return, and referring therein to such copy as a part of the return filed.

Form and contents of the return.

Where a justice omits to return material documentary evidence, the appellate court will not decide the appeal without it, but will order the cause to stand over until it can be returned. *Taylor v. Mayor, etc., of New York*, 4 E. D. Smith, 559; *Foley v. Alger*, id. 719. But where it is entirely clear that the omitted paper would not have any effect upon the decision of the appellate court, that court will not order the cause to stand over for its return, nor even order it to be returned on application for an amended return to that effect. *Keeler v. Adams*, 3 Caines, 84. Where a paper or a document is annexed to a return, and is not included in it, there must be some reference in the return to such paper or document, or it will not be considered as a part of it. *Spring v. Baker*, 1 Hilt. 526. But where the return refers explicitly to a paper as a part of the proceedings, and it is returned with the return, it will be considered as a part of the return, although not annexed to it. *Stolp v. Van Cortland*, 3 Wend. 492. All material facts ought to be stated in the body of the return, and it is not a proper practice to add them by way of a postscript or memorandum. *Logue v. Gillick*, 1 E. D. Smith, 398.

Where a justice omits to return papers or documents which were introduced as evidence in the court below, the return is imperfect, and the parties ought not to bring the cause on for argument, but procure a further return. *McAllister v. Sexton*, 4 E. D. Smith, 41. The return ought to contain within itself a complete history of the entire proceedings in the court below, without reference to any extrinsic papers. And where an affidavit was formerly used as the foundation for a *certiorari*, it was held that the justice's return was not sufficient when it adopted such affidavit, and stated that the facts therein contained were substantially true. *Mann v. Swift*, 3 Cow. 61. It is the duty of the justice to take full minutes of the evidence and proceedings, as has already been seen, *ante*, 705, 706, 752; and he will not be excused from returning such evidence and proceedings on the ground that he omitted to take minutes. *Schuyler v. Warner*, 1 Cow. 59.

The return ought also to show that the justice had jurisdiction of the person of the defendant, and of the subject-matter of the action, when the defendant did not appear in the action below, and in such a case if the action is commenced by summons, but the return does not show that the summons stated any *place* of appearance, or that the constable's return stated any *time* of the service of the process, the judgment will be reversed. *Stewart v. Smith*, 17 Wend. 517.

A return ought also to show that the proceedings below were regular, and that there was a compliance with statutory require-

Form and contents of the return.

ments in matters of practice; and if it should clearly appear that a cause was tried by a jury, and that they retired to deliberate without a constable being sworn to attend them, the judgment would be reversed. *Douglass v. Blackman*, 14 Barb. 381; *Hatch v. Mann*, 9 Wend. 262; *ante*, 736.

A justice's return need not be under seal; it is as valid without it as with it, and the justice will be as liable for a false return as though it had been sealed. *Scott v. Rushman*, 1 Cow. 212.

A justice is not required to make any return in relation to matters which did not occur within his knowledge, as in the case of the misconduct of a jury after they have retired to deliberate upon their verdict. *Anonymous*, 3 Caines, 106. Such matters are to be assigned as error in fact, and decided upon affidavits or such other evidence as may be required. The practice as to error in fact will be fully explained in a subsequent place.

The law does not permit a justice to make a motion to quash an appeal for irregularities. It is his duty to obey the notice by returning what can be legally required of him, and by omitting what he is not bound by law to return. *Van Patten v. Ouderkirk*, 2 Johns. Cas. 108.

A recital in a return that an action was commenced on a particular day is not sufficient proof that it was commenced in time to save the demand sued on from the statute of limitations. *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt. 404. Such a fact must be proved before the justice like any other fact, and the evidence of it returned. *Ib.* In the absence of such proof showing when the summons was issued or actually delivered for service, the legal intendment will be that the action was commenced on the day of the service of the summons. *Ib.*

When the appellant is entitled to a new trial in the appellate court, and has demanded it in his notice of appeal, the justice must return the summons together with each warrant of attachment, order of arrest, or requisition to replevy, or execution granted by him in the action, with proof of the service thereof; the pleadings, or copies thereof; the proceedings upon the trial; and the judgment; with a brief statement of the amount and nature of the claims litigated by the parties. But he need not return the evidence, or any part thereof, unless he is required so to do by the special order of the appellate court. Vol. 1, p. 57, § 3053.

In all cases the justice must annex to his return the notice of appeal, and the undertaking, if any has been delivered to him or his clerk, and file the return with the clerk of the appellate court. *Ib.*

Questions in regard to the regularity of process, its service and re-

turn, in relation to the jurisdiction of the justice, and whether the proper parties have been brought in, and a multitude of other important questions must be raised in the justice's court, and if not there raised, are waived; but if raised, and an appeal is taken, for a new trial or otherwise, the appellate court must review the action of the court below upon them. It is, therefore, the duty of the justice to state in his return what questions were raised before him, his rulings in regard thereto, and the appellate court must, if so required, proceed to pass upon all such questions, although they are frivolous. *Mason v. Reed*, 8 Hun, 618.

The number of cases appealed is so great that the convenience of parties cannot be more effectually consulted than by furnishing appropriate precedents as a guide in making a return. But it is of especial importance to recollect that the form of the return is conclusively governed by the nature of the pleadings or judgment in the action appealed from.

The justice must be careful to make such a return as the particular case requires.

In the forms given, the first is one which is appropriate in those cases in which the case is heard and decided upon the return itself. The second form is applicable to cases in which a new trial is had in the County Court.

Form of return where the evidence is returned, and a new trial is not had in the County Court.

IN JUSTICE'S COURT.

John Doe agst. Richard Roe.

Before RICHARDSON P. CLARK, Justice.
Return on appeal.

To the County Court of Fulton county:

In pursuance of the notice of appeal hereto annexed, which was served on me on the 1st day of August, 1865, and in obedience to the statutes in such case made and provided, I, Richardson P. Clark, a justice of the peace of the town of Johnstown, in the county of Fulton, do hereby certify and return to the said court, that, on the 1st day of July, 1865, at the request of the plaintiff, John Doe, I issued a summons, dated on that day, directed to any constable of Fulton county, commanding him to summon Richard Roe to appear before me, at my office in the village of Johnstown, on the 10th day of July, 1865, at 10 o'clock, A. M., to answer the complaint of John Doe in a civil action.

That on or before the return day of said summons, it was duly returned to me by James Pierson, a constable of said county, with a

Form and contents of the return.

return signed by him, that the same was personally served on the said Richard Roe on the said 1st day of July, 1865.

That on the 10th day of July aforesaid, at the time and place specified for the return of said summons, the parties appeared, the plaintiff in person, and the defendant by his attorney, McIntyre Fraser, and joined issue.

The plaintiff complained upon a promissory note, dated May 1, 1864, purporting to have been made by the defendant, and payable to the plaintiff for the sum of \$100, on demand.

The defendant answered the complaint by denying each and every allegation therein contained; and also by alleging that said note had been fully paid. He also alleged that the plaintiff was indebted to him for goods, wares and merchandise sold and delivered to such plaintiff at his request, and claimed to recover judgment for a balance of \$100.

(Where the pleadings are in writing, insert copies of them.)

Issue having been thus joined, the cause was adjourned, on motion and oath of the defendant, to the 15th day of July, 1865, at 10 A. M., at my office.

At the time and place last mentioned, the parties appeared in person *(or by attorney)*, and at the request of the defendant *(or plaintiff)* I issued a venire to James Pierson, a constable of Johnstown, which venire was returnable forthwith, and the said constable afterward, and on the same day, returned the said venire with a panel containing the names of twelve jurors, summoned by him for the jury aforesaid. All the jurors so summoned appeared, and the following were duly drawn and sworn as jurors to try the action, viz.: *(Here insert the jurors' names.)*

On the trial the plaintiff called A. B. as a witness who, being duly sworn, testified: *(here set out the evidence in full, either on the direct or the cross-examination.)*

The plaintiff then called C. D. as a witness, who testified: *(set out the evidence.)*

The plaintiff then rested his case, and the defendant moved for a nonsuit on the following grounds: *(state the grounds explicitly and fully.)*

The motion for a nonsuit was denied, and the defendant excepted to my decision.

The defendant then called E. F. as a witness, and offered to prove by him — *(state what was offered)*. The plaintiff objected to the evidence, on the ground — *(state the grounds)*, and I excluded the evidence, to which ruling and decision the defendant duly excepted.

The defendant then called G. H. as a witness, who testified: *(set out the evidence fully.)*

The plaintiff then recalled A. B., who testified: *(state the evidence.)*

Neither party offered any further evidence, and the foregoing is all the evidence given on the trial of said action.

The counsel for the respective parties then summed up the cause to the jury, after which I charged the jury as follows: *(state the charge.)* After such charge the cause was submitted to the jury, who retired for

Form and contents of the return.

deliberation, under the charge of a constable, duly sworn for that purpose, and after due deliberation they agreed upon their verdict and returned into court, and after being called by me and severally answering to their names, and the plaintiff then being called and answering, the said jury publicly delivered their verdict in open court, by which they found in favor of the plaintiff for \$150 damages (*or otherwise, as the finding may be*).

Whereupon, I, the said justice, did immediately, and on the same day, render judgment in favor of the said plaintiff, and against the said defendant, for the said \$150 damages, and \$5 costs of the action.

(*If the cause was tried by the justice, without a jury, state the fact, and the time and manner of rendering judgment.*)

I also certify, that when the notice of appeal before referred to was served upon me, the above costs included in the said judgment, namely, \$5, and \$2, the costs of this return, were paid to me by the said defendant.

All of which I send, together with the process, pleadings, proceedings and judgment, as I am required by law and the notice of appeal to do.

Dated JOHNSTOWN, August 2, 1865.

RICHARDSON P. CLARK, *Justice of the Peace.*

Form of return where evidence is not returned, but a new trial is had in the County Court.

IN JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Doe.	}	Before RICHARDSON P. CLARK, <i>Justice.</i> <i>Return on appeal.</i>
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To the County Court of Fulton County:

An appeal having been taken in this action by the defendant (*or the plaintiff*), I, Richardson P. Clark, the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, and in obedience to the statute in such cases made and provided, do hereby certify and return that the following proceedings were had by and before me.

On the 1st day of July, 1865, at the request of the plaintiff, I issued a summons in his favor and against the defendant, of which the following is a copy: (*set out a copy of the summons.*) Said summons was, on or before the return day thereof, returned to me with a written return thereon, made by James Pierson, a constable of Johnstown, which return was as follows: (*set out a copy*).

On the return day of the process, and at the time and place specified for the return thereof, and for the appearance of the parties, the said parties personally appeared.

The plaintiff complained as follows: (*set out a copy of the complaint.*) To which the defendant answered as follows: (*set out a copy of the answer.*) The cause was then adjourned, by consent of the par-

 Who to draw the return.

ties, to the 20th day of July, 1865, at 10 o'clock, A. M., at my office in Johnstown, at which time and place the cause was tried by a jury composed of the following named jurors: (*name them.*) The plaintiff claimed to recover for goods, wares and merchandise sold to the defendant, to the amount or value of \$150. The defendant denied the right of the plaintiff to recover the amount so claimed, on the ground that the goods had been fully paid for; and he also claimed to have a set-off against the plaintiff to the amount of \$100, for which he claimed to be entitled to recover judgment. Both parties introduced evidence upon the claims so made by them, and after hearing the proofs and allegations of the respective parties, the jury, on the said 20th day of July, 1865, found a verdict in favor of the plaintiff and against the defendant, for the sum of \$75 damages.

That on the said 20th day of July, 1865, I immediately rendered judgment upon such verdict in favor of the plaintiff and against the defendant for

Damages	\$75 00
Costs	5 00
	\$80 00

On the 22d day of July, 1865, the defendant served the annexed notice of appeal upon me, and at the same time he paid to me \$5, the costs entered in the judgment, together with \$2 costs or fees for making my return.

That at the same time the defendant delivered to me an undertaking, a copy of which is hereto annexed, with a copy of the approval indorsed thereon.

Dated JOHNSTOWN, *August 3, 1865.*

RICHARDSON P. CLARK, *Justice of the Peace.*

Who to draw the return. The statute makes it the duty of the justice to draw his return and to file it in the appellate court. It is evident that the intention of the statute is that the act shall be performed by the justice himself, and this is ordinarily done in practice. The act of making a return, however, is a ministerial, and not a judicial one, and for this reason a justice may employ an amanuensis to draw the return. This, however, ought never to be done unless in those cases in which there is an imperative necessity for it; and, even in those cases, the justice ought not to employ the attorney of either the appellant or of the respondent, but he should select some impartial third person for the purpose. There are several cases reported upon this question, but they were decided in relation to the practice under the old system, and although good authorities as to the principles involved, it will be observed that none of those cases do more than to tolerate the employment of the attorney of one of the parties in some

Conclusiveness of the return.

particular instances. No case requires the employment of such an attorney, and it ought never to be done. In *Fox v. Johnson*, 3 Cow. 20, the return was set aside on motion of the respondent, upon affidavits showing that it was all drawn by the attorney for the appellant, at the request of the justice himself. The court, in speaking of the act of the justice in this respect, said: "He should have employed some one other than the attorney for the plaintiff. The practice of resorting to the attorney for the plaintiff in error (appellant) is a dangerous one. It is liable to great abuse, being in the hands of one who is interested to reverse the judgment. The rights of the defendant in error are concluded by the return, who must submit or be put to the expense and delay of an action if the return be false." See, also, *Rudd v. Baker*, 7 Johns. 548. In the subsequent case of *Philips v. Caswell*, 4 Cow. 505, it appeared that the attorney for the plaintiff in error (appellant) wrote the entire return; but it also appeared that the justice voluntarily went to the attorney's office and desired him to write it, and that the justice dictated the whole of the facts. The court refused to set this return aside on motion, for the reason that the attorney was a mere amanuensis.

In the still later case of *Hunter v. Graves*, 4 Cow. 537, the court refused to set a return aside where it had been drawn by the attorney for the respondent, and where it did not appear that any improper influence was exerted over the justice.

In a still later case it appeared that the attorney for the respondent made a draft of a return for the justice, which he took home with him, and "corrected, altered and fixed" it so as to cause it to correspond with his minutes and his recollection, and then caused it so corrected to be copied and filed as his return; it was held that it ought not to be set aside, since no wrong or abuse was shown. *Smith v. Johnson*, 30 How. 374.

Conclusiveness of the return. The return made by the justice is the record of the evidence and proceedings in the court below, and, being an official act, it is held to be conclusive as to what occurred there. *Smith v. Johnson*, 30 How. 374; *Barber v. Stettheimer*, 13 Hun, 198. The operation of this rule is to exclude all extrinsic evidence which may be offered for the purpose of contradicting the return, or of adding to or diminishing the facts stated in it. There are some cases in which a return is required to be made, and yet extrinsic evidence is admissible in determining some of the questions involved in the appeal. But even when such evidence is admitted, it is not done in violation of the rule already stated. The return is still conclu-

Conclusiveness of the return.

sive as to the matters stated in it, but the allegations of errors are founded upon matters which are not properly a subject to be included in the return. When error in fact is assigned, or when a default has been taken and a new trial is the relief sought, it will be proper to use affidavits for the purpose of showing the true facts in the case. And even oral evidence is admissible for the same purpose. Vol. 1, p. 57, § 3057. There are some cases, also, in which no return is made, and the facts are proved by other evidence. But when a return is made, and relief is sought in relation to matters which are properly a subject of return by the justice, his return as to those facts or matters is entirely conclusive. This is illustrated by numerous cases, a few of which will be noticed.

In the first place the return cannot be contradicted by showing that it is untrue, or that it states more than really occurred. If a justice's return states that four defendants were impleaded as defendants, and that they joined issue in the action, evidence will not be admissible on the trial in the County Court to show that only two of the defendants were brought into court. *Bates v. Conkling*, 10 Wend. 389.

A return is so far conclusive that it cannot be contradicted by an assignment of errors, even when the errors assigned relate to a question of jurisdiction, if the return affirmatively states that jurisdiction exists. *Haines v. Judges of Westchester*, 20 Wend. 625.

Where the return states the manner in which the cause was tried, the questions made, the offers proposed, and the proceedings had, it is conclusive as to these matters, and affidavits are not admissible to contradict the return. *Spence v. Beck*, 1 Hilt. 276; *Beebe v. Roberts*, 3 E. D. Smith, 195. The aggrieved party should move to correct the matters by an amended return. *Ib.* And see *Rawson v. Adams*, 17 Johns. 130.

Where the return is defective and does not state the facts relied upon as showing error, the remedy is by procuring an amended return which will show them.

Where important matter is omitted in the return, the party aggrieved should cause it to be amended, and affidavits may be used as the foundation of an order directing a more full and specific return. *Lynsky v. Pendegrast*, 2 E. D. Smith, 43.

Such a motion is the only remedy for correcting the return, and if the party proceeds to argument without procuring an amendment he will be bound by the facts stated in the return. *Capewell v. Ormsby*, 2 E. D. Smith, 180.

If exceptions were taken to rulings made by the court below, and these

Compelling a return.

are not stated in the return, an amended return must be procured which sets them out, for affidavits are not admissible for the purpose of proving their existence. *Hyland v. Sherman*, 2 E. D. Smith, 235; *Rawson v. Grow*, 4 id., 18.

It is of no consequence how many erroneous rulings or decisions a justice may make, if they do not appear in the return, since the court will not look into affidavits for the proof of their existence, and if a party neglects to procure an amended or further return which shows them, the judgment will be affirmed. *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Kilpatrick v. Carr*, 3 Abb. 117.

Where the alleged error consists in the disallowance of questions proposed in the court below, by the appellant, he should be careful to see that the questions and rulings are set out in the return, or he will lose the benefit of them. *Peck v. Richmond*, 2 E. D. Smith, 381, 383.

Compelling a return. The law makes it the duty of the justice to make a return to the appellate court, and to file it with the clerk within thirty days from the service of the notice of appeal and the payment of the costs included in the judgment, and the fee for making the return. If he neglects this duty the appellate court may compel him to make and file a return, by attachment. Vol. 1, p. 57. The power of the appellate court to proceed against a justice, by attachment, in such case, existed under the Revised Statutes, and under the former Code. The power to punish him by fine and imprisonment for his neglect of duty is conferred upon the appellate court, in general terms, by subdivision 8 of section 14 of the Code of Civil Procedure. The proceeding by attachment against the justice for his neglect of duty is in the nature of a proceeding to punish a contempt of court, other than a criminal contempt, and the practice in such proceeding is, therefore, regulated by title 3 of chapter 17 of the Code of Civil Procedure. See Code of Civil Pro., § 2266.

In proceedings to punish for contempt, under the title of the Code above mentioned, the court or judge authorized to punish for the offense must, in a case of this nature, upon being satisfied by affidavit of the commission of the offense, either

First, Make an order requiring the accused to show cause before it or him, at the time and place therein specified, why the accused should not be punished for the alleged offense; or

Secondly, Issue a warrant of attachment, directed to the sheriff of a particular county or generally to the sheriff of any county where the accused may be found, commanding him to arrest the accused and bring

Compelling a return.

him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense. Code of Civil Pro., § 2269. Probably, under the general power to punish for contempt, conferred by section 14 of the Code, the appellate court has authority to proceed against the justice, either by order to show cause or by an attachment. But as the latter mode of procedure is specified in the section expressly conferring power upon the appellate court to compel the justice to make and file a return, that form of procedure will be the safest to adopt. See vol. 1, p. 57, § 3055. The two forms of proceeding differ materially in their nature. The order to show cause is equivalent to a notice of motion, and the subsequent proceedings thereupon are taken in the action, as upon a motion made therein. A warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant. Code of Civil Pro., § 2273. The practice in this special proceeding only will be here discussed, as want of space renders the consideration of both forms of procedure impracticable, even if the proceeding, by way of motion in the cause, is authorized in this particular case.

The first step in the proceeding to compel the making and filing of a return is to draw an affidavit showing the neglect of this duty by the justice. This affidavit may be in the following form :

Affidavit that no return has been made.

FULTON COUNTY COURT.

John Doe, respondent,	}
agst.	
Richard Roe, appellant.	

FULTON COUNTY, ss. :

Richard Roe, being duly sworn, says that he is the appellant above named ; that on the 20th day of June, 1882, John Smith, then and now a justice of the peace of the town of Johnstown, in said county, in an action then pending before him, in which John Doe was plaintiff and deponent was defendant, rendered a judgment against deponent for damages, \$109.24, and costs, \$4.36, and entered the same in his docket-book. That on the 30th day of June, 1882, deponent took an appeal from said judgment to the Fulton County Court, by serving upon said justice personally, and upon the respondent, a notice of appeal, of which the following is a copy : (*set out a copy of the notice of appeal.*) That at the time of serving said notice deponent paid to said justice the sum of \$4.36, the amount of the costs included in said judgment, and \$2 as the fee of the justice for making the return ; (*if the notice of appeal demands a new trial in the appellate*

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court, add:) and also delivered to said justice an undertaking executed by A. B. and C. D., as sureties, who were duly approved by said justice, of which undertaking and approval the following is a copy: (*set out copy.*) That a copy of said undertaking, with a notice of the delivery thereof, was duly served, with the notice of appeal, upon the plaintiff, John Doe, who has not excepted to the sufficiency of said sureties, (*or if notice of exception was given, state that fact, and the justification and allowance.*)

That more than thirty days have elapsed since the service of said notice of appeal upon (*and delivery of said undertaking to*) said justice, and the payment to him of such costs and fee; and that said justice has omitted and neglected to make and file his return to said appeal with the clerk of said county as required by law, and that by reason of such neglect deponent is impeded in the prosecution of said appeal.

RICHARD ROE.

Subscribed and sworn to before me, this }
21st day of August, 1882. }

A. B., *Justice of the Peace.*

The next step in the proceeding is to apply to the court for the attachment. The appellate court is always open for this purpose. Vol. 1, p. 57, § 3035. The application may be made without notice to the justice.

Order for an attachment.

At a term of the County Court of Fulton county held at the office of the county judge in the village of Johnstown, in said county, on the 21st day of August, 1882:

Present—Hon. A. B., *County Judge.*

FULTON COUNTY COURT.

John Doe, respondent,	}
agst.	
Richard Roe, appellant.	

On reading and filing the affidavit of Richard Roe, by which it appears that the said Richard Roe has taken an appeal to this court from a judgment rendered against him by John Smith, a justice of the peace of the town of Johnstown, in said county, on the 20th day of June, 1882, in an action pending before said justice, in which John Doe was plaintiff, and Richard Roe was defendant; that more than thirty days have elapsed since the service of the notice of said appeal upon said justice and the payment to him of his fees for making a return and the costs included in said judgment; and that said justice has refused, omitted or neglected to make a return to said appeal, as required by law, on motion of Y. Z., attorney for said appellant, it is

Ordered, That an attachment, as for a contempt, be issued against the said justice, returnable at the next term of this court to be held at the court-house in the village of Johnstown, in said county, on the

Compelling a return.

second Monday in September, 1882. And it is further ordered that the said John Smith be held to bail on said attachment in the sum of \$200.

After procuring the order for an attachment the next step is to make out the warrant and deliver it to the sheriff for service. If the justice is still a resident of the county in which the judgment was rendered, the attachment will be directed to the sheriff of that county. If the justice has removed to another county of the State, the attachment will be directed generally to the sheriff of any county where the accused may be found. See vol. 1, p. 57, § 3055; Code of Civil Pro., § 2269.

Form of attachment.

In the name of the People of the State of New York, to the sheriff of the county of Fulton, greeting :

We command you to arrest John Smith if he can be found in your bailiwick, and bring him before our County Court at the next term thereof to be held at the court-house in the village of Johnstown, in said county, on the 2d Monday in September, 1882, there to answer to us for the offense which it is alleged that he hath committed in refusing, neglecting or omitting to make return to an appeal taken to our said court from a judgment rendered by him on the 20th day of June, 1882, in an action brought before him, in which John Doe was plaintiff, and Richard Roe was defendant, and have you then there this writ.

Witness, A. B., County Judge of Fulton county this 21st day of August, 1882.

Y. Z., Attorney.

W. S. McKIE, Clerk.

The court may in its discretion by an indorsement upon the warrant of attachment fix the sum in which the justice may give an undertaking for his appearance to answer. Code of Civil Pro., § 2275. If the indorsement is made, the justice may obtain his discharge from arrest by giving the undertaking prescribed by section 2277 of the Code.

A copy of the warrant, and of the affidavit upon which it is issued must be served upon the justice when he is arrested. § Id., 2274. If there is no indorsement of the warrant fixing the sum in which the justice may give bail for his appearance, or if the justice does not give the undertaking, the sheriff must keep the accused in his custody until the further direction of the court. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except so far as it is necessary to do so in order to secure his personal attendance. Id., § 2276.

When the justice is produced or appears before the court on the return of the warrant the court must cause interrogatories to be filed, speci-

Compelling a return.

fyng the facts and circumstances of the offense charged against him, unless he admits the offense charged. Id., § 2280. This will be done by an order directing interrogatories to be filed. It should be remembered that up to the time an appeal is taken to another court, all papers are to be entitled in the court below. After the appeal is taken the papers are to be entitled in the appellate court. Id., § 1295. An appeal from the judgment of a justice is taken by the service of the notice of appeal upon the justice and respondent; and consequently all papers in that appeal, after the service of the notice, are entitled in the appellate court. But the service of the warrant of attachment commences an original special proceeding against the accused, in behalf of the people, upon the relation of the complainant; and all papers in that proceeding subsequent to the warrant must be entitled therein. See id., § 2273.

Order to file interrogatories.

At a term of the County Court of Fulton county held at the courthouse in the village of Johnstown, in said county, on the 10th day of September, 1882 :

Present — A. B., *County Judge*.

FULTON COUNTY COURT.

The People of the State of New
York, on the relation of Rich-
ard Roe,

agst.

John Smith.

The defendant John Smith, being charged with contempt of court in refusing, neglecting or omitting to make a return to this court upon an appeal duly taken thereto by Richard Roe, from a judgment rendered in favor of John Doe, by the said John Smith as a justice of the peace, etc., and a warrant of attachment having issued against him for contempt, directed to the sheriff of the county of Fulton, returnable on the 10th day of September, 1882, whereupon the said sheriff has returned that he had attached the said defendant, and had let him at large on bail (*or, that he had attached the defendant and had him in custody before the court*), and the said defendant, now being, by virtue of such attachment, personally before the court, and denying that he is guilty of the misconduct charged, as aforesaid, against him, it is, on motion of H. E. S., attorney for the plaintiff :

Ordered, That the said plaintiff do forthwith (*or within ten days*) file in the office of the clerk of this court interrogatories, specifying the facts and circumstances alleged against the defendant; and that he serve a copy thereof upon the said defendant (*or the attorney of the defendant*), and that the said defendant put in written answers to such

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interrogatories, upon oath, and file the same with said clerk, within twenty-four hours after the time when such interrogatories are served on him.

And it is further *ordered*, that it be referred to A. M., Esq., counselor at law, residing in Johnstown, in said county, to examine the said John Smith, on oath, upon the said interrogatories, and to take such further proofs as either party may produce before him in relation to the alleged misconduct, and that he report such answers and proofs to this court.

And it is further *ordered*, that the said defendant attend before the said referee, in the custody of the said sheriff, and that the said sheriff detain the said defendant in his custody until the further order of this court.

After procuring this order, filing and serving a copy of it, the next step will be to draw and file interrogatories to be administered to the defendant. These interrogatories may be in the following form:

Form of interrogatories.

(Title as in last form.)

Interrogatories to be administered to John Smith above named, for his refusal, neglect or omission to make and file a return to an appeal taken to this court, from a judgment rendered by him in favor of John Doe and against Richard Roe.

First interrogatory. Were you or were you not on the 20th day of June, 1882, a justice of the peace of the town of Johnstown, in Fulton county, N. Y.?

Second interrogatory. Did you on that day, as such justice, render a judgment in a civil action, in favor of the said John Doe and against the said Richard Roe, for the sum of \$109.24 damages and \$4.36 costs?

Third interrogatory. Did the said Richard Roe, on the 30th day of June, 1882, serve upon you a notice of appeal from said judgment to this court, and did he, at the same time, pay to you the costs entered in said judgment, and did he also, at the same time, pay to you the sum of \$2, for making your return thereto; and, further, did he, at the same time, deliver to you an undertaking with sureties for the stay of execution in said action, and did you approve in writing the sufficiency of the undertaking and of the said sureties?

Fourth interrogatory. Have you at any time made and filed any return to said appeal, and if not, why have you refused, neglected or omitted to do so?

Answer to interrogatories.

Title as in order for interrogatories, ante, 955.)

The answer and examination of John Smith, above named, to the interrogatories exhibited by the plaintiff for his examination pursuant to an order of this court, dated the day of , 1882.

First. To the first interrogatory this examinant answers and says, that he was such justice at the time mentioned.

Compelling a return.

Second. He further answers the second interrogatory and says, that he rendered a judgment such as is there described.

Third. He further answers the third interrogatory and says, that a notice of appeal was served upon him at the time mentioned, and that an undertaking was given by said Richard Roe with sureties, and that such undertaking and sureties were approved in writing by this examinant. But he says that his fee of \$2 for making his return was not paid to him at the time of serving the notice of appeal, and that the said sum has never since been paid or tendered to him.

Subscribed and sworn before me, } JOHN SMITH.
this day of , 1882. }

A. M., Referee.

Order discharging attachment.

(*Title and caption as in order for interrogatories, ante, 955.*)

On reading and filing the answer of John Smith, to the interrogatories filed against him in this cause, and on motion of J. M. D., of counsel for the said John Smith, it is

Ordered, That the attachment issued in this cause be and the same is hereby discharged.

Order convicting defendant for contempt.

(*Title and caption as in order for interrogatories, ante, 955.*)

A writ of attachment having heretofore issued out of this court against the defendant, John Smith, for his contempt in refusing, neglecting or omitting to make his return to an appeal duly brought by Richard Roe, from a judgment rendered by said John Smith in favor of John Doe and against said Richard Roe, which attachment was directed to the sheriff of Fulton county, and returnable on the day of , 1882; and the said sheriff having returned that he had attached the said John Smith, and had let him at large on bail (or that he had attached the said John Smith, and had him in custody before this court), and the said John Smith having appeared personally before the court, and interrogatories, specifying the facts and circumstances alleged against the said John Smith, having, by order of the court, been filed, and a copy thereof having been served on the said defendant (*or on H. E. S., Esq., his attorney*), and it having been referred to A. M., Esq., to examine the said John Smith on oath upon such interrogatories, and to take such further proofs as either party might produce before him in relation to said alleged contempt; and the said referee having made his report, and it appearing to the court from such report and the answers and proofs thereto, and the original affidavits on which said attachment issued, that the said John Smith is guilty of the contempt charged against him, and that such misconduct was calculated to or did actually defeat, impair, impede or prejudice the rights of the plaintiff above named. Now, on motion of H. E. S., Esq., attorney for the plaintiff, it is

Compelling a return.

Ordered, That a fine of dollars be and the same is hereby imposed upon the said John Smith for his misconduct.

And it is also further *ordered*, that the said John Smith be and he is hereby directed to stand committed to the common jail of the county of Fulton, there to remain charged upon said contempt until he shall make return to said appeal, and until the fine imposed as aforesaid shall be fully paid, unless he shall be sooner discharged by the court, and that a warrant issue to carry this order into effect.

Warrant of commitment.

The People of the State of New York, to the sheriff of the county of Fulton, greeting:

WHEREAS, in a special proceeding brought in the County Court of the county of Fulton, by the people of the State of New York, on the relation of Richard Roe, against John Smith, an order was made by said court, at a term thereof, held at the court-house in the village of Johnstown, in said county, on the day of , 1882, that the said John Smith be committed to the common jail of said county, there to remain charged with the contempt mentioned in said order, until he shall make return to an appeal to this court from a judgment rendered by him on the 20th day of June, 1882, in favor of John Doe, in an action then pending before him, in which the said John Doe was plaintiff and Richard Roe was defendant, and until he shall have paid the fine imposed upon him for his misconduct, amounting to dollars, and that a warrant issue to carry the said order into effect.

Now, therefore, we command you that you take the body of the said John Smith, and him safely and closely keep in your custody in the common jail of the county of Fulton, until he shall have made his return to said appeal, and until he shall have fully paid the fine imposed as aforesaid, to-wit, the sum of dollars, and also the costs and expenses aforesaid, amounting to dollars, with your fees hereon, or until he shall be discharged by the further order of the court. And you are to return this writ, and to make and return to our said court a certificate, under your hand, of the manner in which you shall have executed the same.

Witness, J. S., county judge of Fulton County Court, at Johnstown, the day of , 1882.

W. S. McKIE, *Clerk*.

H. E. S., *Attorney*.

This warrant should be indorsed thus: "By the court. W. S. McKIE, *Clerk*."

This proceeding by attachment for not making a return is a matter entirely between the appellant and the justice, and for that reason none of the notices, orders or other papers in the matter need be served upon the respondent. When a return is not made, the respondent's remedy is by motion to dismiss the appeal; and when an appellant neglects or refuses to procure a return, or at least to attempt to do so

Amended or further return.

within a reasonable time, the court may dismiss the appeal for such neglect; and this is especially the rule when the appellant refuses to make an effort to procure a return after a proper request, or after due notice by the respondent to procure it.

The court, however, will not dismiss an appeal until a reasonable time has been allowed for making a return. And, if any reasonable excuse exists for the delay, a considerable length of time will be allowed for the purpose of making and filing such return. And where an appellant moves promptly and diligently in procuring a return, but the matter is delayed without his procurement or fault, the court will refuse to dismiss the appeal for any such delays.

Amended or further return. The power of the County Court to compel a return has just been explained. But when a return has been voluntarily made, it may be omissive or in some other respect defective, and in that case the court possesses the same power to compel a further or amended return that it has to compel an original one. Vol. 1, p. 57, § 3055. There is one important point to be observed in relation to the practice in procuring a further or amended return; and that is that the appellate court is to be deemed always open for that purpose. And, therefore, an application for an attachment, or an order granting one, may be granted at any time, on reasonable notice, when any notice is necessary. The forms of proceedings for contempts are alike, whether the attachment is sought for a neglect to make any return, or for a refusal or omission to make an amended return when that has been ordered.

Vigilance in protecting a party's legal rights is as important here as elsewhere in legal proceedings. And when a return has been made and filed in the clerk's office, it is the duty of both parties to promptly examine it for the purpose of ascertaining whether it is omissive or defective in any particular. If it is found to be complete and satisfactory, nothing remains to be done but to bring the cause on for a hearing and determination; but if it is found to be defective, the party desiring to have it amended should promptly make a motion for that purpose, and, as we have already seen, the court is always open for this purpose. Either party is entitled to an amended or further return when that is required, and therefore either party may apply for it by motion.

When the application is made to the County Court, it may be made at any reasonable time before the cause is argued, unless some rule of that court requires the application to be made within some prescribed time. But when the county judge is incapacitated from hearing the cause, and he certifies it into the Supreme Court, the notice for the ap-

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plication must be given within twenty days after the date of the county judge's certificate, or it will be too late. Rule 48 of Supreme Court.

The statute requires the original return to be filed, and for that reason no motion for an amended return need be made until that has been done. And the court would not, probably, before that time, entertain a motion for an amended return. *Fish v. Ferris*, 3 E. D. Smith, 568, 569.

There may be instances in which it will be apparent from the face of the return that it is defective, and in that case the court may order a further or amended return, without other proof, upon the mere production of the original return. But it is almost invariably the case that proof of the defects or omissions must be made by affidavits. Such affidavits are always a sufficient foundation for a motion for an amended return, if they contain facts sufficient to authorize or require such amendment to be made. *Lynsky v. Pendegrast*, 2 E. D. Smith, 43.

As a general rule, a motion for an amended return ought to be made before the cause is brought to argument; and if a party should bring the case to a hearing upon his own notice, before procuring an amended return, the court might refuse to entertain the motion at that stage of the action. But notwithstanding that, the mere fact of noticing the cause and bringing it on for argument does not, in any manner, deprive the court of the power of ordering the cause to stand over for the purpose of hearing an application for an amendment of the return, and where it is evident that justice will be promoted by suspending the argument and ordering the cause to stand over for an amendment of the return, the courts will sometimes pursue that course. *Foley v. Alger*, 4 E. D. Smith, 719; *Matthews v. Fiessel*, 2 id. 91. Such a practice is not, however, to be encouraged, since it encourages negligence; and the proper corrective is to require the payment of costs for the favor especially, when it is evident that the omission to move in due season was the result of inexcusable negligence.

The power to order an amended return is not limited, and therefore the County Court may order such a return as frequently as the case may require it, and until the return is as complete as either party may be entitled to have it upon the proofs made.

In those cases which are heard and decided upon the facts appearing on the face of the return, it will be best, as a general rule, to allow amendments liberally, when the facts proved will authorize such a course.

Magistrates sometimes omit matters which seem to them unimportant, while one of the parties may deem them of great value as a part of the case. Such omissions are, usually, unintentional; but there are cases in which the aggrieved party believes that design had quite as much influence in producing the result as any other cause. Such suspicions may be well or ill founded, but however that may be, the applicant is entitled to be fully heard upon the merits of the question whether the return is really omissive in material particulars.

A party who believes, or knows, that a return is defective, ought not to bring it on for a hearing; for, as we have already seen, *ante*, 949, the return is conclusive as to the facts stated; and it will also be presumed to contain all that transpired below, unless the contrary appears from the return itself, *ante*, 941; and if the party brings the cause to a hearing upon such a return, he will be compelled to abide by what it contains, unless the court should order it to stand over for amendment, which, in some cases, is done for the furtherance of justice. *Ante*, 943.

When an application is made for an amended return, the court ought to examine the matters in respect to which a further or amended return is sought, and the application should be refused in respect to whatever is irrelevant, or is not material and important to the questions presented for review. *Onderdonk v. Ranlett*, 3 Hill, 323, 329.

Where it is evident that the judgment must be reversed, even though an amendment were ordered, the motion for an amended return will be denied. A motion for an order for an amended return will be denied when it is evident from the return that the judgment must be reversed, even if the amendment were ordered. *Wightman v. Clapp*, 2 Cow. 517. So, where a motion is made by a respondent for amendment, the motion will be denied where it appears by the appellant's affidavits, and by the balance of proof, that the amendment sought is incorrect in point of fact. *Ib.*

The court will not order the return of a notice, or other paper, which cannot affect the decision upon the appeal. *Keeler v. Adams*, 3 Caines, 84. And an affidavit, which is made for the purpose of procuring an amended return, must state wherein the errors consist, so that the court may see whether they are material or not. *Leonard v. Sunderlin*, 3 Caines, 136.

An appellate court does not compel a justice to return any particular fact as true or false, but merely whether alleged facts are true or untrue. In one case, *Palmer v. Peck*, 2 Cow. 461, it was moved that a justice should amend his return, by stating certain things and omitting

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or denying others, but the court denied the motion, and said: "We never direct the justice to return that such a thing is true or otherwise, but merely order him to supply defects by stating whether the matters to which he is legally called upon to return, and to which he has omitted to answer, be true or false."

Where an order for an amended return is granted by a County Court, the return is not complete or perfect until such amended return has been made and filed, and the cause cannot properly be placed upon the calendar before that time. *People v. County Judge of Clinton Co.*, 13 How. 277. And if, in such a case, the County Court dismisses the appeal for want of prosecution, before the amended return has been filed, the proceeding will be irregular and void, and a *mandamus* will be issued by the Supreme Court compelling the County Court to reinstate the case and proceed to render a judgment. *Ib.*

Where a return is silent in relation to the matters relied upon as the grounds of reversing the judgment rendered below, it is the duty of the appellant to procure an amended return which will show the alleged errors. *Baum v. Tarpenny*, 3 Hill, 75; *Warring v. Loomis*, 4 Barb. 485; *Stafford v. Williams*, 4 Denio, 182, 183; *Capewell v. Ormsby*, 2 E. D. Smith, 180; *Rawson v. Grow*, 4 id. 18.

Where evidence was ruled out in the court below, and neither the evidence nor its substance appears in the return, the appellate court will not inquire into its relevancy, but will assume that the decision of the court below was correct. *Berry v. Mayhew*, 1 Daly, 54; *Dainese v. Allen*, 4 Jones & Sp. 98; S. C., 45 How. 430; 14 Abb. (N. S.) 363.

The statute does not prescribe any time within which an amended return must be made and filed; and for that reason the order requiring an amended return should specify the time within which it must be done. And if the justice fails to comply with such order, he will be liable to attachment in the same manner as for a neglect or refusal to make and file the original return.

On a motion for an amended return, it is not necessary to serve any notice of the motion, or any copies of the moving affidavits upon the justice. It is sufficient to serve those upon the opposite party. But when an order for an amended return has been obtained, a copy of such order must be served upon the justice. This must be done for the purpose of enabling the justice to know precisely in what particulars he is required to amend his previous return. Full information ought to be given to the justice of those matters or defects which are complained of as omissions, imperfections or errors in the return.

If a return is defective on account of some mistake made by the

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justice, either in omitting or in erroneously stating material matters, he may apply to the County Court for leave to correct or amend his return. And, in one case, a justice was permitted to make the application even after the cause had been noticed for argument, upon his affidavit that a gross imposition had been practiced upon him. *Simpson v. Carter*, 5 Johns. 350. In such a case the cause will be ordered to stand over for the purpose of allowing the justice to make an application to the court for leave to amend or correct his return. *Ib.* Notice of the motion, and copies of the affidavits upon which the motion is founded, must be served upon the attorney for the appellant. *Ib.* If the error was caused by the acts of the respondent's attorney, there is the same reason for requiring a similar practice upon the justice's application. After the original return has been filed, the justice is not at liberty to volunteer an amended or supplementary return, but must obtain leave of the appellate court for that purpose. *Barker v. Webster*, Superior Court, Buffalo, cited 2 Clint. Dig. 1970.

Where the court thought that its decision might depend upon the construction of a lease which was read in evidence below, but not set forth in the return, the court, of its own motion, ordered the justice to amend the return by setting forth a copy of the lease. *Howland v. Miller*, Superior Court, Buffalo, cited 2 Clint. Dig. 1970. In such a case, if the argument had commenced, the court would suspend the hearing until the amended return was made and filed. Since the County Court is always open for the purpose of applications for an amended return, such applications ought to be made promptly after the error or defect is discovered by the justice.

In one case, *Rudd v. Baker*, 7 Johns. 548, a justice signed a return which had been drawn by the appellant's agent or attorney; the justice subsequently made a supplementary return declaring the first one incorrect, and he afterward made a still further return in which he declared that the supplementary return was also erroneous, and that the original return was most nearly correct, and upon a motion for leave to file the returns, the court rejected both of the supplementary returns.

If the return of a justice is evasive, and his conduct is disingenuous, the court will order him to amend it, and require him to pay the costs of the application, upon a proper motion for that purpose, if a proper notice of the application is given to him. *Bird v. Silsbie*, 1 Cow. 582.

On a motion for an order requiring a justice to amend his return, one party read a *certificate* from the justice corroborative of the moving papers; but the other party read an *affidavit* made by the justice contradictory to the certificate, and explanatory of the manner in which it

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was given, and it was held that the affidavit ought to outweigh the certificate. *Keeler v. Adams*, 3 Caines, 84.

*Form of additional return made by justice voluntarily.**To the County Court of Fulton county :*

In pursuance of the notice of appeal heretofore served upon me, and now on file in the office of the clerk of Fulton county, and in obedience to the law, I do hereby make a further return in the action in which John Doe is plaintiff and Richard Roe defendant, and do certify and return that I accidentally omitted to state the evidence of A. B., a witness sworn in behalf of the said John Doe, on the said trial before me; and that said A. B. testified on the trial as follows : (*state the evidence in the usual manner.*) I do further certify and return that after the evidence had been closed and the cause summed up by the counsel for the respective parties, I charged the jury as follows : (*state the substantial parts of the charge given.*)

Dated JOHNSTOWN, August 7, 1865.

RICHARDSON P. CLARK, *Justice of the Peace.*

In such an additional return the essential point is to supply the defects or to correct the errors in the return previously made in the cause. In doing this, care should be taken to return fully and particularly all such matters as are necessary to constitute a full return.

In most of the cases in which an amended return is sought, the motion is founded upon affidavits made or furnished by the party who desires an amendment of the return. The essential features of such an affidavit are that it sets forth truly, fully and particularly the points, matters or things in which it is claimed that the original return is defective. A general form for an affidavit will be here given; but the particulars in which a return may be defective are so numerous that scarcely any two cases will be similar in the facts forming a ground of the motion. For this reason any form which may be given will merely serve as an outline, which must be filled up according to the circumstances of each particular case.

General form of affidavit for an amended return.

FULTON COUNTY COURT.

John Doe, respondent,	}
agst.	
Richard Roe, appellant.	

FULTON COUNTY, ss. :

Richard Roe being duly sworn, says that he is the appellant in the above entitled cause, that Richardson P. Clark, the justice who tried the said cause in the court below, has made and filed a return in obedi-

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ence to the notice of appeal served upon him, which return was filed in the Fulton county clerk's office on the day of , 1865. And deponent says that said return is omissive and defective in several material particulars, and among other things it omits to state that this deponent duly made an application to adjourn the trial of the said cause while the same was pending before said justice; that this deponent made due proof and offered sufficient security to entitle him to an adjournment of the same, and that said justice improperly refused to grant the adjournment sought. And deponent further says, that on the application for such adjournment he was duly sworn by the said justice, and testified to the following facts: (*state fully such facts as were sworn to, but omitted in the return*;) that this deponent also proved by Lucius J. Smith the following facts: (*state the facts*;) that this deponent also offered to give such a bond as may be by law required for an adjournment in such an action, and that he offered Lucius J. Smith and Francis Burdick as sureties in said bond, which sureties were abundantly responsible and were legally capable of becoming such sureties. And deponent further says, that said justice rejected both of said sureties, and denied the application for an adjournment, and that such decision is one of the grounds upon which this appeal is founded, and is so stated in the notice of appeal.

Subscribed and sworn before me, } RICHARD ROE.
 this 7th day of August, 1865, }
 PETER W. PLANTZ, Justice.

Such an affidavit ought to be folioed as in the practice in courts of record. After completing it, the proper copies must be made for service upon the opposite party, and for proving service thereof. If other affidavits are required besides those made by the party, let them be prepared and copies of them made for service. After the affidavits are completed, the next step will be to draw a notice of the motion for such amended return. This notice is brief, and may be in the following form:

Form of notice of motion, etc.

(*Title as in affidavit, ante, 964.*)

SIR — Please to take notice, that upon the return on this appeal, now on file in the Fulton county clerk's office, and upon affidavits, with copies of which you are herewith served, a motion will be made in the Fulton County Court, before the Hon. John Stewart, county judge of Fulton county, at his office in Johnstown, on the day of , 1865, at ten o'clock, A. M., for an order, requiring Richardson P. Clark, the justice who tried the cause in the court below, to make a further

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and amended return, on this appeal, or for such other or further rule, order or relief, as the court may deem proper to grant.

Dated *August 29, 1865.*

Yours, etc.,

SMITH & CARROLL,

Attorneys for appellant, Johnstown, N. Y.

To WELLS & DUDLEY, Esqs.,

Attorneys for respondent.

Such a motion may be made at any time, since the County Court is always open for such motions. But in giving notice of motion, care should be taken to give as much time as is required in ordinary motions in courts of record. When the affidavits and notices are complete, serve them in the usual manner. But no copies of the affidavit or of the notice of the motion need be served on the justice who made the return, unless it is in a case in which it is sought to subject him to costs for an evasive return, or some similar case. *Ante*, 962.

At the time appointed for the motion, the moving party must attend at the place named in the notice of motion, prepared with proof of the service of copies of the affidavits and of the notice of motion. If no opposition is made, the court will usually grant the motion as of course, if the matter sought by the amended return is material.

If the opposite party concludes to oppose the motion, it will usually be upon the following grounds: 1st. That the moving papers are insufficient, or that they have not been properly served; 2d. If sufficient and properly served, that the facts are not truly or fully stated in the moving affidavits; or, 3d. That the matters are not material, or that the facts, if returned as claimed, would not change the result of the appeal. The grounds of opposing such a motion are as numerous as there are tenable objections to urge against the motion; and the nature of the objections will be matter of fact or of law, as the circumstances of the particular case may demand. If there is a dispute as to the truth of the matters stated in the moving affidavits, the proper way to raise the question is by preparing counter affidavits, and reading them on the hearing of the motion.

Draw the affidavits in the usual form, and state the facts as they may be in the particular case, or so as to present such facts as are deemed important in the disposition of the motion. No copies of the affidavit need be served on the opposite party; it will be sufficient to produce and read them at the hearing of the motion. But the original affidavits used by both parties ought to be filed with the clerk of the court, unless the county judge retains them for the purposes of the motion, in which case he will either file them, or direct it to be done.

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After reading the affidavits, and such portions of the return as may be material, the motion is argued in the usual manner.

The moving party ought to be prepared with a draft of an order such as he deems himself to be entitled to; and this ought to be presented to the court at the argument. Such orders are frequently modified by the court, after hearing the arguments of both parties, and such an order as is proper is then granted. After the order is granted it ought to be filed with the county clerk, and copies of it served upon the opposite party and upon the justice who tried the action and made the return. The order may be drawn in the following form:

Order for amended return.

At a term of the County Court held at the office of the Hon. JOHN STEWART, county judge, etc., etc., at Johnstown, on the 8th day of August, 1865:

Present — Hon. JOHN STEWART, *County Judge*.

FULTON COUNTY COURT.

John Doe, respondent,	}
<i>agst.</i>	
Richard Roe, appellant.	

On reading and filing affidavits and notice of motion and proof of the service of the same, and after hearing Horace E. Smith, Esq., for the motion, and John Wells, Esq., appearing and opposing, it is

Ordered, That Richardson P. Clark, Esq., who tried this cause, amend the return filed therein, and therein state whether or not the said Richard Roe, on the day this cause was tried before him, did or did not ask or move for a further adjournment of the cause on account of the absence of a material witness for him, by the name of Peter Smith, who resided in the county of Fulton, or how otherwise; and whether the said Richard Roe was not sworn, and testified to the said justice that since the last adjournment he had procured two subpoenas for the said Peter Smith, and had endeavored to serve him therewith; that one of the said subpoenas he had given to Alexander Stewart, and had hired him to go to the residence of the said witness and subpoena him, and that he had been informed by said Stewart that he had subpoenaed said witness to attend this trial at the day, but that said witness was sick and confined to his bed and could not come, or how otherwise; and whether or not said Richard Roe further testified in said application that Peter Smith was a material witness for him on the trial of this cause, and that he could not safely proceed to the trial of this cause without his testimony, and that he expected the said Alexander Stewart every moment in court, and that he would then prove by him that said Peter Smith had been subpoenaed and was sick and unable to attend court, or how otherwise; and whether or not the said justice refused to wait a few moments for the said Alexander Stewart to come into court, and also refused to

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grant said Richard Roe a further adjournment on his said application, or how otherwise; and it is further *ordered*, that said Richardson P. Clark make said amended return and file the same with the clerk of Fulton county within ten days after the service upon him of a copy of this rule or order, or that he show cause before the Hon. John Stewart, at his office in the village of Johnstown, on the day of , 1865, at ten o'clock, A. M., why an attachment should not issue against him.

MORTIMER WADE, *Clerk*.

In drawing an order for an amended return, the attorney who obtains it ought to be careful to state with particularity every point or fact as to which he seeks information in the amended return. A copy of the order ought then to be served upon the opposite party and upon the justice, with a notice indorsed thereon, in the following form, or some other similar one :

Form of notice of order.

SIR — Take notice that the within is a copy of an order filed in this cause.

Yours, etc., SMITH & CARROLL,
Attorneys for Appellant, Johnstown, N. Y.

To RICHARD P. CLARK, Esq., and to
WELLS & DUDLEY, Esqs.,
Attorneys for Respondent.

Upon the receipt of a copy of this order and notice, it is the duty of the justice to comply with its terms within the time prescribed therein, unless he has some legal excuse for not complying with it. And in that case he must appear and show cause before the county judge at the time specified therefor in the order. Usually there is no legal reason for not complying with the order by making and filing an amended return. And the justice may comply with the order by making his amended return in a form like the following :

Form of amended return.

FULTON COUNTY COURT.

John Doe, respondent,	}
<i>agst.</i>	
Richard Roe, appellant.	

To the County Court of the county of Fulton :

The undersigned, in obedience to the rule, or order, hereto annexed, returns : that the said Richard Roe, on the day the cause in said rule or order mentioned was tried before me, did ask or move for a further adjournment, on account of the absence of a material witness, as he alleged, by the name of Peter Smith, who, he alleged, resided in the

Preparation for trial, and proceedings before trial.

county of Fulton, but he did not produce or offer any evidence that the said Smith had been subpoenaed to attend said trial as a witness.

The undersigned further returns that the said Richard Roe was sworn, and testified to the undersigned that since the last adjournment of said cause, he had procured two subpoenas for said Smith, and endeavored to serve him therewith, and that he had given one of the said subpoenas to Alexander Stewart, and hired him to go to the residence of said witness and subpoena him; and that he had been informed by said Stewart that he had subpoenaed said witness to attend the trial of said cause on said day, and that he was sick and confined to his bed, and could not come as he was also informed by said Stewart; and that the said Smith was a material witness for him on the trial of said cause, and that he could not safely proceed to the trial thereof without his testimony, and that he expected the said Alexander Stewart in court every moment, and he would then prove by him that said Smith had been subpoenaed and was sick and unable to attend said trial.

But the undersigned further says, that no evidence whatever was offered to him to show that any subpoena had in fact been served upon the said Smith by the said Stewart, or by any person, or that Smith was sick or unable to attend, or that said Stewart had ever been to his house to subpoena him. The undersigned denies that he refused to wait a few moments for the said Stewart as requested by said Roe, but, on the contrary, says that at the request of said Roe, he waited according to his best recollection and belief, about half an hour for said Stewart, who not then having arrived, the undersigned proceeded to the trial of the said cause, and refused to grant said Roe a further adjournment, because it was considered that he had not shown himself to be legally entitled to such adjournment.

Dated JOHNSTOWN, *August 31, 1865.*

RICHARDSON P. CLARK, *Justice of the Peace.*

§ 7. **Preparation for trial, and proceedings before trial.** When the appellant is not entitled to a new trial in the appellate court, or where he has not demanded it in his notice of appeal, either party may bring the appeal to a hearing in the appellate court, by serving upon the adverse party, at least eight days before the term, a notice of hearing or argument, for any term of the appellate court, held after the return is filed, at which such an appeal can be heard. Vol. 1, p. 59, § 3062. The county judge appoints the times and places for holding terms of his court. At least two terms for the trial of issues of law or of fact must be appointed to be held in each year. Each term must be held at the place designated by statute for that purpose, except that the county judge may, from time to time, adjourn a term to any place within the county for the hearing and decisions of motions and appeals, and trials and other proceedings without a jury, and may appoint as many terms as he thinks proper to be held, either at the court-house,

Preparation for trial, and proceedings before trial.

or elsewhere in the county, for the same purpose. Code of Civil Pro., § 355. Notices of the time and place of holding these terms are published in the State paper and in at least one newspaper printed in the county where the court is to be held. *Id.*, § 356. If the appeal is to the Superior Court of Buffalo, it must be heard at a General Term of that court. Vol. 1, p. 59, § 3062. The appointment of terms for this court, and the publication of notice of the times and place of holding them, are regulated by the Code. See Code of Civil Pro., §§ 280, 296.

Notice of argument.

(*Title of the cause.*)

SIR — Take notice, That the appeal herein will be brought on for argument before this court at the next term thereof, to be held at the court-house in the village of Johnstown, on the 25th day of September, 1882, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the 14th day of September, 1882.

Yours, etc.,

Y. Z.,

Attorney for Appellant, Johnstown, N. Y.

To D. M., Esq., *Attorney for Respondent.*

When the appeal is brought for the purpose of obtaining a new trial in the appellate court, the action is not deemed at issue therein until after the expiration of ten days from the time of filing the justice's return. Vol. 1, p. 61, § 3071. After the action is deemed at issue in the appellate court, all the proceedings therein are the same as if it had been commenced in that court, except as otherwise specially prescribed by chapter 19 of the Code. *Ib.* A notice of trial cannot, therefore, be served until the expiration of ten days from the filing of the return. But at any time after the cause is at issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. Code of Civil Pro., § 977.

Notice of trial.

(*Title of the cause.*)

SIR — This action will be brought to trial at the next term of this court to be held at the court-house in the village of Fonda, in the county of Montgomery, on the 16th day of October, 1882.

Dated the 2d day of October, 1882.

Yours, etc.,

Y. & V.,

Attorneys for Appellant.

To H. B. C., Esq., *Attorney for Respondent.*

Putting the cause on the calendar. — Service of affidavits excusing default.

If the cause is not disposed of at the term for which the notice of trial or of argument was served, a new notice will be required to bring the cause to trial or argument at a subsequent term. See *Matthews v. Arnold*, 14 Hun, 376; Code of Civil Pro., § 977.

Putting the cause on the calendar. The party who serves a notice of trial or of argument should also file with the clerk of the appellate court a note of issue to guide him in making up the calendar. The note of issue must be filed at least twelve days before the commencement of the term. It must state the title of the action, the names of attorneys, the date of the issue, the nature of the issue, whether of fact or of law, and if an issue of fact, whether it is triable by a jury or by the court without a jury. Code of Civil Pro., § 977. Upon the filing of the note of issue the clerk will place the cause upon the calendar.

Note of issue.

FULTON COUNTY COURT.

John Doe, respondent,	}	Y. & V., <i>Attorneys for respondent.</i>
<i>agst.</i>		
Richard Roe, appellant.	}	H. B. C., <i>Attorney for appellant.</i>

Date of issue, *September 2*, 1882.

Issue of fact, triable by a jury; *or*, issue of law.

When the appeal is taken for a new trial in the appellate court, and the cause is not disposed of at term for which it is noticed, a new note of issue will, as a general rule, be required to place the cause on the calendar for a subsequent term. See Code of Civil Pro., § 977. But where the appeal is not brought for a new trial, and has once been placed upon the calendar, it must be continued thereupon without further notice until it is regularly disposed of. Vol. 1, p. 59, § 3062. A new note of issue need not be served for each successive term. *Matthews v. Arnold*, 14 Hun, 376. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter, at which it might be noticed for hearing, and heard, the court must dismiss the appeal unless it directs it to be continued for cause shown. Vol. 1, p. 59, § 3062. And see *Matthews v. Arnold*, 14 Hun, 376.

Service of affidavits excusing default. The Code provides that if the appeal is taken by a defendant who failed to appear before the justice, either upon the return of the summons or at the time to which the trial of the action was adjourned, and he shows, by affidavit, or otherwise, that manifest injustice has been done, and renders a satis-

Service of affidavits excusing default.

factory excuse for his default, the appellate court may, in its discretion, set aside the judgment appealed from, or stay proceedings thereunder, and by order direct a new trial before the same justice, or before another justice of the same county, designated in the order, at such a time and place specified in the order, upon such terms as it deems proper. Vol. 1, p. 59, § 3064.

The section cited applies only to appeals in which the appellant is not entitled to or has not demanded a new trial in the appellate court. If an issue of fact or of law was joined before the justice, and the appellant has demanded a new trial in the appellate court, in a proper case, he is entitled to a new trial, as a matter of right, whether he was or was not present at the trial. *Id.*, p. 60, § 3068. If, however, he did not appear before the justice at the return of the summons, and no issue was joined, his remedy is by an application for a new trial before the justice, under section 3064 of the Code above cited.

The proof excusing the default, and showing the injustice of the judgment appealed from, may be made by affidavits, or by oral evidence introduced upon the hearing of the appeal. If affidavits are used they may be served with the notice of appeal, or at any time afterward before the hearing, provided they are served at least eight days before the commencement of the term of the County Court; or, in other words, if they are served as is required in the case of the service of the notice of argument.

The form of the affidavit is similar to other affidavits, except that it states with particularity the excuse for the default, and it shows clearly that injustice had been done.

In entitling the affidavits served it will be remembered that no appeal is pending until the notice of appeal is served; and for that reason, if the affidavits are made before the notice of appeal is served, they ought to be entitled in the court below; while if they are served after the service of the notice of appeal, they ought to be entitled in the County Court. The title of an action is not changed by an appeal. But, after an appeal is brought, all affidavits ought to be entitled in the appellate court instead of the court below. *Clickman v. Clickman*, 1 N. Y. 611. If, however, a mistake should be made in that respect, the court would disregard the error, if the opposite party was not misled in consequence. *Bowman v. Sheldon*, 5 Sandf. 657. Or, if the error could not properly be disregarded, the court would order the cause to stand over for the purpose of allowing new affidavits to be served in case there was good reason for adopting such a course. And, whenever

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substantial justice would be promoted by such a practice, that would be the best of reasons for pursuing it.

If the affidavits are made and served after the appeal is perfected, they will be entitled in the County Court, and they may be in the following general form :

Form of affidavit to excuse default.

FULTON COUNTY COURT.

John Doe, respondent,	}
<i>agst.</i>	
Richard Roe, appellant.	

FULTON COUNTY, ss. :

Richard Roe, being duly sworn, says, that he is the defendant and appellant named in the above-entitled action; that on the 20th day of July, 1865, a judgment was rendered against this deponent, and in favor of John Doe, the respondent and plaintiff, by Richardson P. Clark, a justice of the peace of Johnstown, in Fulton county, for the sum of \$200, damages and costs; that this deponent failed to appear in the action before the said justice in consequence of a sudden and serious illness, which attacked the deponent on the morning of the day on which the trial was had; that deponent was so sick as to be confined to his bed, and to be under the care of a physician; that in consequence of such sickness this deponent was unable to attend the trial before said justice or to go after his counsel to attend the same, as deponent had arranged to do before his said illness; that deponent had retained McIntyre Fraser, Esq., as his counsel to defend said action, and had promised to call and notify him when he was required to attend the cause in court, but that in consequence of such sickness deponent was unable to give such notice to said Fraser as agreed, and, therefore, said Fraser did not attend the said trial, as deponent is informed and believes; that the said judgment was rendered in the absence of this deponent, and without any appearance by him in the court below. And deponent further says, that manifest injustice has been done to him by the rendition of said judgment, and he alleges that the judgment was rendered upon a claim made by the plaintiff for goods, wares and merchandise sold and delivered to this deponent; that the plaintiff recovered a judgment for \$200, which is the full value of the goods sold by plaintiff to this deponent; that no credit was given to deponent for payments made for such goods, etc.; that on the 1st day of July, 1865, this deponent paid to said plaintiff the sum of \$100, to be applied on said purchase-price; that no credit was given nor any allowance made on said trial on account of said payment, but the plaintiff recovered judgment for the entire amount of his claim; that by such judgment manifest injustice was done to this deponent, in this, that said judg-

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ment ought not to have been more than \$100, with costs, etc., instead of the sum of \$200, as it now stands.

Subscribed and sworn before me, } RICHARD ROE.
this day of 1865. }

PETER W. PLANTZ, *Justice of the Peace.*

In a case like that supposed in the foregoing affidavit, let the attorney also make an affidavit showing his non-attendance, and the reasons therefor, as stated in the affidavit of the defendant.

As each case has some peculiarities of its own, so the affidavits must be drawn in such a manner as to correspond with the actual facts of the particular case. And it is a safe general rule to make as strong a case as possible in relation to the excuse for the default, and to show that manifest injustice has been done. The cases relating to those points will be fully noticed in a subsequent place.

After the affidavits are completed copies must be made and served upon the respondent, or his attorney, when he has given notice of retainer. No affidavits or notices need be served upon the justice who tried the cause.

The affidavit served upon the respondent ought to be accompanied by a notice stating the object of the affidavits and that they will be used upon the hearing of the cause.

This notice may be in the following form :

Form of notice served with affidavits.

(*Title as in last affidavit, ante, 973.*)

SIR — Take notice, that the affidavits, with copies of which you are herewith served, will be read on the argument of the appeal in this action, for the purpose of obtaining a new trial ; to excuse the default of this appellant ; and to show that manifest injustice has been done to him by the judgment rendered in the court below.

Dated JOHNSTOWN, August 9, 1865.

Yours, etc.,

A. McFARLAN,

Attorney for Appellant.

To MARTIN McMARTIN, Esq.,

Attorney for Respondent.

This notice and the copies of affidavits ought to be served at the least as early as eight days before the sitting of the court. And this will enable the respondent to controvert or explain any of the facts stated in the affidavits, if he desires to do so.

The statute does not declare in express terms that witnesses may be orally examined for the purpose of determining whether the default is excused, and whether manifest injustice has been done to the appel-

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lant. But it provides that a new trial may be ordered, if it appears by the affidavits served by the appellant, *or otherwise*, that injustice has been done, and that a sufficient excuse is shown. It is difficult to see how these facts could appear unless oral evidence is allowed for that purpose, since the fact of injustice and of a reasonable excuse would not usually appear in the return, and some other evidence is intended than the affidavits of the appellant.

If either party intends to call witnesses to be examined orally upon these questions, it would be proper to require them to give notice of such intention, which would enable the opposite party to produce witnesses if he desires.

To require such a notice in this case is the same in principle as that requiring the service of copies of the affidavits on the part of the appellant.

The statute does not in terms require the service of copies of the affidavits, or the giving of any notice, but the analogies of the practice require it to be done, and for that reason the courts always enforce a rule which is so wise and so just to the parties, and so convenient to the court.

The power to order a new trial is not conferred unless the application is made by a defendant. The statute does not apply to a case in which a plaintiff is nonsuited in consequence of a default. His remedy in such a case is by bringing a new action.

The statute requires the defendant to render a *satisfactory* excuse for his default. A satisfactory excuse is such as the court can pronounce legally sufficient, and such as is reasonable under the circumstances of the case. See *ante*, 117.

Upon the whole proof offered, it is left entirely discretionary with the appellate court whether to grant relief or refuse it. But, as a general rule, the court will exercise this power liberally for the furtherance of justice, and in doubtful cases will be inclined to order a new trial, where both parties can have a full and a fair hearing.

There are several cases which decide what constitutes a satisfactory excuse. In *Camp v. Stewart*, 2 E. D. Smith, 88, it appeared from the affidavits of the defendant that he was under the necessity of leaving town; that he had prepared his defense with all proper instructions, and had given the matter in charge of a young man who was specially enjoined to deliver them to the defendant's attorney, with a request that he would attend on the return day of the summons; and that the young man *forgot* to do it, and this was held to be a sufficient excuse. So, where it appeared that the defendant delivered the summons to his

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attorney, with a request that he would appear and answer, which he promised to do, but that such attorney was under the necessity of leaving town, and he, therefore, intrusted the summons to another attorney, who promised to appear; that the latter, owing to the loss of a key, was unable to procure the summons, and he, therefore, went to a wrong court, and before his arrival at the proper court, a judgment had been taken by default, and this was considered a sufficient excuse. *Lent v. Jones*, 4 E. D. Smith, 52.

So, where the affidavit showed that the defendant had retained an attorney to appear in the action; that he left his residence for the courtroom, and in time to reach it at the hour when the summons was returnable; that the attorney was met in the street by a client, who engaged him in a conversation upon a special matter of business; that through a misapprehension as to the lapse of time, such attorney failed to reach court until fifteen minutes after the proper time; that the plaintiff, and his counsel, and witnesses were there in court, and that the plaintiff refused to open the default, and allow a trial upon the payment of costs, etc., and this was held to be a reasonable and satisfactory excuse. *Seymour v. Elmer*, 4 E. D. Smith, 199.

So, where a summons stated that the defendant was required "to answer the complaint of the plaintiff for professional services," and it appeared that the defendant had good reason to believe, from the wording of the summons, and the facts within his knowledge, that the action was for a claim which he admitted to be due, and for that reason he failed to appear before the justice, whereupon the plaintiff recovered judgment for a greater sum, and upon an entirely different claim, this was held sufficient as an excuse. *Bissell v. Dean*, 3 E. D. Smith, 172.

So, where it is shown that the defendant himself mistook the return day of the summons, and for that reason failed to appear, the court may relieve him, *Gottsberger v. Harned*, 2 E. D. Smith, 128, especially where it appears that the defendant acted upon his mistaken impression and appeared at the time which he supposed was the correct one. *Gardner v. Wight*, 3 E. D. Smith, 334.

Where it is evident that a defendant really intended to appear and defend an action, and that he has a good defense thereto, either partial or total, and that he failed to appear in consequence of any excusable mistake, he ought to be relieved upon proper terms.

The manner of serving process may be such as to excuse a defendant from appearing in the action, and to entitle him to relief against a judgment entered by default upon such service. And where the ap-

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pellate court is satisfied, from the affidavits, that the process was not served at all, or that it was so improperly or defectively served that the defendant was not duly apprised of its nature and effect, the default will be opened and a new trial ordered. *Carroll v. Goslin*, 2 E. D. Smith, 376; *ante*, 138.

Where an issue has been joined, and the cause adjourned to a specified day for trial, but previous to that day there is a negotiation between the parties relative to the adjournment of the cause to a still further day, and the defendant actually believes that such adjournment has been agreed on, and he consequently remains absent or fails to appear at the trial, this will be a good excuse and a sufficient ground for opening the default, if he also shows that manifest injustice has been done. *Armstrong v. Craig*, 18 Barb. 387.

So, where the acts of the plaintiff prevent the defendant from appearing, and a default is taken, this will be a good excuse for the default. And where a plaintiff obtains a judgment by default before the proper time, upon a false statement that the defendant does not intend to appear, and when he does in fact appear at the proper time, but after judgment has been rendered against him, this will be a good ground for reversing the judgment. *Beach v. McCann*, 1 Hilt. 256. And if these facts appear in the return, there will not need to be any proof of them by affidavits. *Ib.*

So, where it appeared by the return that the defendant appeared before a justice, at the proper hour, on the return day of a summons which had been served upon him, and asked the justice for his case, when the justice mistakenly informed him that no such cause was pending before him, upon which the defendant left court, but afterward the justice, upon discovering the mistake adjourned, the cause to another day, when a judgment was rendered against the defendant by default, this was held to be erroneous, and the judgment was reversed. *Murling v. Grote*, 1 Hilt. 116; S. C., 3 Abb. 109.

So, where a defendant appeared at the proper time and place for the return of a summons which had been served upon him, and the justice informed him that the action was discontinued, whereupon the defendant left court, and the plaintiff soon after appeared, and the justice then proceeded and heard the cause and gave judgment for the plaintiff, in the absence of the defendant, this was held to be error, and the judgment was reversed. *Tyler v. Olney*, 12 Johns. 378.

Where the defendant has appeared and litigated the cause in the court below, the case does not fall within the provisions of section 3064 of the Code, because that merely provides for cases in which the

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defendant failed to appear on the trial before the justice. And it has been held that the rule is the same where there has been an appearance by an attorney who swears to his authority to appear for the defendant, that if the attorney is responsible, and appeared without authority, the defendant will be bound by his acts, and must seek his remedy by action against the attorney; but that if the attorney is irresponsible the court may relieve the defendant from the consequences of the acts of the attorney, and open the cause as though a default had been taken. *Armstrong v. Craig*, 18 Barb. 387; *Allen v. Stone*, 10 id. 547. But since the decision of these cases the Court of Appeals has held that the rules applicable to the unauthorized appearance of an attorney in a court of record has no application to a similar appearance in a justice's court; that the appearance therein is governed by the general laws of agency; that if the appearance is unauthorized, it does not bind the party; and if authorized, the authority must appear. *Sperry v. Reynolds*, 65 N. Y. 179. The doctrine that the right of a defendant to relief from an actual and excusable default in an action before a justice is to depend upon the responsibility, or want of responsibility, of a person who assumed to act therein in his behalf without authority, must be regarded as exploded; and upon proof of the unauthorized appearance, the defendant is entitled to the same relief as in case of an ordinary default.

If the attorney appears for a defendant, and at his request, or by his authority, litigates the cause, there will, of course, be no relief under section 3064. *Edwards v. Drew*, 2 E. D. Smith, 55; *Bunker v. Latson*, 1 id. 410.

Cases sometimes occur in which relief is granted in cases where an attorney had been retained to appear and defend an action, but failed to do so.

There are some cases in which the negligence of the attorney may deprive a defendant of relief from a default. In *Mulhern v. Hyde*, 3 E. D. Smith, 177, the defendant suffered a default and then asked relief upon affidavits showing that he and his counsel were prevented from attending the trial in consequence of engagements elsewhere, but without stating the nature of those engagements. The court refused to open the default, and said: "We can never sanction a practice that a defendant and his counsel may absent themselves from the court on the day of trial, and then offer a mere allegation of other engagements as an excuse for their failure to appear, and as a ground for setting aside the judgment." In *Fowler v. Colyer*, 2 E. D. Smith, 125, 126, the court said: "The default in this case was taken in the court-

room, after eleven o'clock of the day on which the summons was returnable. The defendant's attorney appears to have absented himself from the court until after that hour, when the summons was returnable at ten. We do not think that going to attend to other business is necessarily a *good excuse* for setting aside a judgment. An application should at least be made to the court below for an opportunity to attend to other business, if necessary, before leaving the court."

Where a summons is served by copy, which the defendant puts into his pocket, and he *forgets* the matter until after a judgment has been rendered against him, the courts will not consider his forgetfulness a sufficient excuse, *Ball v. Mander*, 19 How. 468, especially where it appears that the defendant paid more attention to playing cards than to the process of the court, and where it is evident that there is no substantial defense. *Ib.*

Where issue has been joined and the cause adjourned to a day for trial, the mere fact that the defendant *forgot* the day of trial is not a sufficient excuse when not accompanied by any explanatory circumstances accounting for a default. *Beebe v. Roberts*, 3 E. D. Smith, 194. So, where a defendant neglects to attend on the day of trial, until after judgment has been rendered against him, it will not be a sufficient excuse to allege in his affidavits that he was *ignorant of law proceedings*, especially where it appears that he went in search of counsel in due season, and on not finding him did not attend court until after judgment had been rendered. *Mayor, etc., of New York v. Green*, 1 Hilt. 393. His alleged ignorance is no excuse for not obeying the summons, by appearing at the time and place named in the summons. *Ib.* This case, however, was mainly decided upon the ground that no proof was made that manifest injustice had been done.

If the case is one which is tried by a court in which numerous causes are pending and called in their order, as in the Marine Court of New York, it will not be sufficient ground for opening the default where the defendant alleges as an excuse that he was present in court, but did not hear the cause called, if he fails to show that injustice has been done to him. *Foster v. Capewell*, 1 Hilt. 47.

So, if the action is one which is founded upon an assigned demand, it will not be a sufficient excuse for a default to show that the defendant was negotiating with the *assignor* for a settlement of the claim, after notice of assignment, and that he omitted to appear at the trial, upon a promise of such assignor to stop the proceedings in the action. *Travis v. Bassett*, 3 E. D. Smith, 171. But if such negotiation had occurred between the actual plaintiff and the defendant, and the plaintiff-

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iff had promised to stop the proceedings, and the defendant, acting upon such promise, had remained absent on the day of the trial, this would be a sufficient excuse for setting aside any judgment obtained in violation of such promise. *Armstrong v. Craig*, 18 Barb. 387. And whenever a plaintiff is guilty of a fraudulent practice which prevents the defendant from attending the trial, the court will regard this as a good excuse for not appearing, and will set aside the judgment so fraudulently obtained. *Ib.*

The various cases which have been referred to upon the question of sufficiency or insufficiency of excuse have not been cited as establishing any particular rule of law, but rather as showing what practice usually prevails upon such facts and circumstances as appeared in those cases, and as a guide to the defendant or his attorney in drawing the necessary affidavits.

To entitle a defendant to relief against a default in the court below, it is not sufficient to show a good excuse for the failure to appear; it is also indispensable to show that manifest injustice has been done by the rendition of the judgment. Proof, either of a good excuse or of manifest injustice, when taken separately, will not be sufficient, since it fails to meet the statutory requirement that both facts shall be proved before relief is to be granted.

In drawing the affidavits of the defendant, it will not be sufficient to rely upon a mere statement or allegation that injustice has been done. The statute requires that it shall be *shown* that *manifest* injustice has been done. From the language used, it is evident that it was intended that injustice must be shown in a proper manner by legal proof, which, in such a case, may be by affidavits showing the facts and circumstances from which it may be legally inferred that injustice has been done. If the affidavits of the defendant show the nature of the plaintiff's demand, and the nature of the defense which the defendant desires to interpose, and that it is probable that he can establish such defense upon a fair trial, this will be showing enough to authorize the legal inference that injustice had been done. And in every case in which there is a valid or legal defense to an action which has been lost by reason of the default, it is easy to state such facts and circumstances as will satisfy the appellate court that justice requires a new trial, and when this is done, it is showing manifest injustice within the meaning of the statute.

A party may have suffered injustice by being deprived of his defense upon a default taken against him in the court below; and he may also fail to attain a remedy in the appellate court, if he is again so negligent

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or so unfortunate as not to present proper facts and circumstances entitling him to relief. A defendant may have a case in which a mere statement of the facts and circumstances in his affidavits would entitle him to relief; and yet should he fail to present them to the court, but rely upon a mere affidavit of merits in the usual form, he would fail to secure any relief from the default and judgment below. *Fowler v. Colyer*, 2 E. D. Smith, 125; *Armstrong v. Craig*, 18 Barb. 387. It is not sufficient to state mere conclusions from facts, but the facts themselves must be stated in such a manner that the court will be authorized to infer from such facts that injustice has been done. *Ib.*

The defendant must show such facts as satisfy the court that he has a valid defense, either in whole or in part, to the action; and merely showing that an answer was interposed which set up a particular defense, without any proof that the defense is true in fact, will not be sufficient. *Mix v. White*, 1 E. D. Smith, 614.

In *Mayor, etc., of New York v. Green*, 1 Hilt. 394, 395, the court used the following language in reference to a defendant's affidavit: "Nor does it appear from his affidavit that injustice has been done. He states in it that 'he *denies* that he has violated any of the ordinances of the plaintiffs in manner and form as set forth in the complaint.' This is a mere matter of opinion, whether or not he has violated them. If he wished to satisfy the court that injustice had been done by the judgment, he should have shown, by a statement of facts, that the charge made out by the evidence on the trial was not true. On the contrary, he does no such thing. He asks this court to decide that injustice has been done him by the judgment, because he swears that he denies that he has violated the ordinances. He does not even swear that he has not violated them, but he affirms that he denies the violation, when the truth of such denial is not sworn to. If a defendant wishes to obtain a new trial in such a case, he must point out the mode in which injustice has been done, and leave to the court, and not assume himself, the decision of that question."

Where the affidavits show that the plaintiff took judgment by default for the entire amount of his demand without crediting payments which had been made thereon, this will be showing that manifest injustice has been done. *Bissell v. Dean*, 3 E. D. Smith, 173.

There are cases in which an omission to appear and set off a demand will not bar a subsequent action by the defendant for the amount of his claim; and this is the rule in courts of record, in which a party may set off his claim, or maintain a separate action for it. And, in those instances in which a like rule prevails in inferior courts, it has been

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held that it will not be any ground for a new trial to show that the plaintiff took judgment by default without allowing a set-off, for the reason that a defendant may still recover the amount of his demand by action. *Travis v. Bassett*, 3 E. D. Smith, 171. This last case was where an appeal was taken from the Marine Court to the Court of Common Pleas in New York city. But, even though the defendant might maintain an action for the recovery of his demand in such a case, it does not follow that such an action would be as advantageous as the right of set-off on a new trial. The plaintiff might be irresponsible, and the defendant entirely solvent; and, in such a case, if the plaintiff were allowed to enforce his judgment, while the defendant could not collect his claim, even if he had a judgment, the proceeding would hardly escape the charge of manifest injustice, and the court would be disposed to open the default and order a new trial, so that the defendant may have an opportunity of deducting the amount of his claim from the plaintiff's demand.

In actions in justices' courts, an omission to appear and set off a demand incurs, in most cases, a forfeiture of the claim, and no subsequent action can be maintained for its recovery. Vol. 1, p. 28, § 2947. For this reason, a County Court will always open a judgment taken by default in a justice's court, when it appears that the plaintiff has taken a judgment for the full amount of his claim without allowing the amount of a set-off which, in justice, ought to have been allowed to the defendant. In no other way can a County Court prevent manifest injustice, and carry into effect the intention of the Legislature; although this rule is always subject to the qualification that the defendant has shown a satisfactory excuse for his default.

From the cases cited, an idea may be formed of the facts and circumstances which must be shown by affidavit or otherwise to entitle a defendant to a new trial before a justice of the peace. The proceedings upon the argument of the appeal will be noticed hereafter.

Assigning errors in fact. The Code provides that where an appeal is founded upon an error in fact, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter upon affidavits or in its discretion, upon the examination of witnesses, or in both methods. Vol. 1, p. 57, § 3057.

This is no new power, and it was in common use before the enactment of the Code. And to those who are not familiar with legal principles and proceedings, and especially those who are not familiar with the former practice, there is quite a liability to misapprehension as to the meaning of the terms "error of law," or "error in fact."

Assigning errors in fact.

When a return is made by a justice upon an appeal taken for the purpose of reviewing the proceedings below, upon the facts appearing in the return, such return is considered as a record, after it is filed. And if there are any errors which appear from the face of the record itself, those errors are errors of law; and where the return is the only evidence of the erroneous proceeding below, the errors disclosed by the return are always termed errors in law, as distinguished from error in fact in the proceedings. For errors of law a judgment is nearly always reversible.

When a return is made but it does not set out the errors complained of, although there are errors for which the judgment is reversible, but the return does not disclose them because the facts did not occur within the knowledge of the justice, for which reason he is neither required nor allowed to return them, the remedy of the aggrieved party is by assigning error in fact. And error in fact, in such a case, means some error which took place in the proceedings, not within the knowledge of the justice, but still of such a character as to require a reversal of the judgment below, if the errors are properly established. From what has been already said, it is evident that error in fact does not mean a mere erroneous decision by a jury or by the justice, upon a question of fact involved in the trial below, for such a matter is clearly within the knowledge of the justice, and he can return all the facts relating to such trial. And it will be remembered, therefore, that a mere erroneous decision upon a question of fact, upon the issues raised in the court below, never constitutes what is known as error in fact. *Biglow v. Sanders*, 22 Barb. 147, 149; *Hurd v. Beeman*, 8 How. 254; *Adsit v. Wilson*, 7 id. 64, 68, 69; *Lynch v. McBeth*, id. 113, 118. But where the error arises from some incapacity of the parties, such as infancy, coverture or the like, or from some defect or irregularity in the service of the process for the commencement of the action, or for some misconduct of the jury after they have retired for deliberation, or in other similar cases in which proof of such error must be made in some other manner than by the justice's return, such errors are properly termed errors in fact. See *Tanner v. Marsh*, 53 Barb. 438; S. C., 36 How. 140; *Willins v. Wheeler*, 28 Barb. 669; S. C., 17 How. 93; 8 Abb. 116; *Fritze v. Pultz*, 2 N. Y. Civil Pro. Rep. 142, 147. To illustrate these general views, a few of the numerous cases will now be cited.

Where a constable's return is erroneous or false as to the service of process upon the defendant, he may, if he properly objects thereto before joining issue, or if he does not appear at all in the court below,

Assigning errors in fact.

assign, as error in fact, that the process was never served upon him, or was so defectively served as not to confer jurisdiction upon the justice, or that it was so irregular as to be a ground of reversal of the judgment. *Wavel v. Wiles*, 24 N. Y. 635, 637; *Waring v. McKinley*, 62 Barb. 612. Errors of this kind sometimes appear upon the face of the justice's return, as in some of the cases just referred to, but where the error does not thus appear, it may be proved by affidavits, as will be fully explained in a subsequent place.

A defendant may assign, as error in fact, that the justice who tried the action was not a resident of the town in which either of the parties resided, nor a resident of any town adjoining either of them. *Tiffany v. Gilbert*, 4 Barb. 320.

The relationship of the justice to one of the parties is properly assignable as error in fact, although it will be equally available as error in law, if it appears upon the face of the return.

Where the error complained of relates to the manner in which process has been served, or is founded upon the ground that it was served upon the wrong person, or that there was no service of it upon the defendant, he must take the objection before joining issue or he will waive it. But an appearance and a joinder of issue, without objection, will not waive the error that the justice is related to one of the parties.

The appearance of an infant defendant by attorney instead of guardian is error in fact, and infancy may be shown by the affidavits served. *Arnold v. Sandford*, 14 Johns. 417; *Dewitt v. Post*, 11 id. 460. So the appearance of an infant defendant by attorney and not by guardian is error in fact, and if a judgment is rendered against him it will be reversed, though it is otherwise where the judgment is in his favor. *Camp v. Bennett*, 16 Wend. 48. If an entire judgment be rendered against an infant and another, where the former appears by attorney instead of guardian, it will be reversed upon appeal for error in fact, even though the infant should die after the appeal was brought. *Ib.* See *McMurray v. McMurray*, 41 How. 41; S. C., 9 Abb. (N. S.) 315; 60 Barb. 117; affirmed, 66 N. Y. 175.

Where a judgment is rendered against an infant and another person as joint debtors, but no process is served upon the infant, and he does not appear in the action, he cannot assign as error in fact that he did not appear by guardian. *Mason v. Denison*, 11 Wend. 612; S. C., 15 id. 64.

Where an infant plaintiff appears by attorney instead of guardian or next friend, and a judgment is rendered against him for costs, the

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appellate court will revoke or set aside the judgment, but they will refuse to allow any costs to the infant. *Maynard v. Downer*, 13 Wend. 575.

Misconduct on the part of a jury, or of individual jurors, is a proper matter to be assigned as error in fact; and where the jurors agreed that each of them should mark the sum which he found; that the amounts so marked should be added together, and the total amount divided by the number of jurors; and that the quotient should be the amount of the verdict without alteration, this was held to be erroneous, and the judgment was reversed. *Harvey v. Rickett*, 15 Johns. 87; *Roberts v. Failis*, 1 Cow. 238. See *ante*, 738, 739. So, where a jury or any of the individual jurors drink intoxicating liquors in the jury-room while out for deliberation, this is assignable as error in fact. *Rose v. Smith*, 4 Cow. 17.

In relation to the misconduct of jurors, it may be remarked generally, that whenever their conduct is such as to be a ground of setting aside their verdict, then such misconduct is properly assignable as error in fact.

It is to be remembered, however, that the affidavits of jurors will not be received for the purpose of impeaching their verdict, by showing what influenced their minds in finding the verdict. *Brownell v. McEwen*, 5 Denio, 367. Nor are they admissible to show error in respect to the merits of the verdict, nor for the purpose of showing irregularity or misconduct on the part of the juror himself or that of his fellow jurors. *Clum v. Smith*, 5 Hill, 560; *Dana v. Tucker*, 4 Johns. 487. Their affidavits may, however, be received to exculpate the jurors or in support of their verdict. Or to show the misconduct of a party or of the officer having charge of them. *Ib.*; *Thomas v. Chapman*, 45 Barb. 98.

While error in fact may be assigned for the purpose of correcting all such errors as may have occurred in the course of the action, or for matters connected with it and forming a legal ground of error, there is still a limit to this general rule, and one qualification of the rule is, that error in fact is not assignable as to matters which contradict the record of the court below; and where a defendant pleaded infancy in the court below, which issue was tried by a jury and found against him, it was held that the decision below was conclusive, and that infancy could not be assigned as error in fact on an appeal. *Ingersoll v. Wilson*, 3 Johns. 437.

Having considered the matters which may be assigned as errors in fact, the next step is to consider the manner of presenting these errors

Offer of judgment.

to the appellate court. As has been stated, the appellate court may determine these matters upon affidavits, or upon the examination of witnesses, or in both methods.

Under the old Code the appellant was required to state in his notice of appeal the grounds upon which the appeal was founded. By this statement the respondent was apprised of the particular error in fact relied upon by the appellant for the reversal of the judgment, even if no affidavits were served upon him prior to the hearing. But it was also the practice to serve upon the respondent, at least eight days before the hearing, copies of the affidavits upon which the appellant relied to establish the error in fact stated in the notice of appeal. *Hurd v. Beman*, 8 How. 254; *Cook v. Swift*, 18 id. 454; S. C., 10 Abb. 212; *Sperry v. Reynolds*, 5 Lans. 407, 411; *Lynch v. McBeth*, 7 How. 113. The respondent was thus prepared to meet the case made, either by counter affidavits, or by oral testimony. The present Code does not require that the grounds of error shall be stated in the notice of appeal, and it is, therefore, the more important that the respondent should be served with copies of the affidavits which the appellant intends to read upon the hearing. Otherwise the investigation would be *ex parte*, would operate as a surprise, and might work serious detriment to a respondent, who until the argument of the appeal might be entirely unaware of the alleged error of fact.

The general form of the affidavit is the same as that used on an application for relief from a default. See *ante*, 973. There will, of course, be this difference, viz.: the affidavits used for the purpose of assigning error in fact will state the particular error assigned, and will also state the particular facts and circumstances relating thereto.

The affidavits ought to be copied, and copies thereof served upon the opposite party in the same manner as in cases of asking relief from a default. *Ante*, 974. And in relation to the time of making such service, it is eminently proper that the appellant should serve these affidavits at least eight days before the sitting of the court at which the hearing is to take place. *Hurd v. Beeman*, 8 How. 254; *Cook v. Swift*, 18 id. 454, 457; S. C., 10 Abb. 212; *Adsit v. Wilson*, 7 id. 64, 70.

The notice of hearing, in this case, is similar to that in an application for a new trial, after a default has been taken; and the form of notice, and the time and manner of service may be the same. See *ante*, 974. If any modification of the notice becomes necessary, that may readily be done by the practitioner.

Offer of judgment. The right of a respondent to make an offer to

Offer of judgment.

allow judgment to be rendered in the appellate court, in favor of either party, for a specified sum, has been sufficiently noticed. *Ante*, 938. This offer must be made before the return is filed. In addition to the offer thus provided for by the Code, either party to an appeal for a new trial in the appellate court may at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party a written offer to allow judgment to be taken against him, for a sum or property, or to the effect therein specified, with or without costs. If there are two or more defendants and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken, and if it is accepted, the action becomes severed and may proceed against the other defendants as if it had been originally commenced against them only. Vol. 1, p. 61, § 3072.

It will be seen, from an examination of the section cited, that the offer cannot be made until after the action is deemed at issue in the appellate court, or in other words, until after the expiration of ten days from the time of filing the justice's return. This allows full time for the acceptance or rejection of any offer made by the respondent under section 3070 of the Code, before any other offer is made by either party. The offer may be made at any time after the action is deemed at issue in the appellate court and before trial, but, unless it is served at least ten days before the trial, it will be unavailing to free the party serving it from future costs in case the offer is not accepted, as the party receiving the offer has ten days in which to determine whether he will accept it, and his liability for costs, subsequent to the offer, depends upon his non-acceptance of the offer within the time allowed therefor. Section 385 of the old Code contained a provision substantially the same as that contained in section 3072 of the Code of Civil Procedure. Under that section it was held that the adverse party had, in all cases, ten days in which to elect whether he would accept the offer made to him, or proceed to trial; and that if the offer was served so late that the cause was reached and tried before the expiration of the ten days, the rights of the parties were in all respects the same as if no offer had been made. *Pomeroy v. Hulin*, 7 How. 161; *Walker v. Johnson*, 8 id. 240; *Herman v. Lyons*, 10 Hun, 111; S. C., 2 Abb. N. C. 90; *Hawley v. Davis*, 5 Hun, 642.

The offer may be in the following form :

Offer of judgment.

Offer of judgment.

FULTON COUNTY COURT.

John Doe, respondent,
agst.

Richard Roe, appellant.

Richard Roe, the defendant in the above-entitled action, offers to allow judgment to be taken against him by the plaintiff, John Doe, for the sum of \$150, with costs.

Dated JOHNSTOWN, August 15, 1862.

RICHARD ROE.

To JOHN DOE.

In case the offer is made by one of several defendants the form of the offer may be varied accordingly.

Instead of making the offer in person, it may be made by the defendant's attorney, and may be made to the plaintiff's attorney instead of the plaintiff. The service of this order is made by the delivery of a copy of it to the plaintiff or his attorney, which may be done by the defendant in person or by his attorney. If the offer be made by the plaintiff, the same general principles of practice prevail, except that the necessary changes in the phraseology will be made.

The party upon whom such offer is served has ten days in which to elect whether to accept or refuse it. If he concludes to refuse it, he need not give any notice thereof, because his omission to give notice of acceptance will be a sufficient notice of refusal. But in case the offer is accepted, a written notice of acceptance must be served within ten days after the offer, upon the party making it. This notice of acceptance may be as follows:

Notice of acceptance.

(*Title as in last form.*)

Take notice, that the plaintiff accepts the offer of the defendant, by which he offers to allow the plaintiff to take judgment in this action against him for the sum of \$150, with costs.

Dated JOHNSTOWN, August 15, 1865.

JOHN DOE.

To RICHARD ROE, Esq.

This acceptance may be made by attorney, as well as in the case of the offer of judgment.

This offer of acceptance must be in writing, and must be served within ten days after the service of the offer of judgment. Vol. 1, p. 62, § 3072. Upon serving notice of the acceptance of the offer of judgment, the plaintiff may file the offer, together with proof of accept-

Subpœnaing witnesses, etc.

ance, and thereupon the clerk is required to enter a judgment in pursuance of the offer.

Form of affidavit.

(*Title as in offer, ante*, 988.)

FULTON COUNTY, ss. :

John Doe, of the town of Johnstown, in the county of Fulton, being duly sworn, says, that he is the plaintiff in the above-entitled action; that the annexed offer to allow judgment was made by the defendant therein, and was served on this deponent on the 15th day of August, 1865, at the village of Johnstown aforesaid; that within ten days after such offer was served, to-wit, on the 15th day of August, 1865, he served upon the defendant, at Johnstown, aforesaid, a written notice, that the plaintiff accepted the same, and that the foregoing (*or the annexed*) is a copy thereof.

Subscribed and sworn before me, {
this 15th day of August, 1865, }

JOHN DOE.

PETER W. PLANTZ, *Justice*.

If the offer is not accepted, it cannot be proved upon the trial; and if the party to whom it was made fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer but must pay costs from that time. Vol. 1, p. 60, § 3072.

The form of the judgment to be entered upon acceptance of the offer, and the costs recoverable in case of acceptance or rejection of the offer will be noticed elsewhere.

Subpœnaing witnesses, etc. When it is once finally settled that a new trial is to be had in the County Court, it is the duty of each party to prepare for trial.

If documentary evidence will be necessary on the trial it is important that the party should be prepared with it. So, too, where witnesses are material, they must be properly subpœnaed in due season.

The subpœna may be in the following form:

Form of subpœna.

The People of the State of New York to (name the witnesses required), greeting :

We command you that, all and singular, business and excuses being laid aside, you and each of you appear and attend before our county judge of the county of Fulton, at a County Court to be held in and for the county of Fulton, at the court-house in the village of Johnstown, on the day of , 1882, at o'clock in the noon, to testify and give evidence in a certain action, now pending in said court, then and there to be tried between John Doe, plaintiff, and Richard Roe, defendant, on the part of the plaintiff (*or of the defendant*), and for a failure to attend, you will be deemed guilty of a

Argument of the appeal.

contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit \$50 in addition thereto.

Witness, JOHN STEWART, Esq., county judge of Fulton county, at the court-house in the village of Johnstown, the day of , 1882.

By the court.

MORTIMER WADE, *Clerk*.

A. MCFARLAN, *Plaintiff's Attorney*.

The attorney should also make a subpoena ticket for each witness to be subpoenaed.

The subpoena ticket may be in the following form :

Subpoena ticket.

To Mr. JOHN SMITH :

By virtue of a writ of subpoena to you directed, and herewith shown to you, you are commanded personally to be and appear before the County Court of the county of Fulton on the day of , 1882, at ten o'clock in the forenoon, at a term of said court to be held at the court-house in the village of Johnstown, in and for the county of Fulton, to testify to what you may know in a certain action now pending undetermined in the said court, between John Doe, plaintiff, and Richard Roe, defendant, then and there to be tried, on the part of the plaintiff (*or defendant*) and this you are not to omit under the penalty of \$50.

Dated the day of , in the year of our Lord 1882.

By the court.

A. M., *Plaintiff's (or Defendant's) Attorney*.

Subpoenas may also be necessary to compel the attendance of witnesses on the trial of an appeal founded upon an error in fact. If the appellant has served affidavits setting up an error in fact, the respondent should prepare counter affidavits; and if the persons who are conversant with the facts refuse to make these affidavits, they should be duly subpoenaed.

So if a defendant, who failed to appear before the justice upon the return day of the summons, or upon an adjourned day, has served affidavits tending to excuse his default, and to show that manifest injustice has been done to him, the plaintiff should prepare counter affidavits to be read upon the hearing.

Copies of these counter affidavits need not be served upon the appellant.

§ 8. **Argument of the appeal.** When the appellant is not entitled to, or has not demanded a new trial in the appellate court, the appeal must be heard upon the original papers, or a certified copy thereof. No copies of these papers need be furnished for the use of the court. Vol. 1, p. 59, § 3063.

Under the rule prescribed by this statute, the court will refuse to hear or decide an appeal unless the original return, or a duly certified copy, is produced at the argument. *Smith v. Van Brunt*, 2 E. D. Smith, 534. If the original return is lost or destroyed the proper course is to procure a new return. *Ib.*

Where a cause is transferred to the Supreme Court by reason of the incapacity of the county judge to hear it, the case will still be heard upon the original return, and no copy need be furnished for the court. *Wiles v. Peck*, 16 How. 541.

If a fair copy of the return should be furnished to the court there is no doubt that the court may use that instead of the original return; and in many cases such a copy would be highly convenient to the judge, since it would save him the labor of reading some manuscripts which are well calculated to try his skill and his patience.

Every careful practitioner will desire a copy of the return, since it will greatly facilitate a full and careful examination of the facts of the case while preparing and arranging his brief for the argument; and nothing conduces more to the success of a good cause than a careful study, and a brief but pertinent presentation of its facts during the argument.

There are few causes in which there is any difficulty in determining what legal questions are involved; but there are innumerable cases in which there is an earnest dispute in relation to the facts involved in them, and he who best understands the facts of his case will be able to render most service to the court, and to his own side of the cause.

Practice on the argument. To attempt a full and minute examination of all matters of practice connected with the argument of an appeal, or relating to it, would open a very wide field for investigation, and for that reason it will not be possible to pursue the subject so minutely as would be desirable to some persons, but notwithstanding this, so much space will be devoted to the subject as the limits of this work will permit.

In bringing on an appeal for argument there are several matters to be taken into consideration; and there are several modifications of the practice, according to the circumstances of the particular case. There are several different classes of cases in which relief is sought, each of which is governed by a practice somewhat peculiar to itself. These classes may be conveniently examined in the following order: 1. Those cases in which the relief sought is a reversal or modification of the judgment appealed from, either because it is against evidence or is contrary to law, which errors are claimed to be apparent on the face of the

Practice on the argument.

return ; 2. Those cases in which relief is asked from an excusable default which occurred in the court below ; 3. Those cases in which extrinsic matters are alleged as error in fact. These several classes will be noticed in the order of the arrangement here adopted.

And first, then, of the argument of a cause upon the return. After it has been properly noticed and placed upon the calendar, it will be called in its order, and if ready for argument, will be argued. Upon the argument of an appeal cause, the appellant has the right to open and close the argument. In opening the case the appellant either reads or states such portions of the return as are material to a proper understanding of the points involved in the discussion. And after presenting the facts which show how the points of law are properly raised in the case, the appellant proceeds to argue these questions, and to cite these authorities which are deemed important or conclusive upon their determination.

After the appellant has closed his argument, the respondent is then entitled to be heard in relation to either the facts stated, or the legal propositions advanced by the appellant ; and he also cites such authorities as are deemed applicable for the purpose of overturning the propositions of the appellant, or of otherwise answering their effect as authorities. When the respondent has closed his argument, the appellant has a right to be heard in reply to the positions taken by the respondent, and this usually closes the discussion. •

It would save much time if County Courts would enforce the rule requiring each party, at the opening of the argument, to furnish the court and the other party with a statement of the points made, and of the authorities intended to be cited. If this were generally done, the court and the respective parties would know precisely what matters and points were deemed important in the discussion, and much time and labor be saved by narrowing the course of the argument to these points. •

There may be cases in which it is not possible to anticipate all the questions which may be made on the argument, but it ought to be done as nearly as practicable ; and whenever any material point has been accidentally omitted, the parties ought to be permitted to discuss them. When the points are numerous, and the facts complicated, an oral argument is of the greatest importance, for, if properly presented, in as brief a manner as possible, it will save the court much labor, and will prevent any liability to mistakes which might occur if the cause were merely submitted upon written points. But, in many cases, a careful statement of the points made, with a full reference to the authorities

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relied on, will be the best mode of argument, for in such a case, the court will fully and carefully examine each material point, which will be certain not to escape his attention if the brief is clear, full and accurate as to facts and authorities. But all such matters are governed so much by personal preferences, that every one will consult his own choice in the manner of presenting his views of the case.

The courts favor the submission of proper points, and in the case of *Agreda v. Faulberg*, 3 E. D. Smith, 179, 180, the court said: "The appeal in this action raises several questions which are of considerable importance, and I regret that the respondents have submitted no points in support of the judgment. A party has no right to expect the court to be laborious in their investigation, or ingenious in their endeavor to support a judgment when his own counsel is either unwilling or unable to aid them by any suggestions or examination of authorities on his behalf. The court desire not to reverse, where the judgment might properly be sustained; but where, as in the present case, the proceedings in the court below depend, to some extent, upon various statutory enactments running through a period of forty years, the court are entitled to the aid of the respondent's counsel in pointing out the statutes upon which the regularity of the proceedings depend.

A point which is waived and not argued by counsel at the hearing of the appeal ought to be examined by the court on its own motion if it deems the point a material ground for granting a new trial. *Artisans' Bank v. Backus*, 31 How. 242.

An appeal which is heard upon the justice's return brings up with it every question which can be made as to the regularity or validity of the judgment rendered in the court below. And where error in fact is assigned, which is established by affidavits outside of the return, this subject forms a part of the proceedings, and it must be heard at the same time with the argument of the questions appearing upon the face of the return. And if the County Court refuses to hear and determine the matters so assigned as error in fact, but merely decides upon the questions raised upon the face of the return, this will be error. *Cook v. Swift*, 18 How. 454; S. C., 10 Abb. 212. This rule is the same where an application is made for relief from a default by ordering a new trial, upon sufficient proof that injustice has been done, and that the default was excusable. *Ib.*

Opening default. The mode of excusing a default in the court below and showing that manifest injustice has been done has already been pointed out, and the sufficiency of the affidavits introduced for that purpose has to some extent been considered. The appellant, having

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the burden of showing a sufficient excuse and the injustice done, must first read to the court or state the substance of the affidavits upon which he relies to establish such excuse and injustice. Upon the conclusion of this argument the respondent usually reads answering affidavits and attacks the sufficiency or truthfulness of the affidavits introduced by the plaintiff. After the respondent has concluded his argument the appellant may be heard in reply.

It is sometimes a matter of difficulty to determine whether manifest injustice has been done, and this doubt arises from a conflict in the statements contained in the affidavits of the respective parties.

It has been suggested that it may be questionable whether it was the intention of the statute to permit the plaintiff to introduce affidavits in contradiction of those upon which the defendant asks for a new trial. *Camp v. Stewart*, 2 E. D. Smith, 88, 89; *Lent v. Jones*, 4 id. 52, 53. But notwithstanding these casual remarks, the settled practice of the court is to receive such affidavits, and to act upon them as a part of the proof in the case. *Forster v. Capewell*, 1 Hilt. 47; *Gottsberger v. Harned*, 2 E. D. Smith, 128; *Silkman v. Boiger*, 4 id. 236; *Armstrong v. Craig*, 18 Barb. 387. Besides these cases which received such affidavits, the general analogies of the law favor the reception of such affidavits. If the application is regarded as a motion, then it is clear that the motion may be met by counter affidavits; if it is regarded as a trial, then every party ought to be allowed equal facilities for presenting his views as to his rights; and if the application is regarded as a mere application to the discretionary power of the court to afford relief, it is of the highest importance that both parties should be heard before such discretion is exercised. The court will, therefore, always receive the affidavits of the respondent, and will consider them in disposing of the question as to ordering a new trial. But where it is evident that there is a meritorious defense, which has been shut out by the default, or where it is probable that there is a valid defense, the appellate court will not weigh probabilities very nicely upon conflicting affidavits, but will order a new trial in the court below, upon which the questions may be appropriately settled upon all the evidence given. *Camp v. Stewart*, 2 E. D. Smith, 88; *Carroll v. Goslin*, id. 376, 378. If, however, the evidence is so evenly balanced, that there is no preponderance in favor of the defendant, the court may refuse to order a new trial. *Forster v. Capewell*, 1 Hilt. 47. The manner of weighing the evidence on these applications for a new trial has been sufficiently explained upon

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general principles. There are, however, a few cases which require notice before leaving this subject.

Where the evidence is returned, and it appears that the plaintiff proved his case fully by one competent witness, it has been held that the defendant must do more than to offer his own affidavit in contradiction of the witness sworn. *Armstrong v. Craig*, 18 Barb. 387; *Jewell v. Heinzel*, 6 Daly, 411; *Lent v. Jones*, 4 E. D. Smith, 52, 54. The court said in the last case cited: "To order a new trial upon the proofs before us, and no other proof is shown by the plaintiff to be within his power, would be of no avail to him. If he cannot produce the affidavit of any witness, he should at least show that there are witnesses who refuse to give their affidavits, and who have knowledge of facts to which they can be compelled to testify, and which, if proved, would reduce or disprove the plaintiff's claim." The case of *Silkman v. Boiger*, 4 E. D. Smith, 236, is to the same effect; and it also holds that when, in addition to such a case, the respondent's affidavits show that entire justice has been done, the defendant's single affidavit must be regarded as overborne by the proofs in the case, and a new trial will be refused. So, where the affidavit of the defendant is met and fully denied by that of the plaintiff, it has been held that the defendant must fail in his application for want of a balance of proof. *Forster v. Capewell*, 1 Hilt. 47. The court said: "We cannot say, where the defendant states a fact, and the plaintiff denies it, which of the statements is correct; and the only way to establish it is by the affidavit of the witness by whom the defendants expect to prove their defense." To the same effect is *Van Wyck v. Kelly*, cited in note b, 2 E. D. Smith, 128. Where the defendant's affidavit is met by that of the plaintiff, and also that of another witness, the balance of proof will be against the defendant, and his application must fail. *Gottsberger v. Harned*, 2 E. D. Smith, 128; *Gardner v. Wight*, 3 id. 334.

The cases which have been cited show a tendency to follow the rule usually adopted of being governed by the balance of proof. But it is not always numbers that control. There may be such a statement of facts in the affidavits of the defendant as will leave no doubt that injustice has been done, even when the plaintiff produces a larger number of affidavits or of witnesses than the defendant. But it does not follow, as of course, that the cause is to be decided merely upon a count of the number of affidavits furnished by the respective parties. The true question is, whether the court is satisfied that injustice has been done, or whether the case is not so doubtful as to require a new trial so that justice may prevail. See *ante*, 994.

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And in pursuance of this principle it has been held that the unsupported evidence of the defendant would be sufficient to authorize a new trial when it appeared that the judgment below was obtained upon the evidence of the plaintiff's assignor of the demand sued on. *Seymour v. Elmer*, 4 E. D. Smith, 199, 201.

The statute confers upon the appellate court the power to impose such terms as it may deem proper upon opening a default. Vol. 1, p. 59, § 3064. Such a power will be freely exercised whenever that may become necessary. Inasmuch as the defendant generally asks relief upon the ground that he failed to appear in the court below in consequence of some excusable mistake or neglect, the court will sometimes impose terms upon him by way of paying costs, since he ought to bear the consequences of his neglect rather than the diligent party.

The statute does not declare what terms may be imposed, and, therefore, it is entirely for the County Court to declare what they shall be. This power, however, is not to be harshly or arbitrarily exercised but is to be enforced in such a manner as to secure the just rights and interests of both litigant parties. Upon this question, as upon others of a discretionary character, authorities are not of much value except as illustrations of the practice of the courts under this section. In *Camp v. Stewart*, 2 E. D. Smith, 89, the court ordered a new trial upon the terms that the defendant should pay to the plaintiff \$12 costs of the appeal, within five days. In *Seymour v. Elmer*, 4 E. D. Smith, 199, 201, the County Court ordered a new trial upon the payment by the defendant of the costs of the respondent upon the appeal, and also of waiving any claim for restitution, for the costs paid on appealing. In *Bissell v. Dean*, 3 E. D. Smith, 172, 174, a new trial was ordered upon the payment by the defendant of such sum as his affidavits conceded to be due, and upon the payment by him also of the costs incurred in the court below.

Where a default is opened, and a new trial ordered upon specified conditions, the defendant must comply with those conditions or he will lose the benefit of the order. *Mitchell v. Menkle*, 1 Hilt. 142. And on proper proof that such conditions have not been complied with, the County Court will vacate the order granting a new trial; although any order vacating it would probably be unnecessary, since a failure to comply with the terms of the original order would prevent it from becoming operative so as to vacate the judgment below. *Ib.*

The County Court may order the new trial to take place before the justice who originally rendered judgment, or it may be sent to any

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other justice in the same county for trial. Vol. 1, p. 59, § 3064. In determining this question the County Court will consider the convenience of both parties, and also the impartiality of the justice, and will order the trial before such justice as may result in a full and fair trial between the parties. The statute provides that on an appearance before the justice for the purposes of such new trial, the same proceedings shall be had as upon the return of a summons personally served. Vol. 1, p. 60, § 3065. The effect of this statute is to set aside every thing, even including the former pleadings; and a new issue must be joined, precisely as though no trial or judgment had ever occurred. *Camp v. Stewart*, 2 E. D. Smith, 88, 90, at the end of opinion of court. See *Dean v. Cannon*, 1 Daly, 34.

When a default is opened by order of the County Court, and a new trial is ordered on a particular day, the cause must be tried upon that day or it must be legally adjourned to a subsequent day; and if the cause is not tried on the day assigned, nor the cause regularly adjourned, but a judgment is rendered on a subsequent day, in the absence of the defendant, it will be reversed on the ground that the justice has no jurisdiction to render a judgment upon such subsequent day. *McCollum v. McClave*, 1 Hilt. 140. And in such a case, if the trial is proceeded with on the proper day, the justice must hear the proofs and allegations of the plaintiff; he has no authority to make an order that the previous judgment shall stand as his judgment in the action. *Ib.* A judgment once vacated is always vacated, and the defendant stands in reference thereto as if no action had been prosecuted against him. *Ib.*

Where a new trial is ordered upon the terms that the former judgment shall stand as security, and a new trial takes place which results in a second verdict and judgment for the plaintiff, but which is reversed upon an appeal for errors occurring on such new trial, the first judgment will fall upon the reversal of the second one, since such first judgment was a mere security for the second. *Pierce v. Thomas*, 4 E. D. Smith, 354, 356.

The order granting a new trial must specify the name of the justice before whom it is to take place, the day and hour and place for the appearance of the parties, and the terms upon which the order is granted.

The party obtaining the order should see that it is properly filed and entered by the clerk of the appellate court. The Code does not require that a copy of this order should be served upon the justice, or upon the plaintiff, but on the contrary provides that where a new trial is directed

Opening default.

before a justice, the parties must appear before him at the time and place specified in the order of the appellate court, without service of any notice, or of a copy of the order. Vol. 1, p. 60, § 3065. It will be noticed that the statute applies merely to the appearance of the parties before the justice without service of notice or of a copy of the order. Should the parties appear and join issue the justice would need no evidence of any proceedings in the appellate court to authorize him to proceed with the trial. But should either of the parties make default, the justice might properly demand some proof of the order made by the appellate court before proceeding to render judgment for either party. See *Manning v. Johnson*, 7 Barb. 460. This proof may be made by the service of a certified copy of the order upon the justice.

Order for a new trial.

At a term of the County Court of Fulton county, held at the court house, in the village of Johnstown, on the day of , 1865 :
Present — Hon. JOHN STEWART, *County Judge, etc.*
FULTON COUNTY COURT.

John Doe, respondent

agst.

Richard Roe, appellant.

The above-named Richard Roe having appealed to this court, from a judgment rendered against him on the day of , 1865, for the sum of damages and costs, by Richardson P. Clark, Esq., a justice of the peace of Johnstown, in Fulton county; and after a hearing of this cause upon the return made and filed by the said justice, and upon the affidavits made by the respective parties and read on the hearing, and filed with the clerk of this court, and after hearing Horace E. Smith in support of the said appeal, and upon hearing Archibald McFarlan, Esq., in opposition thereto; and it appearing to the court that the defendant's default is satisfactorily excused, and that manifest injustice has been done to the appellant and defendant, it is now, on motion of Horace E. Smith, Esq.,

*Ordered,** That the judgment so rendered by the said Richardson P. Clark, Esq., be set aside (*or that proceedings thereunder be stayed*), and that a new trial be had before the said Richardson P. Clark, on the 25th day of August, 1865, at ten o'clock in the forenoon, at the office of the said justice, or on such other day as the said cause may be legally adjourned to. (*If the order is granted upon terms or conditions a clause like the following may be added, though it will conform to the order actually made by the court:*) with dollars costs to the appellant (*or respondent*) that such new trial be granted upon the terms and conditions that the said Richard Roe pay to the said John Doe, the plaintiff, the sum of \$10, on or before the hour appointed for such new trial; or that he leave such sum with said justice at that time for the plaintiff.

It is entirely discretionary with the court whether to impose terms or not. If justice demands it, costs may be imposed upon the defendant as the condition of relief. And there may be cases in which the court may impose the costs of the reversal or of a motion upon the plaintiff where his conduct has been fraudulent in procuring the judgment, or where he fraudulently misleads the defendant and induces him to be absent from trial, or in any other similar manner prevents him from making a defense.

Error in fact. The statute provides that the County Court, or other corresponding appellate court, may reverse the judgment of the justice's court, or other inferior court, for errors of law or of fact. Vol. 1, p. 59, § 3063.

On a preceding page an attempt has been made to point out what constitutes an error in fact, and the step preliminary to the actual presentation of the error to the appellate court for redress. See *ante*, 983.

The practice upon the hearing of an appeal, when error in fact is assigned, is the same as that already pointed out in cases of default. *Ante*, 993. And the court must hear all matters claimed as errors, whether appearing in the return, or in the affidavits, or by the oral evidence of witnesses. *Ante*, 993.

There is one material difference between a case in which an appellant seeks relief from a judgment taken against him by default, and one in which he assigns error in fact as ground of reversal. In the former case, the granting of relief is discretionary with the County Court, upon a hearing of all the facts. *Ante*, 972, 975. But where error in fact is assigned, and the truth of the facts assigned is established, the County Court is bound to reverse the judgment below, if the matters assigned as error are such as in law require a reversal of the judgment. And if the County Court refuses to render a proper judgment, the error may be corrected by an appeal to the Supreme Court.

And so, too, when error in fact is assigned, the proper judgment is a mere reversal or affirmance of the judgment below, with the costs of the appeal to the successful party.

The decision is not a mere order, but a final judgment. The form of such a judgment will be given in a subsequent place.

Cross appeals. When both parties appeal from a judgment of a justice's court, both appeals should be heard together and judgment and costs given for the appellant showing himself right upon his appeal. It will be error to hear the appeals separately and to enter separate judgments thereon. *Jones v. Owen*, 5 Hun, 339; *Glassner v. Wheaton*, 2 E. D. Smith, 352.

New trial in the appellate court. — General view of the practice upon a new trial.

§ 9. **New trial in the appellate court.** The Code provides that where an issue of fact or an issue of law was joined before the justice, and the sum for which judgment was demanded by either party in his pleading exceeds \$50; or where, in an action to recover a chattel, the value of the property as fixed, together with the damages received, if any, exceeds \$50, the appellant may, in his notice of appeal, demand a new trial in the appellate court, and thereupon he is entitled thereto whether the defendant was or was not present at the trial. Vol. 1, p. 60, § 3068.

The right to a new trial in the County Court, in all actions except in actions of replevin, depends upon the amount claimed in the pleadings. *Hayes v. Kedzie*, 11 Hun, 577; *Ovenshire v. Ade*, 27 How. 368; *Hobbs v. Weatherwax*, 38 id. 385; *Thompson v. Pine*, 5 Hun, 647; *Merrill v. Pattison*, 44 How. 289. If the sum for which judgment is demanded, by either party in his pleadings, exceeds \$50, he is entitled to a new trial in the appellate court without reference to the form of the action or the amount of the recovery. *Ib.* But in an action of replevin, the appellant will also be entitled to a new trial, although the sum for which judgment was demanded in the pleading did not exceed \$50, provided the damages actually recovered, added to the assessed value of the property, exceed that sum. *Merrill v. Pattison*, 44 How. 289.

Under the section of the Code above cited, a defendant may, by setting up a fictitious claim for more than \$50 in his answer before the justice, demand and obtain a new trial in the County Court, and that court has no right to strike out the answer, or any part of it. *Thompson v. Pine*, 5 Hun, 647; *Fuller v. Brierly*, 36 How. 47. But see *Houghton v. Kenyon*, 38 id. 107; *Denniston v. Tremmer*, 27 Hun, 393; *Johnson v. Dow*, 11 Alb. L. J. 128. The County Court has jurisdiction to re-try a cause on appeal from justice's court, although it appears on the trial in that court that the sum total of the accounts of both parties, proved upon the trial, exceeds \$400. *Crannell v. Comstock*, 12 Hun, 293.

The right to a re-trial in the appellate court is not confined to issues of fact. A re-trial of an issue of law may be had if the sum for which judgment is demanded by either party in his pleadings exceeds \$50. Vol. 1, p. 60, § 3068.

General view of the practice upon a new trial. The distinctive features of this form of appeal have been noticed in the preceding sections. The first proceeding in the cause, the notice of appeal, differs from the notice required in other cases, in this, that it must demand a

Proceedings when a new trial is demanded in an improper case.

new trial in the appellate court. *Ante*, 925. In other cases the giving of security upon appeal is not indispensable; upon an appeal for a new trial security is required whether the appellant desires a stay of execution or otherwise. *Ante*, 929. The return of the justice upon an appeal for a new trial differs from the return required in other cases. *Ante*, 944. Upon the filing of the return a period of ten days must elapse before the cause is deemed at issue in the appellate court. *Ante*, 970.

Upon an appeal of this kind, also, the statute provides a means of compromise by which a judgment may be rendered in the cause without an actual appearance before the appellate court. *Ante*, 938. No proceeding of this nature is authorized upon any other form of appeal from the judgment of a justice of the peace. So, where an appeal is taken for a new trial, the notice of trial must be served at least fourteen days before the term, *ante*, 970, while other appeals may be brought on for argument upon a notice of eight days. *Ante*, 969. So, while the court sits as an appellate tribunal, whatever may be the form of the appeal, in the one case the proceedings are such as rightfully belong to a court sitting in review of the errors of an inferior court, while in the other case the proceedings are those of a court exercising original jurisdiction. The proceedings heretofore described, by which the action is removed from the justice's court to the appellate court, take the place of the ordinary proceedings for the commencement and joinder of issue in an action; and after the action is deemed at issue in the appellate court, all the proceedings therein, including the entry, enforcement and review of the judgment, are the same, with few exceptions, as if the action had been commenced in the appellate court. See vol. 1, p. 61, § 3071. It will be readily understood, that in a work of this character, it is impossible to give even an outline of the practice upon trials in courts of record. Many of the principles relating to practice, pleadings and evidence on trials in justices' courts are equally applicable to all courts. The rules of evidence given in this work are as applicable to the County Court as to the justice's court, and will be found as useful in the one court as in the other.

Proceedings when a new trial is demanded in an improper case.

The cases in which a party has a right to a new trial on appeal have been noticed. It frequently happens that a notice of appeal is served demanding a new trial in the appellate court in a case not authorized by the Code, or if technically authorized, in a case not within the intent of that act. What remedy the respondent has in either case has been the subject of much discussion.

Review of the proceedings in the court below.

Under the corresponding provisions of the former Code it was held that although under section 352 of that act, making the right to a new trial depend upon the amount of the parties, the defendant might take an undue advantage by setting up a claim fictitious in amount, yet the County Court had no right to strike out the answer, or a part of the answer, when the action has been tried in a justice's court. *Thompson v. Pine*, 5 Hun, 647; *Fuller v. Brierley*, 36 How. 47. It has also been held under the same statute that it was not the intention of the law to allow either party the right to a new trial in the appellate court unless judgment for a sum exceeding \$50 is demanded in good faith and in a proper case, and that if a defendant in an action for a conversion should set up a counter-claim and demand judgment for more than \$50 for the purpose of obtaining a new trial in the County Court, the counter-claim might be stricken out on motion by the County Court and the appeal ordered to be heard by argument upon the justice's return. *Houghton v. Kenyon*, 38 How. 107; *Deniston v. Trimmer*, 27 Hun, 393. Under the present Code it has been held that when a party has regularly taken an appeal to the County Court, he is entitled to have either a new trial in that court, or a hearing and consideration by that court of the questions of law presented by the appeal. If the case is one in which the appellant is not entitled to a new trial in the appellate court as prescribed in section 3068, the appeal may be brought to a hearing, and the appeal must then be heard upon the original papers, and the appellate court must render judgment according to the justice of the case. *Matteson v. Hall*, 64 How. 515. As the justice does not return the evidence when a new trial is demanded in the appellate court, it is not apparent how the latter court is to render judgment according to the justice of the case without continuing the cause until the appellant can obtain a return of the evidence under a special order made for that purpose. See vol. 1, p. 57, § 3053. It would seem from the cases that an appellant who has demanded a new trial in the County Court in an improper case has all the rights upon the appeal which he would have had under a notice which did not contain such demand.

Review of proceedings in the court below. It was held under the old Code that the County Court must, on an appeal for a new trial, if so required, pass upon all questions raised in the court below in relation to the regularity of process, its service and return, in relation to the jurisdiction of the justice; whether the proper parties have been brought in; and other questions of that character. *Mawon v. Reed*, 8 Hun, 618. It was also held that a party taking such an appeal could raise in

Power of the court to order, etc. — Amendment of the pleadings — Motion for, etc.

the appellate court all questions which were properly raised in the court below, except such as were raised in respect to proceedings taken on the *trial* of the action, as fully as if the appeal were taken upon questions of law only. *Stevens v. Benton*, 39 How. 13 ; S. C., 2 Lans. 156. These decisions are applicable to appeals taken under the present Code.

Power of the court to order a reference. The County Court has jurisdiction, upon the written consent of the parties, to order a reference of a case brought before it by appeal from a justice's court where there is an issue of fact joined between the parties. *Hyland v. Loomis*, 48 Barb. 126. So where the action is brought upon a contract, and the pleadings show that the trial will require the examination of a long account, the court may, upon the motion of either party, and against the objection of the other, order the cause referred to a referee to hear and determine. *Coy v. Rowland*, 40 How. 385.

Amendment of the pleadings. The Code provides that the court *must*, upon application, allow a pleading to be amended, at any time before the trial, or during the trial, *or upon appeal*, if substantial justice will be promoted thereby. Vol. 1, p. 27, § 2944. Under a provision of the old Code (subd. 5, § 366) conferring authority upon the County Court to allow either party upon appeal for a new trial to amend his pleadings upon such terms as shall be just, it was held that the court could not allow an answer interposed in the justice's court which merely set up a general denial to be amended upon the appeal by inserting therein new and affirmative defenses, such as payment, set-off or counter-claim. *Reno v. Millsbaugh*, 14 Hun, 229. It was also held improper to allow the plaintiff to amend his complaint in such a manner as to change the character of the action from contract to tort. *Burch v. Spencer*, 15 Hun, 504.

Motion for a new trial on a case or exceptions. After a trial in the County Court, in cases in which a new trial is had, the unsuccessful party may move that court for a new trial ; and the application may be made upon a case or upon a case and exceptions, or otherwise. The practice as to the mode of making and settling the case and exceptions is the same as in actions in the Supreme Court, and for that reason it will be sufficient to refer to the works of practice in the Supreme Court for the rules of proceeding, and for the forms necessary to be followed.

§ 10. **Judgment upon appeal.** Where an appeal is taken for the purpose of obtaining a new trial in the appellate court, and a trial is had before a jury, or before the court, or a referee, judgment will be

 Reversal in whole or in part.

entered upon the verdict, decision, or report, in the same manner as in actions commenced in the appellate court. See vol. 1, p. 61, § 3071. If an offer of judgment has been made and accepted under section 3070 or section 3072 of the Code, judgment must be entered in accordance with the offer. *Id.*, p. 61.

If the appeal is not taken for the purpose of obtaining a new trial in the appellate court, judgment must be rendered according to the justice of the case without regard to technical errors or defects which do not affect the merits. Upon such appeal, the appellate court may affirm or reverse the judgment of the justice in whole or in part, and as to any or all of the parties, and for errors of law or fact. *Id.*, p. 59, § 3063. Upon either form of appeal if a sum of money is awarded to one party and costs are awarded to the adverse party, the appellate court must set off the one against the other and render judgment for the balance. *Id.*, p. 58, § 3059.

Where an appeal is taken from a judgment of a District Court of the city of New York to the Court of Common Pleas of that city and county, the appellate court may reverse, affirm or modify the judgment appealed from, and where the judgment is reversed, may order a new trial in the District Court. Code of Civil Pro. § 3213, vol. 1, p. 90, as amended by Laws of 1883, chap. 231.

Reversal in whole or in part. Where no new trial in appellate court is demanded in the notice of appeal the statute expressly authorizes the court to affirm or reverse the judgment below, in whole or in part, according to the justice of the case.

When a judgment is recovered upon a complaint founded upon an account consisting of several items, and the evidence warrants a recovery as to some of the items, but is insufficient as to the others, the judgment may be reversed as to the latter items and affirmed as to the others. *Allen v. Bates*, 1 Hilt. 221, 223. So, where the action is founded upon contract, and there is a recovery for too large an amount, and the court can clearly see that there ought to be a reversal as to part of the judgment, and an affirmance as to the residue, such judgment will be rendered by the appellate court. *Rawson v. Grow*, 4 E. D. Smith, 18, 20; *Thomas v. Mills*, *id.* 75, 77; *Cook v. Clark*, *id.* 213, 215; *Mills v. Fox*, *id.* 220, 224; *Cook v. Ritter*, *id.* 253, 255; *Pinckney v. Keyler*, *id.* 469, 473; *Pollock v. Hoag*, *id.* 473, 476; *Decker v. Hassel*, 26 How. 528.

The rule thus established, as to reversing judgments in part and affirming them as to the residue, in actions arising upon contracts, is equally applicable to judgments founded upon torts. *Staats v. Hudson*.

Reversal in whole or in part.

R. R., 23 How. 463; *S. C.*, 39 Barb. 298; *Shaw v. Davis*, 55 id. 389; *Fields v. Moul*, 15 Abb. 6.

And the rule is now well settled that when the judgment rendered by the justice is for different claims, or is for distinct items or articles of property, separable in their nature, and capable of being separated on the record both as to the identity and value, the County Court not only may but must reverse in part and affirm as to the residue; and if the court fails in this duty, the Supreme Court, on an appeal from the judgment, must give the judgment the County Court ought to have given. *Decker v. Hassel*, 26 How. 528; *Shaw v. Davis*, 55 Barb. 389; *Weed v. Lee*, 50 id. 354; *Brownell v. Winnie*, 29 N. Y. 400. The power to correct an erroneous judgment does not depend upon the question whether the error was committed by a jury or by the justice. See *Fields v. Moul*, 15 Abb. 6.

There are some other cases which illustrate the practice under the Code. In *Shannon v. Burr*, 1 Hilt. 39, the plaintiff recovered a judgment for \$15 damages, in a case in which the law would not give more than nominal damages, and on an appeal the New York Common Pleas reversed the judgment as to all but the sum of six cents damages, and affirmed the judgment for that amount, without costs of the appeal to either party.

So, in an action for a fraud, if it appears that the judgment is for too large a sum, and that there is a particular amount which ought to have been deducted from the recovery, the appellate court may reverse the judgment for so much as ought to have been deducted, and affirm it as to the residue. *Harris v. Bernard*, 4 E. D. Smith, 195. See, also *Donohue v. Henry*, id. 162, 165.

And there is one case which extends the rule still further than any of the cases already cited. In *La Motte v. Archer*, 4 E. D. Smith, 46, the plaintiff recovered a judgment against the plaintiff for \$100 damages in an action of trover. The evidence rendered it certain that this judgment was considerably larger than the law would allow as a measure of damages in that action. But it was a case in which, upon the findings of fact in the court below, the plaintiff was entitled to some damages, or about one-half of the amount recovered. Upon an appeal to the Common Pleas, that court ordered a reversal of the judgment, unless the plaintiff chose to accept the sum of \$60, in which case the judgment was to be affirmed for that amount, and reversed as to the residue. The court said, per WOODRUFF, J.: "The amount of damages given (\$100) is wholly without evidence in its support, and upon this ground we would be warranted in reversing it. But the Code re-

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quires us to do substantial justice between the parties, if the case has been fully investigated ; and my conclusion is, that we should give the plaintiff the privilege of making a reasonable abatement from the amount of the judgment and suffer it to stand for the residue."

"Although a finding for \$75 might, perhaps, be sustained, I am not satisfied that the three articles have not depreciated since they were purchased ; and in view of all the circumstances disclosed by the evidence, I think that the plaintiff will be fully indemnified by a recovery of \$60 damages and her costs below.

"If this be deemed arbitrary and speculative, let it be answered that the court do not require the plaintiff to make such abatement. No injustice is done to her, since there is a sufficient ground for a reversal. She may elect to make the abatement or not at her pleasure. * * * The order should be, that if the plaintiff elect within ten days to reduce the damages to \$60, and her costs below, and file written statements of such election with the clerk, the judgment is affirmed to that extent, and reversed as to the residue, without costs to either party on appeal ; on default of such election, the judgment is reversed with costs."

The form of an order to reduce the judgment, and of the respondent's consent thereto, will be sufficient if it clearly specifies what is ordered and what is accepted by the respondent.

Order for reversal unless respondent consents to a reduction of judgment.

(Title and caption.)

*(As in the form, ante, 998, to the *, but omitting what is said as to the affidavits, and then continue)* that the judgment of the said justice be reversed with costs of this appeal, unless within ten days after the service of a copy of this order upon him or his attorney, the respondent makes and files with the clerk of this court a written consent to reduce said judgment, and also serves a copy thereof upon the appellant's attorney within the same time; and such consent shall be to the effect that the respondent consents to reduce the recovery for damages in said action to the sum of \$100, as of the day of , 1865; and if the judgment be so reduced then it is ordered that the judgment so reduced be in all things affirmed, with costs to the appellant *(or the respondent)*.

If the respondent elects to reduce the judgment to the amount specified in the order, he ought to make and file a written statement to that effect with the clerk of the appellate court, and also to serve a copy of it upon the appellant's attorney within the time allowed for that purpose.

Reversal as to any or all the parties. — Judgment by default.

Form of consent to reduce judgment.

(Title of cause in County Court.)

In pursuance of an order made in this cause on the day of , 1865, I, John Doe, the respondent and plaintiff, do hereby consent that the judgment appealed from in this action, be reduced to the sum of \$100 damages, as of the day of August, 1865.

JOHN DOE,
or JOHN M. CARROLL,
Att'y for Respondent.

The form of a judgment in such a case will be given in a subsequent place.

Reversal as to any or all the parties. The power to reverse a judgment as to any or all of the parties is as clear as the power to reverse a judgment in whole or in part. Indeed, there never has been as much question upon the right to reverse as to any or all of the parties, as once existed in relation to the power to reverse a judgment in part and affirm it as to the residue.

The last clause of section 3063 of the Code of Civil Procedure, which declares that the court may affirm or reverse the judgment of the justice in whole or in part, and as to any or all the parties, and for errors of law or of fact, is merely a re-enactment of the corresponding provisions of section 366 of the old Code. Under that section it was held that, when an appeal has been taken from a joint judgment rendered by a justice in an action of tort against two defendants, where a cause of action had been made out against one, and not against the other, the County Court had the undoubted right to reverse the judgment as to one and affirm it as to the other. *Van Slyck v. Snell*, 6 Lans. 299; *Geraud v. Stagg*, 10 How. 369; S. C., 4 E. D. Smith, 27. It was also held that on an appeal taken from a judgment rendered by a justice of the peace in an action upon contract in favor of two defendants, against one of whom a cause of action had been proved, the appellate court could reverse the judgment as to one of the defendants and affirm as to the other. *Nixon v. Jenkins*, 1 Hilt. 318.

But where an appeal is taken from a judgment rendered in an action upon a joint contract against two defendants, one of whom was not liable thereon, the court must reverse the judgment against both, and cannot reverse it as to one and affirm it as to the other, because the cause of action is joint, and a several judgment would not be proper. *Pollock v. Webster*, 16 Hun, 104.

Judgment by default. A practical question of considerable importance sometimes arises in relation to the power of the County Court to re-

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verse or affirm a judgment by default. In *Whitney v. Bayard*, 2 Sandf. 634, it was held that on an appeal from a justice's court, the judgment will be reversed by default, if the respondent does not appear to argue the appeal when it is moved for argument by the appellant. So, where an appeal has been regularly noticed and placed upon the calendar, it may be called up for argument, and if the appellant does not appear it will be affirmed by default on motion of the respondent. *Townsend v. Keenan*, 2 Hilt. 544. See *Matthews v. Arnold*, 14 Hun, 376; *Geraghty v. Malone*, 1 Sandf. 734.

Notwithstanding these decisions there are some considerations which ought to weigh with a court in determining whether a judgment ought to be reversed by default, when the case is one which is heard and decided upon the facts contained in the return. And in *Bellony v. Alexander*, 1 Sandf. 734, the court refused to reverse a judgment by default. It is true that this case was decided under the Code of 1848, which provided for hearing a case upon the affidavits of the parties; but in that case those affidavits took the place of a return, and the case was heard upon them in the same manner as upon a return made.

If either party fails to appear and argue the cause, and he has a reasonable excuse for his default, the appellate court will always relieve a party from a default, even if one is allowed to be taken. The practice of the court ought always to be liberal in this respect, so far as it relates to opening the default; but as to the terms upon which this shall be done, much will depend upon the circumstances of each particular case. It has been held that where a judgment of affirmance has been regularly taken by default, the court will require the appellant, on a motion to open the default, and before hearing his excuse, to show that the case has merits either upon the law or the facts involved in it, which will be ascertained on the motion from a mere statement without argument, or by a careful inspection of the return. *Tryon v. Jennings*, 22 How. 421; S. C., 12 Abb. 33. This rule, however, was adopted on account of the press of business in the court which established it; and the extent to which a County Court would apply it would be to see that the appeal had no pretense of merits.

Reversal upon questions of fact. The rule has been long laid down and repeatedly declared, that where on a trial in a justice's court there is evidence on both sides, and even where there is only slight evidence in support of the cause of action on which there is a recovery, the County Court is not authorized to reverse the judgment, although such court may arrive at a conclusion upon the facts of the case, or the weight of evidence, different from that drawn by the justice if he de

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cides the case, or by the jury, if there was a jury trial. *Burnham v. Butler*, 31 N. Y. 480; *Noyes v. Hewitt*, 18 Wend. 141; *Stryker v. Berghin*, 15 id. 491; *Fleming v. Smith*, 44 Barb. 554; *Adams v. Cole*, 1 Daly, 147; *Reynolds v. Kelly*, id. 283; *Smith v. Simms*, 51 How. 305; *Wright v. Maseras*, 56 Barb. 521, 532; *Commissioners of Excise v. Backus*, 29 How. 33.

The reason for such a rule is obvious. When a trial takes place upon a question of fact, and witnesses are sworn, the justice or the jury who see the witness and hear the language in which his evidence is given, and who see the manner in which he testifies, will be much better able to properly estimate the value of the evidence than any appellate court knowing nothing of the case, except what appears upon the written or printed record.

The cases in which an appellate court will interfere and reverse the judgment of an inferior court upon questions of fact are the following:

1. Where the plaintiff fails to prove a cause of action upon a consideration of the entire evidence given. This may arise from the fact that the law does not entitle the plaintiff to recover upon all the facts proved, though in such a case the error would be one of law; or in the second place, in a case in which there was some material defect in the proofs;

2. Where the verdict is against the undisputed or overwhelming weight of evidence;

3. Where it is evident that the verdict is the result of prejudice, partiality, passion or fraud;

4. Where the court or jury have evidently disregarded unimpeached and controlling evidence.

These principles are not new ones introduced by the Code, but are such as have long been established in this State. And they are equally applicable whether the action is founded upon contract or upon tort.

The cases which will first be noticed are those which show that a judgment will be reversed where there is a total or a material defect in the proofs.

First. The following cases were decided under the old practice which prevailed before the enactment of the Code. In *Baldwin v. Delevan*, 2 Hill, 125, the action was for a fraudulent misrepresentation on an exchange of horses; but the evidence did not show any representation whatever by the defendant, except what he had said to a third person, a short time before the exchange with the plaintiff; this proof was held to be insufficient and judgment in favor of the plaintiff reversed. In *Clark v. Denure*, 3 Denio, 319, 320, the action was for fraud in the

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sale of a span of horses, but there was no proof of a *scienter*, and a judgment for the plaintiff was reversed. In *Palmer v. Manning*, 4 Denio, 131, a judgment rendered upon a promissory note was reversed because the identity of the note was not proved, where the note was proved by the admissions of the defendant.

In *Tift v. Tift*, 4 Denio, 175, the plaintiff recovered a judgment against the defendant for the acts of his infant child who set a dog upon the plaintiff's hog and killed it; but there was no proof that the defendant authorized the act, and the judgment was reversed; and the court said: "In actions before justices of the peace, if any material part of the plaintiff's case is wholly unsupported by evidence, a judgment in his favor will be reversed," and this is so whether the trial was with or without a jury.

In *Blanchard v. Isaacs*, 3 Barb. 388, the plaintiff recovered judgment against the defendant, as a common carrier, for the value of a coat which had been lost, but there was no proof of the delivery of the coat to the defendant, or that the person to whom it was delivered was an agent of the defendant authorized to take charge of such property, and the judgment was reversed.

In *Pryne v. Westfall*, 3 Barb. 496, the plaintiff recovered a judgment as a constable for the wrongful taking of property which he had previously levied upon. He had not taken actual possession of the property, and the action was brought for the benefit of the plaintiff in the execution. There was no proof of any judgment upon which the execution was issued, though the execution was proved, but this was held insufficient, and the judgment was reversed. And see *Underhill v. Reinor*, 2 Hilt. 319.

Where a plaintiff claims to recover for services rendered, he must prove that the defendant employed him; and if he obtains a judgment without proving this fact, it will be reversed. *Howard v. Brown*, 2 E. D. Smith, 247.

The plaintiff must do more than to prove such facts as would warrant a conjecture that he is entitled to recover. He is bound to make out a *prima facie* cause of action, and he must furnish some criterion by which a right of recovery for some amount can be fixed without danger of doing injustice, and when the plaintiff's evidence leaves in doubt not only the amount which he is entitled to recover, but also the fact whether he is entitled to recover at all, a judgment in his favor will be reversed. *Fox v. Decker*, 3 E. D. Smith, 150.

In an action by the holder against the indorser of a note, the plaintiff must prove such facts as fix the liability of the defendant; and if

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there is no proof of presentment, demand, refusal or notice to the defendant, or a waiver of them, a judgment in favor of the plaintiff will be reversed. *Jones v. Pridham*, 3 E. D. Smith, 155; *Storp v. Harbutt*, 4 id. 464. See, also, vol. 1, pp. 798, 803, etc. The same principle applies when the holder of a bill of exchange seeks to charge the drawer thereof. *Vantrac v. McCulloch*, 2 Hilt. 272.

In an action to recover damages for injuries resulting from negligence, the plaintiff must establish by evidence that the injury was in some manner done by the defendants. In one case, in which the plaintiff recovered a judgment against the defendants, for injuries alleged to have been done to his wagon by the defendants' stage, the court, upon reversing the judgment, said: "Assuming that the plaintiff sufficiently proved that his wagon was injured by the carelessness of a person who was driving a stage, the only evidence that either of these defendants was responsible was that of the plaintiff's son, who testified that two gentlemen called upon his father and conversed on the subject, and one of them answered to the name of 'Lent,' and that the latter wished the wagon sent to his place to be repaired, and both were satisfied that it was their stage by which the injury was caused. This by no means identifies the defendant. The witness does not intimate that he is acquainted with the defendants, or either of them, and it is hardly necessary to say that a defendant cannot legally be charged with liability because some person who assumes to answer to the same surname is shown to have admitted his liability." *Fanning v. Lent & Mulford*, 3 E. D. Smith, 206, 207.

In an action by a plaintiff to recover the value of his dog, which is alleged to have been killed by the defendant's dog, the plaintiff must prove that the defendant was the owner of the dog, or that he harbored him, and that such dog was the aggressor in the particular fight; and if he recovers a judgment without such proof, it will be reversed. *Wiley v. Slater*, 22 Barb. 506.

The principles which govern an appellate court as to reversing judgments which are against evidence, are clearly and forcibly stated in *Rathbone v. Stanton*, 6 Barb. 141, 143, 144, by GEDLEY, J., who said: "There is at this day no doubt, and there never should have been any, that the verdict of a jury should be set aside where there has been no evidence to support it. * * * The true doctrine is this: When there is a *disputed question of fact*, and evidence has been given *on both sides of such question*, the courts will not disturb the finding of the jury. But when, upon any one question which is decisive against either party, there is evidence on one side of such question and none

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on the other, and the verdict has been given for the party who has given no evidence upon the point in question, the verdict will be set aside, and if the County Court does not reverse a judgment founded upon such a verdict, it is the duty of the Supreme Court to correct the error."

In an action which claims to recover money for services rendered in building a house, and for furnishing materials therefor, and where it appears from the evidence that the work was performed under a written sealed contract which specifies a time for the completion of the work, and the payment was to be made on the completion of the work, the plaintiff must show a performance on his part before he is entitled to recover; and a judgment for the plaintiff, without furnishing such proof, will be reversed. *Lynch v. McBeth*, 7 How. 113, 120, 121. In the last case, the Supreme Court reversed a judgment of the County Court, as well as that of the justice, where the plaintiff had recovered in such a case. The court said: "In addition to the above errors, the justice's judgment was *clearly* wrong upon the merits, and contrary to the justice of the case, as it appeared upon the trial. The justice certifies that his return contains the substance of the testimony and proceedings had before him, and yet it does not contain any legal evidence to support his judgment. The defendant proved that the plaintiff was under a covenant to do the work which he did for the defendant. The plaintiff attempted to show that this covenant was varied by a subsequent parol agreement. Besides the incompetency of parol evidence to have that effect, the plaintiff did not, even with the help of his own testimony, prove any parol attempt to vary the sealed contract. There was nothing in the conversation which he testified to, purporting to release him from any of the obligations of his covenant, or to impose any new obligation in that respect, upon the defendant; the most that the plaintiff's testimony on this subject tended to show was a parol promise of the defendant, without any consideration, to let the plaintiff have money as fast as he wanted it to go on with the work, not as payment for the work, nor in lieu of the payments which the plaintiff had covenanted to receive when the work was done. This was wholly insufficient to produce the effect claimed for it by the plaintiff, and given to it by the justice. In such a case the County Court ought to have reversed the judgment of the justice's court, and erred in not doing so." The same principle is enforced in *Jacobs v. Kolff*, 2 Hilt. 133.

It has been held that a failure to prove the proper measure of damages would be a ground of reversal in an action for a breach of warranty on the sale of a horse. *Fales v. McKeon*, 2 Hilt. 53.

Second. A brief examination will now be made of the cases which hold that a County Court ought to reverse a judgment which is rendered against the overwhelming weight of evidence. There is scarcely an instance in which a County Court can exercise its appellate powers with greater advantage than in that of correcting judgments which have been given in violation of the rights of one of the parties by entirely disregarding the whole scope, weight and force of the evidence given on the trial. In courts of record it has long been the practice to grant a new trial in such cases, and the power of the County Court to do the same thing in cases arising upon an appeal from a justice's court is now clearly established and daily exercised. This rule is not a new one introduced by the Code, but was well settled in the former practice.

In *Buckley v. Leonard*, 4 Denio, 500, the action was for damages done by the defendant's dog. On the trial, which was by jury, the plaintiff proved that while he was passing through a yard used in common by the defendant and a family which occupied an adjoining house as tenants of the defendant, with a view to call at such adjoining house, the dog bit him, and that on account of it he became somewhat lame, and was prevented from laboring for a few days. The plaintiff also proved that about a year before the dog had bitten another person, and there was some evidence that the dog had also bitten a boy. On both the former occasions the defendant had been informed of the injuries; and it was shown that for the most part he had kept the dog chained up in the day-time, and in his store nights.

The defendant offered to prove that the dog was of a quiet and peaceable disposition. The plaintiff objected to the evidence, but the justice admitted it, and several witnesses testified that they were acquainted with the animal and considered him inoffensive. The jury found a verdict for the defendant, upon which the justice rendered judgment, which was affirmed by the County Court on appeal. The Supreme Court reversed both judgments, and the court said:

"The evidence given by the defendant of the mild character of the dog, I think, was improperly admitted. It was immaterial. If the evidence proved that the dog bit the plaintiff, that the defendant was the owner, and knew or had notice that the dog had been accustomed to bite others, he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors. Such evidence was well calculated to divert the jury from a proper consideration of the real point in issue. There was no conflicting evidence upon any position which the plaintiff was bound to maintain, nor was there any question as to the credibility of witnesses. It was not,

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therefore, one of the classes of cases where the verdict of a jury precludes a court of review from examining the facts. The evidence of the injury to the plaintiff, of the dog having previously bitten others, and that the defendant had notice of it, stands uncontradicted; and these facts were abundantly sufficient to require the jury to find for the plaintiff. I think this is a case where the verdict and judgment are entirely unsupported by the evidence."

This case is but one of numerous cases of a similar character decided before the Code; and several of the cases already cited were the same in principle. And since the Code the same practice is firmly settled and uniformly enforced. In *Robertson v. Ketchum*, 11 Barb. 652, an exchange of horses was made between the plaintiff's agent and the defendant upon terms which, as the defendant knew, the plaintiff had himself refused to adopt as the basis of an exchange. The plaintiff did not know of the bargain until after it was made; nor did he know of the terms of it and that it was contrary to his proposition, until after the death of the horse received in exchange had put it out of his power to return it. He repudiated the bargain as soon as he knew what it was, and brought an action of trover in a justice's court for the value of his horse. The case was tried by a jury, who found a verdict for the defendant, upon which judgment was rendered; and the County Court, upon an appeal, affirmed this judgment. The Supreme Court reversed both judgments, and the court said:

"There was no conflict in the evidence on the fact that the actual exchange of horses made by the agent was upon a consideration which the plaintiff had never authorized, and that this was known to the defendant at the time. A verdict finding to the contrary is not merely verdict against the weight of evidence, but is a verdict without a particle of evidence to support it. The ground on which the County Court affirmed the judgment of the justice was that there was evidence of a subsequent ratification of the bargain by the plaintiff. The evidence was that the plaintiff asked the defendant how he traded, to which the latter replied, '*pretty much as you and I talked*'; a little different; and if you are not suited with the trade, we will trade back this evening.' Upon this the parties drank together and parted. This answer of the defendant was untrue; the trade was made, not as the plaintiff had proposed, but as the defendant had offered, and which offer the plaintiff had expressly rejected. If the defendant had truly disclosed the terms of the bargain when he was asked, and the plaintiff had silently acquiesced, it would have presented quite a different question. No doctrine is better settled, upon principle and authority, than

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this: that the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded upon mistake or fraud. The answer of the defendant to the plaintiff's inquiry was untrue, and was well calculated, and doubtless intended, to prevent further inquiry. The defendant had agreed with the agent to conceal from the plaintiff the departure from his instructions. It would be a reproach to the law to uphold such a fraud. There was no dispute about the facts; the jury drew an erroneous conclusion from the testimony. They must have held that subsequent assent to the trade was a ratification of the bargain, whether the plaintiff knew of its terms or not. The judgment of the County Court and of the justice must be reversed."

In *Marselis v. Seaman*, 21 Barb. 319, 324, an action was brought for the recovery of a penalty for taking illegal toll upon a plankroad. The proof was clear that the plaintiff was entitled to recover, provided the acts done rendered the defendant liable to a penalty within the meaning of the statute. The cause was tried by a jury, and a verdict and a judgment rendered for the plaintiff; which was affirmed by the County Court, but both judgments were reversed by the Supreme Court, which said, by BOCKES, J.: "There is no conflict of proof in the case. The facts are plain, and admit of but one fair conclusion; and it only remains now for the court to pronounce the judgment which the justice should have rendered, when the defendant insisted that there was no evidence that the defendant or his wife demanded or received more toll than he was allowed by law to collect. The verdict of the jury is irreconcilable to conscience, and must have been rendered under mistake, improper influence, or through fraud."

In *Watts v. Cleaveland*, 3 E. D. Smith, 553, an action was brought by a constable to recover the value of goods upon which he had levied. The officer proved a sufficient levy, which was the principal point in the case, but a judgment was rendered in favor of the defendant. This judgment was reversed on an appeal.

In *Goldsmith v. Obermier*, 3 E. D. Smith, 121, 122, the plaintiff claimed to recover for his services in procuring the purchase of a horse. The plaintiff proved an employment by the defendant, or at least a full and unequivocal recognition of an original employment, and an actual calling upon the plaintiff by the defendant, and procuring him to render further services; the actual devotion by the plaintiff of his time, labor and attention for the defendant's benefit and in aid of the

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purchase of his horse, and a distinct promise by the defendant that he would pay him well for the services which he admitted the plaintiff had rendered. The court below rendered a judgment in favor of the defendant, which was reversed upon appeal, when the court said: "We do not interfere with the finding in the court below, upon the mere ground that, upon the whole evidence, we think we should have come to a contrary conclusion. But where the evidence, upon which the plaintiff is, in our judgment, clearly entitled to recover, is uncontradicted and unimpeached, we are warranted in saying that a finding, in total disregard of the proof, must be founded in some erroneous view of the law applicable to the case made out by the plaintiff."

In *McCarty v. Ely*, 4 E. D. Smith, 375, 376, the action was for the recovery of rent, due upon a written lease. The defendant claimed to deduct a specified sum on account of alleged misrepresentations as to the capacity of the premises for the business for which they were used. There was nothing in the lease showing any representations, nor did the proofs establish any false representations. The jury found for the defendant, but the judgment thereon was reversed, and the court said: "The jury must, I think, have acted under some misapprehension or mistake, as their verdict is, in my judgment, not only against the weight of the evidence, but is without evidence to support it. The judgment should, therefore, be reversed."

In *Lambert v. Seely*, 2 Hilt. 429, the plaintiff recovered for goods sold. The evidence showed that the bill of goods claimed to have been sold was receipted by a check of the plaintiff, who was authorized to do such acts; and there was no explanation of the receipt. Besides this, there was no proof that the goods were ever actually delivered to the defendant; and there was evidence that the goods were sold to a third person, who had given credit for the amount upon a note held by him against the plaintiff. The plaintiff had a judgment, which was reversed, on the ground that it was not only unsupported by evidence, but was directly contrary to it.

In *Neary v. Bostwick*, 2 Hilt. 514, the plaintiff claimed to be a tenant of the defendant, and sought to recover damages for a breach of the covenants contained in the lease. The defense was, an accord and satisfaction. The justice rendered a judgment in favor of the plaintiff for \$150 damages, which was reversed upon an appeal. The court states the facts of the case thus: "When the troubles and injuries complained of by the plaintiff would seem to have reached their highest point, and in the month of July, the defendant called on him, and he demanded damages for his injuries at that time, stating what they were

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and in what they consisted. He then agreed to take \$20 for the demands, and the defendant paid it; the plaintiff saying that he took it to save trouble. Upon this point the plaintiff further testified that he accepted this \$20 as a compromise only, for his loss of rent of the addition to that time; but the subsequent testimony on the part of the defendant, and which the plaintiff did not deny, was that the defendant declined to pay any thing whatever, claiming that the agreement permitted what was done, and that the plaintiff had no right under it to the addition or extension. The plaintiff threatened a lawsuit, and was told to sue away; and the defendant arose to go. The plaintiff then said he would take \$20 and settle it, and the defendant paid it to prevent a lawsuit. The plaintiff had previously stated all he complained of, and which was of the hole in the cellar, the timbers under the building and the addition. On receiving the \$20 he pledged his honor that all his claim was settled, and he would not sue. The outline of the case here given is from the plaintiff's evidence, except as to the defense of accord and satisfaction, and that is taken from the whole case. Upon such testimony I am at a loss to discover upon what ground the justice arrived at his conclusion that the plaintiff was entitled to the damages he awarded. * * * The clear weight of the evidence on this point being as I have stated, I do not understand why it was ignored by the justice. The parties were shown to have met respecting the subject-matter and injuries complained of in this action. There can be no doubt that the defendant disputed the claim in good faith, and after the parties had considered the matter in dispute, the defendant paid and the plaintiff accepted \$20, saying that all his claim was then settled. In no view that I have been able to take of this case can the judgment of the justice be sustained."

In *Baker v. Bonesteel*, 2 Hilt. 397, the action was for the recovery of goods sold to the defendant, who interposed the defense of payment. The plaintiff proved that one of the bills so paid was a counterfeit, and he also proved that this bill was paid by the defendant. The defendant was sworn in his own behalf, and testified that he had no recollection of paying for the goods with this bill. The justice gave judgment for the defendant, and the plaintiff appealed. The court, upon reversing the judgment, said: "The witness Brant testified that he gave the identical bills received by him from the defendant to Marin, the clerk of the plaintiffs, and Marin testified that the bill in question was one of those he so received from Brant. This testimony was uncontradicted, and there was no circumstances shown which warranted the justice in disregarding it. The evidence of Bliss left no doubt as

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to the bill being spurious and of no value. It should not, therefore, operate as a payment for the coal shown to have been sold and delivered to the defendant. The finding of the justice was clearly against the evidence. Judgment reversed.”

Where the plaintiff swears to a state of facts, and the defendant swears to a directly contrary state of facts, and the defendant also introduces in evidence a letter which was written by the plaintiff before the commencement of the action, and such letter flatly contradicts what he swears to on the trial, the jury are bound to disregard his oath and to find in favor of the defendant, and if they find for the plaintiff, the appellate court will set aside the verdict and judgment. *Boyd v. Colt*, 20 How. 384.

Third. In some cases it is evident that the verdict or decision in the court below must have been the result of prejudice, partiality or passion, and in those cases the appellate courts correct the error by reversing the judgment.

In *Pearson v. Fiske*, 2 Hilt. 147, the rule was stated thus: “An appellate court will not assume the office of a jury, or of a referee, and weigh the testimony with the view of ascertaining on which side the weight of the probability lies. They will reverse for the want of evidence; or, where the finding is against evidence, in respect to which there is no contradiction nor conflict, and in extreme cases, though there may be some conflict or contradiction in the testimony, they will set aside the verdict, finding or report, if, after full and careful deliberation, they are convinced that it must have been induced by partiality, prejudice or corruption, or was the result of an obvious and palpable mistake.” See, also, *Marselis v. Seaman*, 21 Barb. 324, end of opinion.

In *Westbrook v. Douglass*, 21 Barb. 602, 604, the action was against a constable for not returning an execution. The plaintiff proved facts which entitled him to recover, but the jury rendered a verdict in favor of the defendant, and the justice rendered a judgment thereon, which was affirmed by the County Court. The Supreme Court reversed the judgment; and the court said, by HARRIS, J.: “The jury, moved by their sympathy for an officer who had unfortunately lost an execution which he was unable to collect, as it would seem from the evidence in the case, found a verdict entirely against the evidence. The justice, of course, had no alternative but to render a judgment in accordance with the verdict. The County Court, willing, perhaps, to find a reason for upholding such judgment, has relied upon the general and settled doctrine that in such a proceeding, jurisdiction will never be presumed, but must be proved. Upon the grounds already stated, I

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think it must be inferred that such jurisdiction was in fact proved. If so, the judgment was contrary to law and the evidence in the case, and should be reversed."

Fourth. There is still another class of cases in which appellate courts feel bound to reverse judgments which have been founded upon a total disregard of unimpeached evidence. And many of the cases which have been already noticed under other preceding heads were also erroneous because the courts below had entirely disregarded evidence which stood fair and conclusive before the court. An early case in this State explains and enforces this rule in a most satisfactory manner. In *Newton v. Pope*, 1 Cow. 109, the plaintiff sued to recover damages for negligence in the use of his horses by the defendant. The plaintiff had a judgment, which the Supreme Court reversed, and thus expressed its views:

"The plaintiff is not entitled to recover, unless the horse was injured through unskillfulness, negligence, or willful misconduct of the defendant; and it is incumbent on the plaintiff to prove the negligence or unskillfulness charged. The defendant stands at least upon as favorable a footing as a bailee for hire; and there is no doubt of the rule in such a case. There is no evidence of negligence or unskillfulness in this case, even excluding the testimony of the defendant's witnesses; and admitting this testimony, the evidence of ordinary care and skill is conclusive. The justice had no right, entirely, and arbitrarily, to disregard the testimony of two unimpeached witnesses on the ground 'that he was satisfied that they were biased in favor of the defendant.' There was no attempt to impeach their characters. The facts sworn to by them were not contradicted by any other witnesses either directly or indirectly; nor was there any intrinsic improbability in the narration given by them. It is difficult to establish a rule which shall regulate and limit the discretion of a court or jury in the degree of credit to be given to the testimony of different witnesses. Much must depend upon the particular circumstances of each case. But there is no difficulty in saying that where (as in this case) the witness is unimpeached, the facts sworn to by him, uncontradicted either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than of a jury to decide according to evidence. But it is mockery to talk of evidence, if it is discretionary with the tribunal to which it is addressed, to disregard it, upon vague suggestion, unsupported by proof of the bias of the witness."

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This case was cited with approbation in *Dolsen v. Arnold*, 10 How. 528, 532, where it was held that the evidence of even a single witness could not be arbitrarily disregarded where his testimony stands fair, and is uncontradicted, and there is no reason shown for disregarding it, and a verdict in violation of the rule was set aside.

In *Jacks v. Darrin*, 3 E. D. Smith, 559, the court, upon reversing a justice's judgment, said: "No reasons are given by the justice for his judgment, but it would seem, from the statement made by him, that he discredited the plaintiff's witnesses. The evidence of these witnesses was direct, unequivocal and consistent, and when such is the fact, and the witnesses stand before the court unimpeached and uncontradicted, it is the duty of the court or of a jury to believe them, and when the finding of a justice or of a jury is in conflict with what is expressly sworn to, under such circumstances, it will be set aside as against evidence."

In *Dresser v. Van Pelt*, 1 Hilt. 316, the action was for the recovery of an account. The defense was the statute of limitations, and the question was, whether the debt had been renewed by a part payment. The assignor of the plaintiff testified that he believed that the defendant had paid \$5 within six years, but of this he was not certain; that he was positive \$5 had been paid, but would not swear positively that the payment was within the last six years. The defendant swore that he did not, within six years, pay \$5 to the assignor of the bill in suit. The justice rendered judgment in favor of the plaintiff, which was reversed on appeal, and the court said: "The finding of the justice, therefore, was clearly against evidence. The assignor merely swore to his belief or impression. He did not strengthen it by any circumstance that could guide the justice, except that it was about the time when the defendant and plaintiff dissolved partnership, without stating when they dissolved. It was not a conflict of testimony upon which the finding of the justice would be conclusive, but of imperfect recollection on one side, and of positive recollection on the other. In such a case there can be no weighing of testimony. The belief of a party to an act, who cannot swear that it occurred within the six years preceding the time that he is examined, who cannot fix it or swear positively that it took place at least within that range of time, amounts to nothing when there is positive evidence that it did not occur within that period. Presumptively, the claim was barred by the statute, and it was for the plaintiff to remove that presumption, by showing that the defendant had made a payment upon it within six years before the commencement of the suit, which he did not do. The defendant having sworn

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positively that it was not made within that time, and the plaintiff offering nothing but the uncertain impression of the assignor against the positive statement of the defendant, upon such evidence there could be no alternative but to find for the defendant."

Where a cause of action is made out solely by admissions, the whole admission must be taken together, and a refusal to do so will be sufficient ground for reversing a judgment in favor of the plaintiff. *Perego v. Purdy*, 1 Hilt. 269. And see *ante*, 396, 415, 416. But it has been held that a verdict in favor of a plaintiff is final upon a question of fact in a case in which the plaintiff swears one way and the defendants the opposite way. *Justison v. Crawford*, 25 How. 465.

If a plaintiff proves a *prima facie* case, and the defendant does not introduce any evidence, it will be error to nonsuit the plaintiff, and an appeal will lie to correct it. *Babcock v. Raymond*, 2 Hilt. 62. So, where the uncontradicted evidence of the plaintiff entitles him to a verdict for substantial damages, and the jury disregard the evidence and find a verdict for a mere nominal sum of six cents, the verdict will be set aside. *Robbins v. Hudson River R. R.*, 7 Bosw. 1; *Collins v. Albany and Schenectady R. R.*, 12 Barb. 492.

In relation to all of these cases in which the finding is without any evidence, or where it is clearly against the overwhelming force of the evidence given, the appellate court will presume that the result is produced by some erroneous view of the law applicable to such a case.

This presumption is more natural than that which presupposes corruption, or a willful violation of official duty and of the juror's oath.

That a jury may err in their application of the law to established facts is a matter of frequent observation, while a criminal disregard of duty or of the obligations of an oath is comparatively rare, and therefore the courts will incline to the view that the jury erred in their application of the law to that particular case. The numerous cases which have been cited are ample illustrations of the application of this presumption by the courts, as well as conclusive evidence that the courts will reverse judgments founded upon any such erroneous view of the entire case. See *Fish v. Skut*, 21 Barb. 333, 335, end of opinion; and *Goldsmith v. Obermier*, 3 E. D. Smith, 122; *Fettritch v. Dickenson*, 22 How. 249; *Lansing v. Stone*, 37 Barb. 15, 22; *Mars-ton v. Vultee*, 8 Bosw. 129. As to what are questions of fact, see *ante*, 747-749.

Reversal upon questions of law. The cases in which relief is sought from judgments rendered by default, or against evidence, or for errors in fact, having been sufficiently noticed already, it will now be

proper to notice those cases in which a reversal is sought on account of some legal error committed by the court below. The principal part of the appeals which are brought are founded upon some alleged error in the proceedings in the lower court. Such errors may occur in any stage of the proceedings from the commencement of an action until its final termination in a judgment. To enumerate all the instances in which it has been held that an error had been committed would be to cite all the cases upon the subject, which is not the object of this article. It will be proper, however, to point out some of the classes of cases in which such errors occur.

To commence with the proceedings in an action is a convenient point to start from. If the justice has no jurisdiction of the subject-matter of the action, or if he does not acquire jurisdiction over the person of the defendant, this will be a ground of error. The place where an action must be brought is sometimes limited, and the law must be complied with in this respect. Sometimes the justice is disqualified by reason of relationship, or of some other personal disqualification. So, again, the process which has been issued may not be regular or valid on account of the want of affidavits, bonds, or other proof or securities; and if these are sufficient, the process may not be sufficient or proper in form or kind. The service of process may be irregular or defective. Errors may also occur in the disposition of questions relating to the pleadings or to an adjournment. And what is still more common, there may be errors committed on the trial of a cause, such as admitting improper evidence, rejecting proper evidence, excluding or receiving witnesses, improperly granting or refusing a nonsuit, charging a jury, receiving verdicts, or entering judgments, and the like. In all of the foregoing proceedings, and in many others not mentioned, there may be errors which may be a good ground of appeal. And all these questions are outside of other questions which arise as to the right of the plaintiff to recover, upon the law applicable to the case, or whether a judgment in favor of the defendant can be sustained when all the facts in the case are duly considered. And whenever it appears from the record that any material error has been committed in the proceedings in the court below, either by the justice or by a jury, the general rule is that such error may be corrected on an appeal.

For an illustration of the cases in which the proceedings are regular and valid, or irregular and erroneous, the student may examine each of the classes of cases which have been pointed out, such as relate to process, pleadings, evidence, trials, judgments, etc.

And whenever the appellate court can clearly see from the whole

Objections first taken on the argument.

record that the judgment appealed from is against law and the evidence—or, in other words, is unjust, because against the clear merits of the case, the judgment will be reversed.

It is clear, both from the provisions of the Code and from the settled practice of the court, that its power to review and reverse, or to modify the judgments of justices of the peace, is by no means confined to cases where the justice has failed to acquire or retain jurisdiction, or has made an erroneous decision upon the merits. Errors may be made in the issue, form, or service of process, and in various interlocutory proceedings for which the judgment of a justice will be reversed, though they do not directly touch the merits, or deprive him of jurisdiction. The rule is general that the judgment of a justice may be reversed upon appeal for any error in the proceedings before him which affects the substantial rights of the appellant. If an order of arrest is improperly and erroneously made in an action before a justice of the peace, upon which the defendant may be subjected to imprisonment, either upon the order or upon final process in the action, it is certainly such an error of law as ought to be redressed upon appeal, and for which, as there is no other remedy, the judgment should be reversed. And the same rule should be observed when an attachment is erroneously granted and the defendant's property is seized and held until it can be subjected to sale upon the execution to be issued on the judgment in the action in which such error is committed. The issuing of an attachment by a justice upon an insufficient affidavit is an error of law affecting the substantial right of a defendant for which the judgment will be reversed. *Fritze v. Pultz*, 2 N. Y. Civil Pro. Rep. 142.

Objections first taken on the argument. It is a general rule that a party must take such objections below, as he wishes to rely upon, if he appears in the action, or participates in the proceedings. This rule is a most important one in its consequences, and it is very uniformly enforced in practice. A few cases will suffice to illustrate the practice.

If a party wishes to take any objections to process, either as to the mode of issuing or service, he must raise the proper objections at the first opportunity. A defect in pleadings must be objected to by demurrer. If process is defective either in form or in substance, and the defendant wishes to object to it, he must do so before joining issue; and if he fails to do this in the court below, he cannot raise the objection upon an appeal. If a demurrer is sustained when it has been interposed notwithstanding the legal sufficiency of the pleading demurred to, the injured party may redress the wrong by an appeal. But he must

Objections first taken on the argument.

abide by his pleading, and refuse to amend it; or he will waive the right to insist upon the point upon an appeal. If a complaint is defective the objection must be made in the court below, and if the defendant fails to do this he cannot reverse the judgment for the insufficiency of the complaint, provided a good cause of action was proved by legal evidence. *Stafford v. Williams*, 4 Denio, 182, 184; *Hall v. McKech-nie*, 22 Barb. 244. If an adjournment is desired, a proper application must be made, and there must be a refusal to grant it before error will lie. A refusal of a justice to require a bond on an adjournment on motion of the defendant will be error, if the plaintiff objects to such a course. There are numerous cases, as we shall soon see, where a party may raise objections, even though he did not appear and object. But there are some objections which must be taken below, or they cannot be raised upon an appeal. A party who does not appear and object to the competency of a juror on account of his want of a property qualification will lose the right. *Clark v. Van Vrancken*, 20 Barb. 278; *Eggleston v. Smiley*, 17 Johns. 133. When both parties appear in the court below, an objection on the ground of nonjoinder or misjoinder of parties must be made there, or the question will not be entertained on an appeal. *Tibbits v. Percy*, 24 Barb. 39; *Avogadro v. Bull*, 4 E. D. Smith, 384; *ante*, 77, 79, 93, 95.

The cases in which objections may and must be taken on trial, and the mode in which it is to be done, have been quite fully noticed. *Ante*, 751-762.

Where it is evident from the return that the parties assumed the existence of facts which were material to the case and neither party in any manner raises an objection to the want of proof of the existence of such facts, this assumption will preclude any question from being made upon appeal as to the defect. *Paige v. Fazackerly*, 36 Barb. 392, where several cases are cited; *Smith v. Hill*, 22 id. 656; *Austin v. Burns*, 16 id. 643; *Jencks v. Smith*, 1 N. Y. 90; *Gelhaar v. Ross*, 1 Hilt. 117; *Rue v. Perry*, 63 Barb. 40; S. C., 41 How. 385; *Hill v. Heermans*, 17 Hun, 470; *Northrup v. Garrett*, id. 497; *McDonald v. Christie*, 42 Barb. 36, 39; *Cooper v. Bean*, 5 Lans. 318.

If it is intended to raise a question as to the manner in which a fact is proved this must be done in the court below, or the right of objection will be lost. If there is a formal defect in the proof of the issuing of letters of administration, which form a part of the plaintiff's proofs, the objection must be taken in the court below to render it available. *Donohue v. Henry*, 4 E. D. Smith, 162.

So, an objection to evidence, on the ground that it is incompetent

Reversing for want of, etc. — Admitting illegal or incompetent, etc. — Excluding, etc.

and inadmissible, must be made in the court below, and if it is not, the objection cannot be made for the first time on the appeal. *Rouillier v. Wernicki*, 3 E. D. Smith, 310. So, where a sealed instrument which has a subscribing witness is proved in the court below without producing the subscribing witness, and without objection, the objection cannot be taken upon the appeal. *Ramney v. Gwynne*, id. 59. So an objection as to the competency of a witness must be taken below to be available. *Fenn v. Timpson*, 4 id. 276, 278. There are cases in which the defendant may raise objections for the first time upon an appeal if he did not appear in the action below. *Ante*, 707.

So, he may, in some cases, raise an objection on appeal, although it was not taken below, where it is clear that the objection could not have been obviated if taken in the court below. *Ante*, 757. But the correct and the safe practice always is to take the proper objection at the earliest opportunity, and to state it so clearly as not to be misunderstood by the court below, or by the opposite party, and so as to be certain that it will be sufficient to be available on the appeal.

Reversing for want of evidence. The cases relating to this subject have been so fully noticed while treating of reversals upon questions of fact, that little need be added here.

Where the plaintiff fails to make out a case against a defendant who does not appear at the trial, the judgment will be reversed in the same manner as though he had appeared and objected that the evidence given did not make a case. *Ante*, 757.

Admitting illegal or incompetent evidence. One of the most common grounds of appeal is that illegal or incompetent evidence was admitted by the court below. And where it is clear that such evidence was admitted under objection, and that it affected the result of the action to the detriment of appellant, the judgment will be reversed. This subject has been sufficiently discussed elsewhere. See *ante*, 753.

Excluding legal and competent evidence. The rejection of evidence by the court below is a frequent ground of appeal, and when the complaint is well founded it is a sufficient ground of reversal on an appeal by the injured party. It is a general rule that every party has a right to introduce such legal and competent evidence as he desires. There are some instances in which the court may limit the number of witnesses upon mere collateral matters. *Ante*, 763. But, with this exception, it is clear that legal and competent evidence, when properly and reasonably offered, cannot be rejected without committing an error which will be sufficient to reverse a judgment rendered against the party offering to introduce the evidence. See *ante*, 760.

Intendments by appellate court.

Intendments by appellate court. It is a familiar rule that errors must be made to appear affirmatively before a judgment will be reversed. *Everingham v. Vanderbilt*, 13 Hun, 75; *Tracy v. Altmeyer*, 46 N. Y. 598; *Briant v. Trimmer*, 47 id. 96; *Martin v. Houghton*, 31 How. 82; S. C., 45 Barb. 258.

And it is also well settled that all reasonable intendments will be indulged in favor of the judgment of the inferior court. *Schoonmaker v. Spencer*, 54 N. Y. 366; *Beecher v. Kendall*, 14 Hun, 327; *Avery v. Woodbeck*, 5 Lans. 498; S. C., 62 Barb. 557. And that no presumption of error will be indulged against the regularity of such judgment. *Potter v. Whittaker*, 27 How. 10. There are some matters, however, in which this rule does not prevail, and when a judgment of an inferior court is brought up for review, the record must show that the court had jurisdiction of the subject-matter, and of the person of the defendant. *Frees v. Ford*, 6 N. Y. 176; *Drake v. Miller*, 15 Hun, 356. It is otherwise when the record is to be used merely as evidence. *Van Deusen v. Sweet*, 51 N. Y. 378.

Where a justice renders a judgment in favor of a plaintiff upon conflicting evidence, the appellate court will assume, in respect to every point on which the testimony was conflicting, that the justice found in favor of the plaintiff. *Dayton v. Rowland*, 1 Daly, 446.

It is an intendment of law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial. *Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. 400.

When the return is silent upon the subject, the appellate court will intend, in support of the judgment, that the justice issued a summons in proper form, and that it was delivered to a proper constable, *Potter v. Whittaker*, 27 How. 10; that the justice waited an hour for the defendant on the return day of the process, *Stafford v. Williams*, 4 Denio, 182; that the justice also waited one hour for the defendant to appear on the adjourned day, *Clark v. Garrison*, 3 Barb. 372; that the justice truly and openly stated the grounds upon which he refused an adjournment, *Decker v. Hassel*, 26 How. 528; that the witnesses were duly sworn on the trial, or that an oath was waived, *House v. Low*, 2 Johns. 378; that a general objection to evidence was properly overruled, where the grounds of objection are not properly stated, and the court can see that a proper objection might have been taken, *Bel lows v. Sackett*, 15 Barb. 96; that a cause was properly submitted to the court before judgment was rendered, *Peters v. Diossy*, 3 E. D. Smith, 115; that a judgment was rendered upon a verdict upon the day of its rendition, when the case might have occupied two days for

Restitution.

the trial, as where it appeared that the trial commenced on the 11th day of a certain month, and the judgment was rendered on the 12th, *Beattie v. Qua*, 15 Barb. 132; that the plaintiff was present in court when a verdict was rendered in his favor, *Baum v. Tarpenney*, 3 Hill, 75; *McEachron v. Randles*, 34 Barb. 301; *Warring v. Loomis*, 4 id. 485; that there were foreign witnesses when the justice allows more than \$5 costs of the action. *Oakley v. Van Horn*, 21 Wend. 305; *Fuller v. Wilcox*, 19 id. 351.

These cases which have been cited are mere illustrations of the general principle that regularity of proceeding will be presumed when it may properly be done, and where jurisdiction is shown. For other illustrations, see *ante*, 756, 761.

Restitution. The Code provides that when the judgment of the justice is reversed or modified, the appellate court may make or compel restitution of property, or of a right lost by means of the erroneous judgment; but not so as to affect the title of a purchaser in good faith, and for value, of property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case the appellate court may compel the value, or the purchase-price to be restored or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given; and if the application is granted before judgment, the proper direction may be included therein. Vol. 1, p. 58, § 3058.

Where it can properly be done, the most convenient way will be to serve notice of application for the order at the time of serving the notice of argument; and in such a case it will only be necessary to change the notice of argument by adding a clause containing a notice of application for an order of restitution, and a reference to the affidavits, papers or records upon which the motion will be made. If affidavits are used, copies must be served in the usual manner, and at least six days before the motion is made.

When no application for restitution is made at the hearing, and no order is then made, it will be necessary to make a subsequent application, by way of motion, upon due notice.

The affidavits for such a motion must set out the necessary facts to show that the party is entitled to the relief sought. The justice's return and the judgment-roll will always be available as a part of the moving papers, and they will usually be indispensable as the best evidence of the proceedings in the court below and in the County Court.

The affidavits ought to be entitled in the appellate court, and may be drawn in the usual form. So many precedents of affidavits have been

 Restitution.

given already, it is not deemed necessary to add to the number. Copies of all affidavits intended to be used must be served at least as early as the notice of motion, and at least six days before making the application. But when any of the moving papers are records, as in the case of the return or judgment-roll, and the like, no copies need be served.

In making such a motion, notice to the opposite party is necessary, and, therefore, the motion must be made at a regular term of the County Court, and not at chambers, as in the case of applications when no notice is necessary. The notice need not be in any particular form if it states facts sufficient to inform the opposite party of the application, and of the papers upon which the motion will be made.

Notice of application for restitution.

FULTON COUNTY COURT.

John Doe, respondent,	}
<i>agst.</i>	
Richard Roe, appellant.	

SIR — Take notice that upon affidavits, with copies of which you are herewith served, and upon the justice's return, and the judgment-roll in this action, a motion will be made, at the next term of this court, to be held at the court-house, in Johnstown, on the day of , 1865, for an order requiring the said John Doe to make restitution of the value of the property sold by virtue of the execution issued upon the judgment from which this appeal is taken, or for such other or further order or relief, as the said court may deem proper to grant, with the costs of this motion.

Dated JOHNSTOWN, *August 25*, 1865.

Yours, etc.,

HORACE E. SMITH,
Attorney for Appellant.

To A. McFARLAN, Esq.,
Attorney for Respondent.

Before making a motion for restitution, it will always be proper to demand the amount which is due to the appellant. If he refuses to make the proper restitution, the appellate court will grant the costs of a motion for restitution as matter of course. But if no such demand is made, the court might decline to impose costs, though the matter would be entirely discretionary with the court, and the discretion exercised according to the circumstances of the case. At the proper time the motion is to be brought to argument, and, if the appellant is successful, he will then enter a proper order with the clerk of the appellate court, procure a certified copy thereof, and serve it upon the adverse party.

Judgment on offer. — Judgment on affirmance.

Judgment on offer. Where the appellant has accepted an offer made by the respondent to allow judgment to be rendered in the appellate court for a specified sum as prescribed in section 3070 of the Code of Civil Procedure, he should file it with an affidavit of service of the notice of acceptance with the clerk of the appellate court, who thereupon must enter judgment in accordance with the offer. *Ante*, 939.

Form of judgment on offer.

At a term of the Fulton County Court, held at the court-house in the village of Johnstown, on the 15th day of August, 1865 :

Present — HON. JOHN STEWART, *County Judge*.

FULTON COUNTY COURT.

John Doe, respondent,	}
agst.	

Richard Roe, appellant.	}
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This action having been brought into this court by an appeal taken by the above-named Richard Roe from a judgment rendered against him and in favor of John Doe, the respondent above named, on the 3d day of July, 1865, by Richardson P. Clark, a justice of the peace of said county, for the sum of \$150 damages, and costs, and the respondent having duly offered to allow judgment to be rendered in this court in his favor for the sum of \$125. And the appellant having duly accepted said offer and filed the same in the office of the clerk of said county, with an affidavit of service of a notice of acceptance of the same, now, on motion of A. B., attorney for said appellant, it is

Ordered and adjudged that the respondent, John Doe, recover of the appellant, Richard Roe, the sum of \$118, the amount of said offer, less the amount of the appellant's costs in the court below and his disbursements upon this appeal, adjusted at the sum of \$7, and hereby set off against the sum specified in said offer.

Judgment upon an offer made in pursuance of section 3072 of the Code may be in substantially the same form. The statute requires that where a sum of money is awarded to one party and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance. Vol. 1, p. 58, § 3059.

Judgment on affirmance. After the argument and decision of an appeal taken upon questions of law only, the successful party usually enters the proper judgment. The Code provides that a judgment, affirming wholly or partly a judgment from which an appeal has been taken, shall not expressly and in terms award to the respondent a sum of money or other relief which was awarded to him by the judgment so affirmed. Code of Civ. Pro., § 1317. And see *id.*, § 1319; *Beers*

Judgment of reversal.

v. *Hendrickson*, 45 N. Y. 665. But this provision does not seem applicable to appeals to the County Court.

Judgment of affirmance.

At a term of the Fulton County Court, held at the court-house in the village of Johnstown, on the last Tuesday of November, 1865:

Present—HON. JOHN STEWART, County Judge, presiding.

FULTON COUNTY COURT.

John Doe, respondent,
agst.

Richard Roe, appellant.

The above-entitled action having been duly brought into this court on appeal taken by the appellant Richard Roe, from a judgment rendered on the day of , 1865, by Richardson P. Clark, Esq., a justice of the peace of the town of Johnstown, in Fulton county, for the sum of \$ damages and costs, in favor of the said John Doe and against the said Richard Roe;† and the said cause having been duly brought to a hearing, and after hearing Horace E. Smith, Esq., of counsel for the appellant, and Archibald McFarlan, Esq., of counsel for the respondent, and due deliberation having been had thereon, it is now, on motion of Archibald McFarlan,

Ordered and adjudged that the judgment rendered by the said justice, as aforesaid,* be and the same is hereby in all things affirmed, that the said John Doe recover of the said Richard Roe the amount of the judgment in the court below, to-wit: the sum of \$, with interest thereon from the rendition of said judgment, amounting to the sum of \$; that he also recover the amount of his costs and charges adjusted at \$, which amount in the whole to the sum of \$, and that he have an execution thereon, etc.

Judgment of reversal. If the appellant succeeds upon his appeal, wholly or in part, he should enter the proper judgment in the appellate court. The judgment may be in one of the following forms:

Judgment of reversal.

(*As in the preceding form down to the *, and then proceed thus:*) be and the same is hereby in all things reversed with costs, and it is further *ordered* and adjudged, that an execution issue, etc.

Reversal in part, absolutely.

(*As in the form of affirmance above, to the *, and then proceed thus:*) be and the same is hereby reversed as to the sum of \$50, and for the residue of the said judgment, to-wit, for the sum of \$100, the said judgment is affirmed with \$10 costs to the appellant (*or to the respondent*), and it is further *ordered* and adjudged, that an execution issue, etc.

Judgments where a new trial is had in the county court.

Reversal in part, conditionally.

(*As in the form of affirmance ante, 1030, to the words, "duly brought to a hearing," and then proceed thus:*) and the annexed decision of this court thereon having been made and filed, whereby said judgment is affirmed in case the plaintiff consents to reduce the recovery for damages to the sum of \$, as of the day of , 1865, and the plaintiff having consented to such reduction, now, on motion of John M. Carroll, Esq., of counsel for the appellant, it is

Ordered and adjudged, that the judgment so rendered by the said justice be and the same is hereby reversed for the sum of \$, and the residue of said judgment, to-wit, for the sum of \$, is hereby affirmed, with \$ costs; and it is further *ordered*, that an execution issue, etc.

In making up the judgment-roll in this last case, it will be proper, if not necessary, to incorporate a copy of the order of modification, *ante*, 1006, and of the consent of the plaintiff, *ante*, 1007.

Judgment of reversal, with restitution, etc.

(*As in the form of affirmance, ante, 1030, to the *, and then proceed thus:*) be and the same is hereby in all things reversed. And it appearing to the court that, notwithstanding the appeal herein, the respondent executed and collected the amount of the judgment of the court below, with costs, constable's fees etc., to-wit, the sum of \$, it is therefore further ordered and adjudged, that the respondent make restitution; by paying to the said appellant or his attorney, within days after the service of this judgment upon him or his attorney, the said sum of \$, with interest from the day of , 1865, the date of said collection by the said respondent. And it is further *ordered* and adjudged, that the appellant recover \$ costs on this appeal, amounting in the whole to \$, and that an execution issue, etc.

In the form of judgment just given, the order for restitution forms a part of the judgment itself, as it properly may where the order for restitution is made on the hearing of the appeal. But if the application for restitution is not made until after bringing on the appeal, a motion will be necessary; and upon proper proofs an order of restitution will be made.

Judgment on dismissal of appeal.

(*As in the judgment of affirmance, ante, 1030, to the words "now on motion of Archibald McFarlan," and then proceed thus:*) It is *ordered* and adjudged that said appeal be dismissed, with \$ costs to the respondent, and that an execution issue, etc.

Judgments where a new trial is had in the County Court. The forms of judgments already given relate to cases in which the appeal

Judgment-roll. — Costs on appeal.

was heard and decided upon the facts appearing upon the face of the justice's return. But, since there must be judgments in cases which are retried in the County Court by a jury, it is necessary to give the proper forms of judgments in such cases.

Judgment for plaintiff on verdict.

(*As in affirmance, ante, 1030, to †, and then proceed thus:*) and the said justice having made and filed his return to said appeal, and having returned the process, proof of service thereof, and the pleadings in the said action, etc., and the said action being duly pending in this court, the issues joined between the parties having been duly brought on for trial therein, before the Hon. John Stewart, county judge of Fulton county, and a jury of said county, at the term of this court held at the court-house in the village of Johnstown on the day of _____, 1865, and the issues having been tried, and a verdict for ‡ the plaintiff for the sum of \$ _____ having been duly rendered on the _____ day of _____, 1865, and his costs having been adjusted at \$ _____, now, on motion of Alva H. Tremain, Esq., attorney for the plaintiff, it is adjudged that the said plaintiff recover of the said defendant \$ _____, so found by the jury, with \$ _____ costs; and that an execution issue, etc.

Judgment for defendant on verdict.

(*As in the last form, to the †, and then proceed thus:*) the defendant having been duly rendered, and his costs having been adjusted at \$ _____, now, on motion of Richard H. Rosa, Esq., it is adjudged that the defendant have judgment against the plaintiff, upon the issues of this action for the sum of \$ _____, and that an execution issue, etc.

The foregoing forms are sufficient to show the young practitioner what the general form of such judgments should be, and in those instances in which the facts differ from those in a case like those already specified, each person can modify these forms to suit the particular case.

Judgment-roll. The statute prescribes what papers are necessary to constitute a judgment-roll. Vol. 1, p. 58, § 3061.

It is the duty of the clerk to attach these papers together and file them immediately after entering final judgment upon the determination of the appeal. *Ib.*

§ 11. **Costs on appeal.** There is usually very little difficulty in relation to the adjustment of costs on appeals to the County Courts from inferior courts. The provisions of the statute are few and simple, and for that reason there will be no occasion for any extended remarks upon the subject.

Since the change in the law which provides for new trials in the

When the appeal is heard upon the return. — Where a new trial is had, etc.

County Courts, there will be two different rates or classes of costs, viz. : one in those cases which are heard and decided upon the return ; the other in those cases in which a new trial is had. These classes will be examined separately ; and first, then, as to the costs in cases heard upon the return.

When the appeal is heard upon the return. Where an appeal has been taken for any purpose other than to obtain a new trial in the appellate court, the award of costs is regulated as follows :

1. If the appeal is dismissed because neither party brings it to a hearing, costs cannot be awarded to either party.

2. If the judgment is reversed for an error in fact not affecting the merits, or if a new trial is directed before the same or another justice, the costs of the appeal are in the discretion of the appellate court.

3. If the judgment is affirmed, costs must be awarded to the respondent.

4. If the judgment is reversed, costs must be awarded to the appellant.

5. If the judgment is affirmed only in part, the costs or such part thereof as to the appellate court seems just, not exceeding \$10 besides disbursements, may be awarded to either party. Vol. 1, p. 60, § 3066.

6. If on an appeal from a judgment of a District Court to the Common Pleas of the city and county of New York, the judgment of the District Court is modified, or if it is reversed and a new trial is ordered in the District Court, costs are in the discretion of the appellate court. Code of Civil Pro., § 3213, as amended by Laws of 1883, chap. 231.

The costs awarded upon an appeal not taken for a new trial in the appellate court are prescribed by the statute as follows :

To the appellant, upon reversal, \$30.

To the respondent, upon affirmance, \$25.

To this must be added the disbursements of the successful party. See vol. 1, p. 60, § 3067.

When costs are awarded to the appellant, he may include in the disbursements upon appeal the costs and fee paid to the justice upon taking the appeal ; and where the judgment rendered by the justice was against the appellant, he may also include in those disbursements, the costs of the action before the justice which he would have been entitled to recover if the judgment of the justice had been in his favor. Id., p. 58, § 3060.

Where a new trial is had in the appellate court. The provisions of the Code as to the right of a party to costs where a new trial is had

Where a new trial is had in the appellate court.

in the appellate court are somewhat obscure, though when it is determined which party is entitled to costs, the amount to which he is entitled is fixed by the statute with sufficient certainty.

If upon an appeal from a judgment for a sum of money only, the respondent has made offer of judgment which has been accepted by the appellant as provided in section 3070 of the Code, the appellant will be entitled to recover his costs in the court below and his disbursements upon the appeal, including the costs and fee, if any, paid to the justice upon taking the appeal, but neither party will be entitled to costs upon the appeal. *Id.*, p. 61, § 3070.

If an offer is not made under the section cited, and the verdict, report or decision upon the appeal is more favorable to the appellant by the sum of \$10 than the verdict or decision in the court below, the appellant is entitled to recover costs upon the appeal; otherwise the respondent is entitled to recover costs. *Ib.*

If the offer is made by the respondent but is not accepted by the appellant, and the verdict, report, or decision upon the appeal is more favorable to the appellant by the sum of \$10 than the amount of the offer, the appellant is entitled to recover costs upon the appeal; otherwise the respondent is entitled to recover costs. *Ib.*

This is the plain declaration of the statute. But it has been held that the provisions of section 3070 above cited have reference only to cases where some judgment is recovered by the respondent; that in no case can a party to an action recover costs where he fails to recover judgment against his adversary; that where, on an appeal by the defendant from a money judgment rendered by a justice in favor of the plaintiff, a new trial is had in the appellate court resulting in a verdict of "no cause of action," the defendant is entitled to costs regardless of section 3070, that such a case falls within section 3229 of the Code; and that the plaintiff not being entitled to costs under the latter section, the defendant is entitled to costs established for such actions by section 3073. *Quick v. Wixon*, 27 Hun, 592.

The case last cited being a decision of the General Term of the Supreme Court, and the only one reported upon the point in question, must be regarded as a controlling authority until it is reversed or overruled. It may not be presuming too much to suggest that the case engrafts a limitation upon the application of section 3070 of the Code not mentioned by the legislature, and gives an application to section 3229 of that act which the legislature expressly denied it. See Code of Civil Pro., § 3237.

If an offer of judgment made under section 3072 of the Code is not

More favorable judgment.

accepted, and the party to whom it was made fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time. Vol. 1, p. 62.

Upon an appeal for a new trial the statute allows the following costs, besides disbursements:

For all proceedings before notice of trial, \$15.

For all subsequent proceedings before trial, \$10.

For the trial of an issue of law, \$15.

For the trial of an issue of fact, \$20.

For the argument of a motion for a new trial on a case, \$15.

For each term, not more than five, at which the appeal is regularly on the calendar, excluding the term at which it is tried or otherwise finally disposed of, \$10. *Id.*, § 3073.

More favorable judgment. There are many cases in which there will be no dispute whether the judgment recovered is more or less favorable to the party recovering it than the offer made to him by the opposite party. As illustrations, suppose that the defendant, in an action for a trespass to personal property, should offer to allow a judgment to be taken against him for \$100 damages, but on the trial the plaintiff recovers only \$25; in such a case no one would question a claim made by the defendant that the judgment was less favorable to the plaintiff than the offer made, and that he must consequently pay costs under the statute.

So, too, in an action for damages for the breach of a special contract, if the defendant were to offer to allow a judgment for \$150 damages, and the plaintiff should recover but \$75 damages, it is clear that the same result must follow. But there may be cases in which the mere amount of the verdict is not alone the matter which is to control the determination of the question as to the liability for costs. A similar statute is applicable to actions in the Supreme Court, and several cases have been decided upon the construction of that statute; and since the principle of the statute is alike in both cases, the cases thus decided are equally applicable to cases arising under this section.

In *Ruggles v. Fogg*, 7 How. 324, the defendant, before answering in the action, offered to allow judgment to be taken against himself for \$250 and costs in a case in which the complaint claimed \$274; this offer was refused. The defendant then answered by a general denial, and also interposed a counter-claim for \$175. On the trial the plaintiff recovered \$241.67, which was less than the offer of \$230, with interest from the date of the offer to the day of trial; but this was held to be a more favorable judgment to the plaintiff than that offered, because

More favorable judgment.

the judgment extinguished the counter-claim, while that would not have been the result if the offer had been accepted, and that the plaintiff was, therefore, entitled to costs.

The principle is the same where the plaintiff recovers the precise sum offered, but extinguishes a counter-claim set up by the defendant after the date of the offer and refusal, and where the offer is made before answering in the action. *Fielding v. Mills*, 2 Bosw. 489.

Where a complaint sets out a note and account as the causes of action, and the defendant interposes a defense by answer, setting up a counter-claim or a set-off, and he afterward serves an offer to allow the plaintiff to take judgment against him for a specified sum, which the plaintiff declines to accept, and the plaintiff on the trial recovers a verdict for a less amount than the sum offered, with interest thereon to the date of the verdict, the plaintiff must in such a case pay costs to the defendant from the time of the offer, because the verdict is less favorable than the offer since an offer of judgment made at that stage of the case, and its acceptance and the entry of judgment thereon would extinguish the counter-claim or set-off. *Schneider v. Jacobi*, 1 Duer, 694; *Kilts v. Seeber*, 10 How. 270.

The principle applicable to such cases is clearly and forcibly stated by BROWN, J., in *Budd v. Jackson*, 26 How. 398, 400, 401. "When the plaintiff unites in the same action, as he did in the present case, a claim that is not disputed with one that is, the defendant may remove from the controversy the undisputed claim by the offer under the section quoted, and thus make the subsequent costs of the litigation depend upon the litigation in regard to the disputed claim. The offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it, and whether it is equal to that sum or not is to be determined (if it is not accepted) by the sum subsequently proved to be due by the verdict of the jury or the report of the referee. The plaintiff is at liberty to reject the offer, and to proceed in the action as if it had not been made, but he does this at the peril of losing his own subsequent costs, and also of paying costs to the defendant should he fail to recover a more favorable judgment. This 'more favorable judgment,' spoken of in the section, which he must recover to entitle him to costs, does not mean in the case of a money demand upon which interest is accruing a sum greater at the time of the report or verdict than the sum offered, because the excess may be made up of the interest accruing since the time of the offer and pending the litigation. Were this construction to obtain, the section would become practically useless, for as it would be impossible to know how

Taxation of costs.

long the litigation has to last, so it would be impossible to know what sum to offer. Besides, if the offer be a greater sum than that actually due at the time of the offer, by accepting it the plaintiff would, in fact, get what did not belong to him. The time of making the offer is a material element in determining whether it is as favorable as the judgment recovered. And if the verdict is made up of principal and the interest which accrued upon that principal, in determining which is most favorable to the plaintiff, the interest which accrued intermediate the time of the offer and the time of the rendition of the judgment is to be rejected therefrom. Thus, in the present case, the sum named in the written order was \$357.44; the sum found due the plaintiff by the referee is \$377.17, being \$19.73 in excess of the sum expressed in the offer, but as this excess is not equal to the interest from the time of the offer to the date of the report the plaintiff has failed to obtain a more favorable judgment. The test is the sum due to the plaintiff for principal and interest thereon at the time of the written offer, and not that sum increased and enlarged with the interest intermediate the date of the offer and the date of report or verdict." In the case just cited, it was held that the plaintiff was not entitled to recover costs from the time of the offer, but must pay costs to the defendant from that time to the judgment.

Interest added by the jury or by the court to the damages recovered upon an appeal to the County Court from the judgment of a court of a justice of the peace cannot be estimated in determining whether the judgment in the County Court is more favorable to the appellant than the offer of the respondent. *Pike v. Johnson*, 47 N. Y. 1. See, also, *Johnston v. Catlin*, 57 id. 652; *Smith v. May*, 32 How. 222; S. C., 2 Abb. (N. S.) 227; *Baldwin v. Brown*, 37 How. 385; *Humiston v. Ballard*, 40 id. 40; S. C., 63 Barb. 11; *Tilman v. Keane*, 1 Abb. (N. S.) 23; *Kelly v. Bonesteel*, 29 Hun, 546. But see *Bathgate v. Haskin*, 63 N. Y. 261.

Taxation of costs. The practice as to the adjustment of costs is the same as in actions in the Supreme Court, and there is no need of stating it at length in this place, since the usual books of practice will furnish all desired information. But the provisions of the Code may be conveniently given.

"Costs must be taxed by the clerk, upon the application of the party entitled thereto; except that the court may direct that interlocutory costs, or costs in a special proceeding, be taxed by a judge. The clerk must insert, in the judgment or final order, the amount of the costs, as taxed. In a case where the costs are in the discretion of the court,

Taxation of costs.

the report or decision, or the direction of the court for final judgment, upon a default, or after a jury trial, must specify which party or parties are entitled to costs; but the amount of the costs must be ascertained by taxation. The allowance, specified in section 3252 of this act, must be computed by the clerk upon the taxation; but the value of property, required to be ascertained for that purpose, must be ascertained by the court, unless it has been fixed by the decision or report, or by the verdict of the jury, upon which the final judgment is entered; except that, in case of actual partition, it must be determined by the commissioners."

Code of Civil Pro., § 3262.

"Costs may be taxed, upon notice to the attorney for each adverse party, who has appeared, and is interested in reducing the amount thereof. Notice of taxation must be served, not less than five days before the taxation; unless the attorneys, serving and served with the notice, all reside, or have their offices, in the city or town where the costs are to be taxed; in which case, a notice of two days is sufficient. A copy of the bill of costs, specifying the items, with the disbursements stated in detail, must be served with the notice of taxation." *Id.*, § 3263.

"Costs may also be taxed without notice. But where they are so taxed, notice of retaxation thereof must immediately afterward be given, as prescribed in the last section, by the party at whose instance they were taxed; in default whereof, the court must, upon the application of a party entitled to notice, direct a retaxation, with costs of the motion, to be paid by the party in default. The court may, in its discretion, upon the application of a party interested, direct a retaxation of costs at any time. Any sum, deducted upon a retaxation, must be credited upon the execution, or other mandate issued to enforce the judgment." *Id.*, § 3264.

"A taxation or a retaxation may be reviewed by the court, upon a motion for a new taxation. The order, made upon such a motion, may allow or disallow any item, objected to before the taxing officer, in which case, it has the effect of a new taxation; or it may direct a new taxation before the proper officer, specifying the grounds or the proof upon which the item may be allowed or disallowed by him." *Id.*, § 3265.

"An officer, authorized to tax costs in an action or a special proceeding, must, whether the taxation is opposed or not, examine the bills presented to him for taxation; must satisfy himself that all the items allowed by him are correct and legal; and must strike out all charges for fees other than the prospective charges expressly allowed by law,

Enforcement of the judgment.

where it does not appear that the services, for which they are charged, were necessarily performed." *Id.*, § 3266.

"A charge, for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge, for a copy of a document or paper, cannot be allowed, without an affidavit, stating that it was actually and necessarily used, or was necessarily obtained for use. An item of disbursements, in a bill of costs, cannot be allowed, in any case, unless it is verified by affidavit, and appears to have been necessarily incurred, and to be reasonable in amount." *Id.*, § 3267.

§ 12. Enforcement of the judgment. A judgment rendered upon an appeal where a new trial has been had in the appellate court is enforced in the same manner as a judgment rendered in an action commenced in that court, that is, by an execution issued by the attorney for the successful party and delivered to the sheriff of the county for service. See vol. 1, p. 61, § 3070.

The judgment of the appellate court on an appeal wherein no new trial is had is enforced by an execution issued by the attorney and executed by the sheriff.

PART IX.

SPECIAL PROCEEDINGS AND PRECEDENTS.

CHAPTER I.

PRECEDENTS OF PLEADINGS.

SECTION 1. Complaints on contracts. Pleadings of some kind must be used in every court in which actions are tried and judgments rendered upon evidence introduced. In justices' courts these pleadings are frequently oral, and sometimes quite informal and insufficient if duly objected to. The change in the law which authorized a new trial in the County Court, upon an appeal, will induce more general care as to the pleadings interposed. To aid the young practitioner in this particular, a selection of precedents will be given, which will include most of the forms of pleading required in actions tried in this court. And where the law relating to the particular precedent has been discussed in this work, a reference will be made to the pages relating to such law.

The formal parts of a complaint may be as follows :

IN JUSTICE'S COURT.

John Doe <i>agst.</i> Richard Roe.	}	Before DAVID KENNEDY, Esq.
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The plaintiff complains of the defendant, and alleges (*here state the cause of action*).

Wherefore, the plaintiff demands judgment in his favor, and against the defendant, for the sum of \$200, together with the costs of this action.

For the general rules relating to complaints, see *ante*, 305-326.

Complaint by an infant plaintiff.

IN JUSTICE'S COURT.

James Smith, an infant, by John Smith, his guardian, plaintiff, <i>agst.</i> John Doe, defendant.	}	Before DAVID KENNEDY, Esq.
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The plaintiff complains of the defendant, and alleges that he is an

Complaints on contracts.

infant, under the age of twenty-one years, and that on the 13th day of November, 1865, the said John Smith was duly appointed, by the said justice, guardian for the plaintiff, for the purpose of prosecuting this action; that (*state cause of action*). Wherefore, etc. (*state demand of judgment as ante*, 1040). See *ante*, 307.

Complaint on a justice's judgment.

(*Title and commencement as ante*, 1040.)

That on the day of , 1865, at the town of Mayfield, in the county of Fulton, the said John Doe commenced a civil action against the said Richard Roe, then (*and still*) being a resident of said county, before Henry Bartlett, then (*and still*) being a justice of the peace in and for said county, by the service of a summons upon said defendant personally.

That the said summons was issued by and under the hand of the said justice, and directed to any constable of the said county, commanding him to summon the said Richard Roe to be and appear before the said justice, at his office in Mayfield aforesaid, on the day of , 1865, at ten o'clock in the forenoon, to answer the complaint of the said John Doe in a civil action, and was by the said justice delivered to John W. Brown, then (*and still*) being a constable of the said county, who afterward, and before the time of appearance therein mentioned, returned the same to the said justice, with a return thereupon in writing, with his name signed thereto, that he had on the day of , 1865, served the same upon the said Richard Roe personally. That at the time and place of appearance mentioned in the said summons (*if the defendant did not appear*) the said John Doe appeared before the said justice, and the said Richard Roe did not appear then, nor within one hour thereafter, but therein made default.

(*If the defendant did appear, then allege*): The said John Doe and Richard Roe appeared before the said justice, and the said John Doe complained against the said Richard Roe for work and labor (*or as the cause of action may have been*), and claimed damages to the amount of \$200 only. That the said Richard Roe answered the said complaint by interposing a general denial of all the allegations contained in the said complaint (*with any other defense which may have been interposed*); the said justice then and there holding a court for the trial of the said action.

That such proceedings were thereupon had before the said justice; that the said John Doe afterward, and on the day of , 1865, at the place aforesaid (*or if judgment was rendered on the same day, on the day and year last aforesaid, at, etc.*) by the consideration and judgment of the said justice, recovered a judgment against the said Richard Roe, for the sum of \$150 damages and costs, adjudged to the said John Doe by the said justice.

That said judgment still remains in full force and effect, wholly unsatisfied, not paid nor reversed, annulled nor set aside, nor has the said John Doe had execution thereof. Wherefore the plaintiff demands

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judgment for the sum of \$150, with interest and costs, amounting to the sum of \$200.

For the rules relating to complaints on judgments, see vol. 2, pp. 223, 224.

Complaint on a chattel mortgage.

(*Title and commencement, as ante, 1040.*)

That on the day of , 18 , at the town of , in the county of , the defendant, for a valuable consideration, made his chattel mortgage in writing, under his hand (*and seal, if there is one attached*), and delivered it to the plaintiff, of which the following is a copy (*set out a copy*). That the said mortgage remains wholly unpaid and unsatisfied, and that there is now due thereon to the plaintiff from the defendant the sum of \$, with interest on the same from the day of , 18 . Wherefore the plaintiff demands judgment, etc., as *ante*, 1040. See vol. 1, pp. 263-329.

Complaint on bond for payment of money only.

(*Title and commencement, as ante, 1040.*)

That on the day of , 18 , the defendant made his bond in writing, under his hand and seal, and delivered it to the plaintiff, of which the following is a copy (*set out a copy*). That the said bond remains entirely unpaid, and that there is now due thereon to the plaintiff from the defendant, the sum of \$, with interest from the day of , 18 . Wherefore, etc., as *ante*, 1040.

Complaint on bond for limits.

(*Title and commencement, as ante, 1040.*)

That on the day of , 18 , at a court held by and before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, the plaintiff duly and legally recovered a judgment against one John Smith for the sum of \$ in an action (*state the cause of action, which must be one in which the defendant could be arrested on execution*); that on the day of , 18 , the said justice duly issued an execution upon the said judgment, which execution was directed to any constable of the county of Fulton, and contained a command requiring said constable to (*set out the command of the execution*); that said execution was on the day of , 18 , delivered to Jacob Lawyer, then a constable of the county of Fulton, to be executed; that said Jacob Lawyer, on the day of , 18 , who was then constable as aforesaid, at the town of Mayfield, in Fulton county, took and arrested the said John Smith, by virtue of and in pursuance of the authority contained in such execution; that on the day of , 18 , the said constable delivered the said John Smith to Austin Kasson, Esq., who was then sheriff of the county of Fulton, and who kept the said jail of said county, by his under-sheriff, Bradford T. Simmons, Esq.; that such

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sheriff, by his under-sheriff aforesaid, on the said day of , 18 , received the said John Smith into his custody as such sheriff, etc., by virtue of such execution; that such John Smith remained in such custody until the time of making the bond hereafter mentioned; that on the day of , 18 , at the village of Johnstown, in the said county of Fulton, the said John Smith, together with one George Smith, entered into and executed a bond, in due form of law, for the purpose of entitling the said John Smith to the liberties of the said jail; which bond was delivered to the said sheriff on the day of , 18 ; that such bond was executed to the said Austin Kason, Esq., as sheriff of the county of Fulton; that said bond contained and was subject to the conditions following, viz. (*set out the conditions of the bond*); that on the day of , 18 , the said sheriff duly assigned said bond to the plaintiff, and that on the day of , 18 , the said John Smith did escape and go at large from the said jail liberties, without the consent and against the will of the plaintiff, wherefore the plaintiff demands a judgment against the said George Smith for the sum of \$200, besides the costs of this action.

The law in relation to escapes will be found in vol. 2, p. 438.

Complaint on an undertaking for an attachment.

(*Title and commencement, as ante, 1040.*)

That on the day of , 18 , the defendant herein applied to David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, for a summons against the plaintiff herein, and also for a warrant of attachment against the property of the plaintiff herein to accompany said summons; and at the time of making said application delivered to said justice in support thereof an affidavit purporting to state facts authorizing the justice to issue said warrant; and also delivered to said justice an undertaking, executed by said defendant and C. D. and E. F. as his sureties, of which the following is a copy (*here set out a copy of the undertaking*). That on the delivery to the said justice of the affidavit and undertaking, the said justice did, on the day of , 18 , issue a warrant of attachment in favor of the defendant herein against the property of the plaintiff herein, of which the following is a copy (*set out copy of attachment*); that the said summons and warrant of attachment were, on the day of , 18 , by the direction and request of the defendant herein, delivered for service and execution to one Jacob Lawyer, a constable of the county of Fulton; that said constable served the said summons personally on the plaintiff herein, and by virtue of the warrant of attachment did, on the day of , 18 , attach and take into his possession the following property of the plaintiff herein (*enumerate and describe the articles attached*).

And the plaintiff further alleges that after the making of said undertaking and the issuing and levy of such warrant of attachment, issue was joined before said justice in the action between the defendant herein and the plaintiff herein, and such proceedings were thereupon duly had

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that the plaintiff herein, the defendant in the action aforesaid, recovered judgment against the plaintiff in said action, the defendant herein, on the merits for his costs, to-wit, for \$7.30, which still remains unpaid.

And the plaintiff further alleges that by reason of the issuing of such attachment and of the service thereof plaintiff has been greatly injured and delayed in the prosecution of his business (*or other damages sustained by the plaintiff*), and the value of such attached property has been greatly impaired. Wherefore, etc., *as ante*, 1040. See *ante*, 185.

Complaint on bond given on claim of attached property.

(*Title and commencement, as ante*, 1040.)

That on the day of , 18 , one A. B. was indebted to this plaintiff on a demand arising upon contract; that on the day of , 18 , this plaintiff made application in writing to David Kennedy, then a justice of the peace of the town of Mayfield, in the county of Fulton for a summons against the said A. B. and for a warrant of attachment against the property of said A. B. to accompany such summons; that said application was accompanied by an affidavit, which showed that (*state the grounds of the application*); that said plaintiff also furnished said justice with an undertaking such as is required by law in such cases; that said justice did, on the said day of , 18 , duly issue such summons and also an attachment, which was as follows (*set out a copy*); that such summons and attachment was on the same day delivered to Jacob Lawyer, who was then a constable of said county of Fulton, and that by virtue of said attachment, the said Lawyer, as such constable, did, on the day of , 18 , attach and take into his custody and possession the following described property (*designate it*), which then belonged to the said A. B.; that while said property was thus in the custody and possession of said constable, and before any execution had been issued upon the judgment in the action in which said attachment was issued, one C. D. claimed that he was the owner of said goods and chattels, so attached as aforesaid; that on the day of , 18 , the said C. D., with the sureties, E. F. and G. H., did execute a bond under their hands and seals, to the said plaintiff; that said sureties were duly approved by the said justice (*or the constable who held the attachment*); that said bond was duly delivered to the said constable, which bond was as follows (*set out a copy*); that upon the delivery of said bond to the said constable, he delivered up the said attached property to the said C. D.; that said bond was afterward duly delivered to the plaintiff, who is now the owner and holder thereof; that this action is brought within three months from the date of said bond; and the plaintiff alleges that the said claimant, C. D., is not the owner of the said attached goods and chattels, but they are the property of said A. B. Wherefore, the plaintiff demands judgment in his favor, against the defendants, for the value of said goods, etc., with interest thereon from the time when they were so delivered to the said C. D., which amounts to the sum of \$, together with costs, etc.

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The statutory provisions which authorize the giving of such a bond, will be found in vol. 1, p. 16. And see *ante*, 192-195.

Complaint on an undertaking on an appeal.

(*Title and commencement, as ante*, 1040.)

That, on the day of , 18 , a judgment was rendered in a justice's court, held by and before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, in favor of the plaintiff, and against one A. B., for the sum of \$ damages and costs; that, on the day of , 18 , the said A. B. brought an appeal, in due form of law, upon said judgment to the County Court of Fulton county; that, upon said appeal, an undertaking was given by the said A. B., which was made and executed by the said A. B., together with C. D. and E. F., as his sureties therein; that said undertaking was delivered to the said justice by the said A. B. for the use and benefit of the plaintiff, which undertaking was as follows (*here set out a copy*); that said justice made a return on said appeal in due form of law; that said appeal was duly argued in the said County Court, and the judgment of the justice was in all things affirmed by said County Court, on the day of , 18 ; that a judgment was rendered in favor of the plaintiff, and against the said A. B., on said appeal, on the day of , 18 , for \$ damages, and \$ costs; that an execution, in due form of law, was issued upon said judgment, on the day of , 18 , to the sheriff of the county of Fulton, in which the said A. B. then resided, and said execution was returned by the said sheriff wholly unsatisfied; that, on the day of , 18 , a demand of the said sum of damages and costs was made of the said A. B., and the said C. D. and E. F., the sureties aforesaid, who neglected and refused to pay the same; and the plaintiff says that the said sum of \$ remains wholly unpaid and unsatisfied. Wherefore, etc. See *ante*, 926.

Complaint on an undertaking in replevin.

(*Title and commencement, as ante*, 1040.)

That, on the day of , 18 , the plaintiff commenced an action for the recovery of the possession of certain personal property before David Kennedy, Esq., a justice of the peace of the town of Mayfield, in the county of Fulton, and this plaintiff was also plaintiff in that action, and the present defendant, A. B., was also defendant in that action; that such proceedings were had in that action that one Jacob Lawyer, a constable of said county, in pursuance of the process issued in said action, and delivered to him as such constable, did, on the day of , 18 , take into his custody and possession the following named articles (*describe them*); that before the return day of the summons issued by the said justice, the said A. B. served a notice upon said justice that he required a return of the property replevied, and also an affidavit of ownership of said property, and made and executed an undertaking, in writing, which was also executed by C. D.

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and E. F., as sureties for the said A. B.; that said undertaking was then and there delivered to said justice, and it is as follows (*here set out a copy*); that on the return day of the summons issued by said justice, the sureties in said undertaking appeared and justified, whereupon said justice indorsed his allowance on said undertaking and filed the same; that thereupon the said personal property, so taken by said constable, was returned to the said A. B., in pursuance of law; that such proceedings were subsequently, and on the day of , 18 , duly had by and before the said justice; that this plaintiff recovered a judgment in his favor, and against the said A. B., adjudging that this plaintiff was the owner, and entitled to the immediate possession of said personal property; that such judgment also adjudged that the plaintiff was entitled to the sum of \$ as damages for the wrongful detention of said personal property, and the value of said property was assessed at the sum of \$; that, on the day of , 18 , this plaintiff duly demanded payment of the said damages, and of the value of the property so assessed, etc.; but that no part thereof has been paid, and the said defendants are now justly indebted to this plaintiff in the sum of \$ thereon, with interest thereon, from the day of , 18 . Wherefore, etc., as *ante*, 1040. See *ante*, 217-221.

Complaint on bond of indemnity.

(*Title and commencement, as ante*, 1040.)

That, at the times hereinafter mentioned, the plaintiff was a constable of the county of Fulton; that, on the day of , 18 , and while the plaintiff was such constable, the defendant, A. B., delivered to the plaintiff an execution, in due form of law, to be executed by the plaintiff; that said execution was issued upon a judgment duly rendered on the day of , 18 , by David Kennedy, a justice of the peace of the town of Mayfield, in the county of Fulton; that said execution was duly issued, and was in due form of law, and was as follows (*here set out a copy of the execution*); that on the day of , 18 , this plaintiff as such constable, and by virtue of the said execution, levied upon certain personal property then in the possession of C. D., who was named as defendant in said execution; that said property consisted of the following described articles (*here set them out*); that on the day of , 18 , and after such levy, and before the removal or sale of said property, one E. F. claimed to be the owner thereof, and on the day of , 18 , the said E. F. notified this plaintiff of his said claim, and then forbade this plaintiff from selling the same on the said execution; that due notice was given to the said defendant A. B., on the day of , 18 , of the said claim and notice of the said E. F.; that the said defendant A. B. insisted that the said property did not belong to the said E. F., and that the plaintiff should sell the same as such constable, etc.; that, on the day of , 18 , the plaintiff requested the said defendant A. B. to indemnify him against the consequences of such sale; that on

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the day of , 18 , the defendant A. B., and his sureties, G. H. and I. J., duly made and executed a bond of indemnity, in writing, and under their hands and seals, and delivered the same to this plaintiff, which bond is as follows (*set out a copy of the bond*); that afterward, on the day of , 18 , the plaintiff, in pursuance of said execution, and on the faith of the indemnity aforesaid, duly sold said property as such constable; that, on the day of , 18 , the said E. F. brought an action against this plaintiff, before David Kennedy, a justice of the peace of Mayfield, in the county of Fulton, for selling said property; that, before the trial of said action, due notice was given by this plaintiff to the said defendant A. B., of the commencement of said action, and the said defendant A. B. was requested to defend the said action, which he neglected and refused to do; that, on the day of , 18 , such proceedings were had by and before said justice, that the said E. F. recovered a judgment against this plaintiff for the sum of \$, for the selling of said property on said execution aforesaid; that, on the day of , 18 , this plaintiff notified said defendant A. B. of the rendition of said judgment for the cause aforesaid, and demanded of said A. B. that he should pay the amount thereof, which the said A. B. neglected and refused to do; that, on the day of , 18 , the plaintiff paid the amount of said judgment to said E. F.; that, in addition to the payment of said judgment, the plaintiff was compelled to pay the sum of \$, as fees of counsel in said action, and he was also subjected to great loss of time, and was compelled to pay large expenses in the defense of said action, amounting in all to the sum of \$. Wherefore, etc., as *ante*, 1040. See vol. 1, pp. 250-255.

Complaint on undertaking to indemnify in case of a lost note, etc.

(*Title and commencement, as ante*, 1040.)

That, on the day of , 18 , at , the plaintiff made his negotiable promissory note (*or bill of exchange*), in writing, and delivered the same to the defendant A. B., as the owner and holder thereof; that, on the day of , 18 , and after the maturity of said note, the said A. B. demanded payment on the said note of this plaintiff, and alleged that said note was accidentally lost; that this plaintiff refused to pay the said note because of its non-production; that, on the day of , 18 , the said A. B. commenced an action for the recovery of the amount payable by said note, by summons, before David Kennedy, Esq., a justice of the peace of Mayfield, in Fulton county; that, on the return day of said summons, which was on the day of , 18 , the parties appeared and joined issue before said justice in said action; that on the trial of said action, which was on the day of joining such issue, the said A. B. failed to produce the said note, but alleged that the same was accidentally lost; that the said A. B. then and there made and executed an undertaking to indemnify this plaintiff as is required by law; that said undertaking was also executed by C. D. and E. F. as sureties therein, and was then

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and there duly delivered to this plaintiff; that such undertaking is as follows (*set out a copy*); that such proceedings were afterward had by and before said justice that he, on the day of , 18 , rendered a judgment on said note in favor of the said A. B., and against this plaintiff, for the sum of \$, which judgment the plaintiff paid before the commencement of this action; that the said note was afterward presented to the plaintiff by one G. H., who was a *bona fide* purchaser of the same before it became due, for value paid by him; that this plaintiff was sued upon said note by the said G. H., before one David Kennedy, a justice of the peace of Mayfield, in Fulton county, and a judgment recovered against him in favor of the said G. H., on the day of , 18 , for the sum of \$ damages, and costs of action, which judgment this plaintiff has since paid; that afterward due notice thereof was given to the defendant, who refused to repay to this plaintiff the amount of said judgment, etc. Wherefore, etc., as *ante*, 1040. See title *Bills and Notes* for law as to lost notes, vol. 1, pp. 752-758.

Complaint for rent due on lease; lessor against lessee.

(*Title and commencement, as ante*, 1040.)

That on the 1st day of May, 1864, at Johnstown, in the county of Fulton, N. Y., by a certain instrument in writing, the plaintiff did demise, lease, and to farm let, unto the defendant and his assigns, and the defendant did hire of the plaintiff, a certain messuage or dwelling-house, tenements and premises, with the appurtenances particularly described in said lease, and situated in the village of Johnstown, Fulton county, N. Y., known as (*briefly describe premises*), to have and to hold the said messuage or dwelling-house, tenements and premises, with the appurtenances, unto the said defendant and his assigns, for the term of one year from the said 1st day of May, 1864, for the yearly rent of \$100, payable to the plaintiff on the (*state days of payment*), which rent the defendant did thereby, for himself and his assigns, promise, covenant and agree to pay to the plaintiff as aforesaid; that the said defendant, afterward, to-wit: on the 1st day of May, 1864, and during the said term, entered into the possession and was possessed of the said premises; that the plaintiff has fully and faithfully performed the said agreement and its covenants on his part; that the said defendant has not kept or performed the said agreement or covenant on his part, and that before the commencement of this action there was due and in arrear from the said defendant to this plaintiff the sum of \$100, for the rent aforesaid. Wherefore, etc.

For the law relating to landlord and tenant, see vol. 1, pp. 330-384.

Use and occupation.

That on the day of , 1864, the defendant hired from this plaintiff, and thereupon took possession, and thereafter, from the day of , 1864, until the day of , 1865, had, with the permission of this plaintiff, the use and occupation of a certain house

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and premises, known as (*describe premises briefly*), the property of this plaintiff; for which the defendant promised to pay this plaintiff a reasonable sum (*or the sum of dollars, on, etc.*).

That the sum of dollars is a reasonable sum therefor, but that no part thereof has been paid, and the defendant is now justly indebted therefor to this plaintiff in the sum of dollars, with interest from, etc. Wherefore, etc.

For the law as to use and occupation, see vol. 2, pp. 407-411.

Complaint against tenant for not keeping in repair, etc
(*Title and commencement, as ante, 1040.*)

That on the 1st day of May, 1864, by a lease in writing, made between the plaintiff and the defendant, under their hands and seals, the plaintiff leased to the defendant, and the defendant hired of the plaintiff, for the term of one year from that date, at the yearly rent of \$150, a certain dwelling-house, with the land and appurtenances, situated in the village of Gloversville, Fulton county, N. Y., the property of the plaintiff, bounded and described as follows (*describe premises by boundaries or otherwise*); that the said lease was as follows (*set out a copy*); that the defendant entered into the possession of the said premises under and by virtue of said lease, and occupied and possessed them during the term specified; that he has failed to keep his covenants, or to perform the agreement so made by him in said lease, but that on the contrary he has broken the same; that he has not kept the premises in good repair; that he has left them in an untenantlike condition; that the fences are injured and broken down; that the roofs of the dwelling-house are leaky and admit the water, so that the walls have, in consequence, been greatly injured and destroyed; that the window glass have been broken, and the doors and other woodwork of the house greatly marred and defaced; and that the premises are otherwise injured and out of repair in consequence of the refusal or neglect of the defendant to keep them in good repair, as he agreed to do, to the damage of the plaintiff of \$200. Wherefore, etc.

For the law relating to the rights and duties of a tenant as to repairs, see vol. 1, pp. 373-380.

Complaint against landlord for neglect to repair, etc.
(*Title and commencement, as ante, 1040.*)

That on the 1st day of May, 1864, the plaintiff and the defendant made a lease in writing, under their hands and seals, by virtue of which the defendant leased and rented, and the plaintiff hired the following described premises, situated in the village of Johnstown, Fulton county, N. Y., bounded as follows (*describe premises*), at the yearly rent of \$200; that said lease was as follows (*set out a copy*); that the plaintiff entered into the possession and occupation of said premises under and by virtue of said lease, and used them for the purposes for which they were leased and hired; that the defendant has failed, neglected and

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refused to perform the covenants and agreements on his part, in said lease contained; that he has failed, neglected and refused to make the following repairs (*specify them as provided for in the lease*); and that the premises are greatly out of repair (*describe how, and the injuries resulting therefrom*), to the great damage of the plaintiff of \$200. Wherefore, etc. See vol. 1, pp. 373-380.

Complaint by schoolmaster against trustees, etc., on contract with predecessors.

(*Title and commencement, as ante, 1040.*)

That on the 1st day of May, 1860, at the town of Mayfield, in the county of Fulton, N. Y., the plaintiff, at the request of A. B., C. D. and E. F., three trustees of school district number two in said town, commenced teaching the district school in said district, and that for the space of six consecutive months thereafter he continued to teach and educate as a schoolmaster or teacher, the scholars or pupils sent to the school so taught by him; that before and during the time the plaintiff so taught, he was duly qualified and licensed to teach, in the manner required by law; that the said trustees promised and agreed to pay the plaintiff the sum of \$30 a month, for each month during which the plaintiff should so teach said school; that the plaintiff has fully performed the said agreement on his part, by teaching for the time and in the manner so agreed; that the defendants have not performed their said agreement, or any part thereof, but they have wholly neglected and refused to perform the same; that there is now due to the plaintiff, from the said defendants, the sum of \$180. Wherefore, etc. See vol. 1, pp. 366, 367.

If there had been a change of trustees during the time the plaintiff is teaching, or before he sues to recover his wages, the complaint ought to state that fact, which may be alleged as follows: "That afterward, and on the day of , 186 , the said A. B., C. D. and E. F. went out of their office of trustees (*state whether by death, expiration of term or otherwise*), and the defendants succeeded them in the office of trustees, which office they held at the commencement of this action, and still hold; and that the defendants are, therefore, liable to pay to the plaintiff the said sum of \$180, etc."

By an employee, discharged or prevented from fulfilling his contract.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at , the plaintiff and the defendant made an agreement in writing, of which the following is a copy (*set out a copy*) (or made an agreement, whereby the plaintiff undertook to render his services to the defendant as book-keeper, or as salesman, or as teacher, or otherwise as the case may be, from said date to the day of , 1865; in consideration whereof the defendant agreed so to employ the plaintiff during said

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period, and to pay him for his services at the rate of dollars each month); that the plaintiff (entered upon his employment under said agreement, and duly discharged all the duties thereof until the day of , 1865, and he) has ever since been and still is ready and willing (and on the day of , 1865, duly offered) to perform all the conditions of said agreement on his part; that the defendant then refused and still refuses to allow him to do so, or to pay him therefor, to his damage of \$200. Wherefore, etc. See vol. 1, p. 229.

Where the plaintiff has entered into such service under the contract, and is afterward wrongfully discharged before the expiration of the term of service, it is not necessary to allege or prove an offer to serve. *Wallis v. Warren*, 4 Exch. 361. And see *Wilkinson v. Gaston*, 9 Q. B. 137.

By an employer on refusal to serve.

(*Title and commencement, as ante*, 1040.)

That on the day of , 1865, at , the plaintiff and the defendant made an agreement in writing, of which the following is a copy (*set out a copy*) (or made an agreement whereby the defendant agreed to render his services to the plaintiff as book-keeper, or as a salesman, or as a teacher, or otherwise as the case may be), from said date to the day of , 1865; in consideration whereof the plaintiff agreed so to employ the defendant during said period, and to pay him for his services at the rate of dollars each month; that the plaintiff (has ever been ready and willing to employ the defendant, and on the day of , 1865, offered to do so, and has otherwise) duly performed all the conditions on his part; that the defendant entered upon the service of the plaintiff on the above-mentioned day, but afterward on the day of , 1865, and ever since he has refused to serve the plaintiff as aforesaid, to his damage of \$200. Wherefore, etc.

Against overseers of poor for support of a bastard child on contract by predecessors.

(*Title and commencement, as ante*, 1040.)

That A. B. and C. D., the defendants, are now, and were at the time of commencing this action, overseers of the poor of the town of Broadalbin, in the county of Fulton, N. Y.; that heretofore E. F. and G. H. were the overseers of the poor of said town, and were the predecessors in the office of the said defendants; that on the 1st day of January, 1865, the then overseers of the poor of the said town made an agreement with the plaintiff for the support of I. J., a bastard child, chargeable to the said town of Broadalbin, and for the support and maintenance of which said bastard child two of the justices of the peace of the said town had duly made an order of filiation and support; that said E. F. and G. H. requested the plaintiff to support and maintain such

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bastard child for the term of six months from the said 1st day of January, 1865 (*or other time, as the fact may be*), for which support and maintenance the said E. F. and G. H. promised and agreed to pay the plaintiff the sum of \$2 for each week of such time; that the plaintiff, in consideration of such request and promise, and of the premises, did then and there promise to and agree with the said E. F. and G. H. to support and maintain said bastard child, for the price and during the time mentioned; that the plaintiff, in pursuance of such request, promise and agreement, did well, truly and properly support and maintain the said bastard child for and during the time aforesaid; that the said E. F. and G. H. afterward, on the day of , 1865, went out of their office as overseers, as aforesaid (*state whether by expiration of term, or how otherwise*), leaving the said sum of money due and unpaid to the plaintiff, thereupon the said defendants succeeded them in the said office, and they still hold the same; that neither the said E. F. and G. H., nor the said defendants, have either of them paid the said sum or any part thereof, but the same remains due and unpaid to the plaintiff. Wherefore, etc. See vol. 1, pp. 257-262.

Against seller for not delivering.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, the plaintiff and defendant entered into an agreement whereby it was mutually agreed between them as follows: that the defendant should sell and deliver to the plaintiff at Albany, and on or before the day of , 1865 (*or on demand, or within a reasonable time, or otherwise as the case may be*), fifty barrels of flour, and that the plaintiff should pay the defendant therefor, upon the delivery of said flour, at the rate of \$10 for each barrel; that the plaintiff was ready at the time and place appointed to receive said flour, and to pay for the same according to the agreement; and otherwise has duly performed all the conditions on his part; that the defendant neglected and refused to deliver said flour, to the damage of the plaintiff of \$200. Wherefore, etc. Vol. 2, pp. 133, 347-349. As to measure of damages, *ante*, 785.

Complaint against purchaser for not accepting goods.

(*Title and commencement, as ante, 1040.*)

That on the 1st day of May, 1865, at the town of Kinderhook, Columbia county, N. Y., the plaintiff and the defendant made an agreement by which the plaintiff sold to the defendant, and the defendant purchased of the plaintiff, one hundred bushels of corn, at the price of \$1.50 per bushel, on the terms hereinafter stated; that by the terms of said contract of sale the said corn was to be delivered, by the plaintiff to the defendant, on the 10th day of June, 1865, at the dwelling-house of said defendant, in said town, which said corn was to be paid for by the defendant, on the delivery thereof as aforesaid; that afterward, and on the said 10th day of June, 1865, the said plaintiff, at the dwelling-house of the said defendant, offered and tendered the said one

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hundred bushels of corn to the defendant, and was then and there ready and willing to deliver the same to him, as by said agreement he was required; that the said plaintiff then and there requested the said defendant to accept the said corn, and to pay for the same as he had agreed; but that the said defendant then and there refused to accept or receive the same or to pay for it, and that he has always refused, and still refuses to do so; that the plaintiff has, by such refusal, been put to great expense in carrying and tendering the same to the defendant, and in returning it to the premises of the plaintiff, and also in rehousing the same, to the plaintiff's damage of \$200. Wherefore, etc. As to the law in such a case, see vol. 2, p. 345. As to the general law of sales, see vol. 2, pp. 1-136.

Complaint to recover balance on exchange of horses.

(*Title and commencement, as ante, 1040.*)

That on the 1st day of January, 1864, at the city of Albany, N. Y., the plaintiff and the defendant made an agreement for an exchange of horses; that by the terms of said agreement it was agreed that the plaintiff should deliver his horse to the defendant, and the said defendant, in consideration thereof, was to deliver his horse and \$50 in exchange therefor; that the plaintiff then and there delivered his horse to the defendant in pursuance of the said agreement, and the said defendant also then and there, in consideration of the premises and of such exchange, promised and delivered the said horse to the plaintiff, and he also then and there, in consideration of the premises and of such exchange, promised and agreed to and with the plaintiff to pay him the said \$50 on or before the 1st day of February, 1864 (*or on demand; or generally, in which case it is due immediately*); that the said defendant has been frequently requested to perform his said agreement by paying said \$50, but that he has hitherto neglected and refused to do so, or to pay any part thereof, to the plaintiff's damage of \$200, etc. Wherefore, etc. See *Clark v. Fairchild*, 22 Wend. 576; *Farren v. Sherwood*, 17 N. Y. 227; *Common Counts, ante, 314, 315.*

Complaint for breach of warranty of title to goods sold.

(*Title and commencement, as ante, 1040.*)

That on the 1st day of January, 1865, at the city of Albany, the plaintiff, on the offer and at the request of the defendant, purchased of said defendant a one-horse sleigh; that the purchase-price thereof was \$100; at the time of such sale and before the purchase was completed, the defendant represented and warranted that the said sleigh was the property of the defendant; that the plaintiff believed and relied upon such representation and warranty, and in consideration thereof purchased said sleigh of the defendant, and then and there paid him the said sum of \$100 therefor; that at the time of such sale the said defendant was not the owner of said sleigh, but the same was then the property of one William R. Davidson, which the defendant at the time of such sale and warranty well knew. That afterward, the said David-

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son commenced an action in the Supreme Court of this State for the recovery of the possession of said sleigh ; that the plaintiff gave the defendant due and legal notice of the commencement of said action, and he also duly requested the defendant to answer and defend the said action so commenced by said Davidson ; that the defendant neglected and refused to answer or defend said action, and such proceedings were afterward had therein, that the said Davidson recovered a judgment against this plaintiff for the possession of the said sleigh, together with \$100 costs and damages of said action ; that on the 1st day of May, 1865, and before this action was brought, the plaintiff demanded a repayment of the said defendant of the purchase-price of the said sleigh, with interest thereon from the time of such payment, as well as the costs and damages so recovered by the said Davidson against this plaintiff ; that by reason of the premises, the plaintiff thus sustained damages to the amount of \$200. Wherefore, etc.

As to the law in relation to the warranty of title to personal property, see vol. 2, pp. 98-100. As to the allegations in a complaint for a breach of warranty, see vol. 2, pp. 349-351.

Complaint for breach of warranty as to quality of goods sold.

(Title and commencement, as ante, 1040.)

That on the 1st day of January, 1865, at the city of Albany, N. Y., the defendant offered to sell and deliver one hundred barrels of ale to the plaintiff ; that the defendant was then and there a brewer, and at that time carried on the business of brewing ale at the place aforesaid ; that the defendant then and there represented and warranted to the plaintiff that the said ale was of good and merchantable quality ; that it was of the first quality to ship to a distant seaport ; that the said barrels of ale were well and properly filled with ale, and that such ale would not sour nor burst the barrels containing the same, on a distant voyage by sea ; that the plaintiff then and there believed and relied upon such representation and warranty so made by the defendant, and in consequence and consideration thereof, the plaintiff then and there purchased the said one hundred barrels of ale of the defendant, and paid him therefor the sum of \$500 ; that the said ale, at the time of such sale and warranty, was not good and of merchantable quality, nor of the first quality to ship to a distant seaport, nor were the said barrels well and properly filled with ale, nor was the said ale of such a quality that it would not sour or burst the barrels on a distant voyage by sea ; but that on the contrary to such a warranty as aforesaid, the said ale was then and there of a bad and unmerchantable quality ; that it was unfit to ship to a distant seaport ; that the barrels were but partially filled with ale ; that the said plaintiff shipped the said ale to a distant seaport, to-wit, to the city of San Francisco, in the State of California, and that the said ale did sour during such voyage, and became unfit for use ; and that twenty-five of the said barrels of ale did, during said voyage, burst the barrels containing the same ; that said ale was of very little value to the plaintiff, and that by reason of the premises the

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plaintiff has sustained damages to the amount of \$200. Wherefore, etc. See vol. 2, pp. 349-351.

Complaint against receptor for not delivering goods.

(*Title and commencement, as ante, 1040.*)

That on the 12th day of January, 1865, at the city of Albany, N. Y., the defendant, in consideration that the plaintiff would then and there deliver to him one sofa, six chairs (*state the articles*), the said defendant then and there promised and agreed with the plaintiff to redeliver such goods and chattels to the plaintiff on his demand therefor; that on the same day, and at the same place, the plaintiff, in consideration of such promise and agreement, delivered the said goods and chattels to the plaintiff; that afterward, and on the 20th day of January, at the city of Albany aforesaid, the plaintiff duly demanded a redelivery of said goods and chattels of the defendant, who then and there refused to redeliver the same, or any part thereof, to the plaintiff; and that the defendant has ever since refused to redeliver such goods or chattels to the plaintiff, although frequently requested so to do, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 1, pp. 662-664.

Complaint against an agent for not accounting, etc.

(*Title and commencement, as ante, 1040.*)

That on the 12th day of January, 1865, at the city of Albany, N. Y., the plaintiff delivered certain goods and chattels of great value to the defendant, at his request; that such goods and chattels consisted of (*describe them generally*), and were of the value of \$200; that such goods and chattels were delivered to the defendant, to sell and dispose of as an agent of the plaintiff, and for a reasonable consideration to be paid to him therefor by the plaintiff; that it was the legal duty of the defendant, and at the time of such delivery of the goods, etc., to the defendant, for sale, etc., he agreed and promised to the plaintiff that he would render a just, full and reasonable account of such sales, and that he would also pay over the proceeds thereof, in a reasonable time, whenever he should be requested by the plaintiff to do so; that the defendant received the said goods, etc., and afterward sold and disposed of them for the sum of \$200; that since such sale, etc., a reasonable time has elapsed for the accounting and paying over of such proceeds, etc., to the plaintiff; that the plaintiff, on the 1st day of February, 1865, at the city of Albany, N. Y., duly demanded of the defendant an accounting for the proceeds of such sale, and the payment of the money so received from such sale by the defendant; and that the defendant did then and there refuse and neglect to account for or pay over said sum of money, or any part thereof, and still refuses so to do, to damage of the plaintiff of \$200. Wherefore, etc.

As to the general principles relating to the rights and duties of agents, see vol. 1, pp. 426-430.

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If the plaintiff cannot prove that the goods have been sold, the complaint should omit the allegation of sale, and allege instead thereof, "that the defendant agreed and promised to account for the goods delivered to him, whenever requested by the plaintiff," and the complaint should then allege "that on the day of , 186 , at the town of , the plaintiff duly demanded of the defendant that he should account for the said goods to the plaintiff, or deliver the same to him; and that the defendant then and there neglected and refused to account for said goods, or deliver them to the plaintiff."

Such a form of action is proper in those cases in which the agent may have disposed of the property by way of exchange for other property, or in any other manner which did not produce money as the result of the disposition of the property. And it is also proper in those cases in which the agent refuses either to account for the property, or to return it on demand; though in the latter case an action for the conversion of the goods would be preferable.

Complaint against agent for selling goods on credit, and not for cash, or a good bill, contrary to orders.

(*Title and commencement, as ante, 1040.*)

That from the 1st day of May, 1865, and until after the time of the making the sales of goods hereinafter mentioned, the defendant was the servant and agent of the plaintiff; that such defendant was to be paid a valuable and legal consideration for the services so rendered and to be rendered by him for the plaintiff; that on the 29th day of May, 1865, the plaintiff employed and instructed the defendant to sell and dispose of a large quantity of lumber for cash, or for an approved bill for a short date; that the defendant promised and agreed, and it was also his legal duty, as such agent, to sell the said lumber for cash, or for an approved bill at short date; that afterward, and on the 20th day of May, 1865, at the city of Albany, N. Y., the defendant sold and disposed of said lumber for the sum of \$200, otherwise than for cash or an approved bill at short date, and for a bad and insufficient bill of exchange, which has become of no use or value to the plaintiff, and which sum of money is wholly unpaid to the plaintiff, to his damage of \$200. Wherefore, etc. See vol. 1, pp. 404, 450-453.

Complaint against a clerk for selling goods on credit, contrary to express orders.

(*Title and commencement, as ante, 1040.*)

That before and at the time of the making of the sales of goods hereinafter mentioned, the plaintiff was a dry goods merchant, carrying on the business as such in the city of Albany, N. Y.; that at the

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time of the sales hereinafter mentioned, the defendant was a servant, shopman or clerk of the plaintiff, and retained to act as such in said store for a valuable consideration paid and to be paid therefor to him by the plaintiff; that the plaintiff directed and instructed the defendant, as such clerk, etc., not to sell any goods, etc., on credit, or in any other manner than for cash on delivery of the goods to the purchaser; that afterward, on the 1st day of May, 1865, while acting as such clerk, in violation of such orders and instructions, and in violation of his duty as such clerk, the defendant sold and delivered a large quantity of dry goods, etc., the property of the plaintiff, to one John Smith, which goods were of the value of \$200; that the defendant sold and delivered the said goods, etc., to the said Smith on credit, and not for cash; that the said John Smith has not paid plaintiff for the said goods, but that the whole amount of the purchase-price remains unpaid, to the plaintiff's damage of \$200. Wherefore, etc. See vol. 1, pp. 404, 450-453.

Complaint to recover a reward offered by defendant.

(*Title and commencement, as ante, 1040.*)

That on the 12th day of January, 1865, in the city of Albany, N. Y., the defendant published, or caused to be published, a placard, handbill, or advertisement, which, after reciting that one Peter Paywell had been robbed, and that it was feared that he had also been murdered, contained a promise and agreement, on the part of said defendant, that he would pay the sum of \$200 to any person who should give such information as should lead to the discovery and conviction of the person who had committed said crime, except that the person who actually committed the crime should not be entitled to such reward; that the plaintiff in compliance with such request and promise, afterward and on the day of , 1865, did give to the defendant such information as led to the discovery of the said criminal, who was not this plaintiff; that afterward on, etc., at, etc., at a Court of Oyer and Terminer, held at the city of Albany, in and for the county of Albany, one A. B., who was guilty of the said offense of robbery, etc., was in due course of law tried and convicted of the said robbery, in consequence of such information so given by the plaintiff, and that the said sum of \$200 has not been paid to the said plaintiff by the said defendant. Wherefore, etc. See vol. 1, pp. 205, 206, 211.

Verified complaint against maker of a note.

(*Title and commencement, as ante, 1040.*)

That the said defendant heretofore for value received made and delivered to the plaintiff his promissory note, in writing, of which the following is a copy (*set out a true copy of the note*); that no part of said note has been paid (*or if a payment has been made add*), except the sum of dollars; and that there is now due to the plaintiff

from the defendant on said note the sum of _____ dollars, with interest thereon from the _____ day of _____, 1882. Wherefore, etc.
(Signature of plaintiff.)

STATE OF NEW YORK, } ss. :
County of , }

(*Jurat.*)

(Signature.)

“The plaintiff complains of the defendant and alleges upon information and belief.” The complaint should be signed by the person verifying it. The agent must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the plaintiff. *Ante*, 326.

(Venue.)

(*Jurat.*)

(Signature.)

(Title and commencement, as ante, 1040.)

That the defendant A. B., at Albany, N. Y., heretofore made his promissory note in writing, of which the following is a copy (*set out a copy of the note*), and delivered the same to the defendant C. D.; and the said C. D. afterward indorsed said note, and the same was thereupon, and before it became due, for value received, duly transferred to the plaintiff, who then became and still is the owner and holder thereof; that when the said note became due it was duly pre-

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sented at _____, the place where it was made payable, for payment, and payment thereof then and there duly demanded, which was refused; whereupon the said note was then and there duly protested for non-payment, of all which the said C. D. had due notice. That the said defendants have not paid the said note or any part thereof; and that there is due to the plaintiff from the defendants thereon the sum of \$ _____ and \$ _____ expenses of protest, with interest on said sum of \$ _____ from the _____ day of _____, 18 _____. Wherefore, etc. See *Bills and Notes*, vol. 1, pp. 690-804.

Complaint on a note made by partners.

(*Title and commencement, as ante*, 1040.)

That at the time of making the note hereinafter mentioned and set forth the defendants were partners, and doing business under the firm name of Vail & McFarlan; that on the 13th day of January, 1865, at the city of Albany, N. Y., the defendants made, under their firm name of Vail & McFarlan, and delivered to the plaintiff their promissory note in writing, of which the following is a copy (*set out a full copy of the note*); and that there is now due to the plaintiff thereon from the defendants the sum of \$200, with interest from the 13th day of January, 186 _____. Wherefore, etc.

Complaint on a note wrongly dated.

(*Title and commencement, as ante*, 1040.)

That on the 13th day of January, 1864, at the city of Albany, N. Y., the defendant made his promissory note in writing, which, by mistake, bears date on the 13th day of January, 1863, when in truth and fact it was intended that it should bear date on the 1st day of January, 1864, and the defendant thereby, for value received, promised to pay to the plaintiff or his order (*or bearer*) the sum of \$150, one month after the 1st day of January, 1864, and delivered the same to the plaintiff; and that said note has not been paid, nor any part thereof; but the defendant is now indebted to the plaintiff thereon in the sum of \$150, with interest from the said 1st day of January, 1864. Wherefore, etc.

Complaint on a note made by an agent.

(*Title and commencement, as ante*, 1040.)

That on the 13th day of January, 1864, at the city of Albany, N. Y., the defendant, by one A. B., his duly authorized agent, made and delivered his promissory note in writing to the plaintiff; that the following is a copy of said note (*set out a full copy of the note*); that there is now due to the plaintiff from the defendants on said note the sum of \$100, with interest from the 13th day of January, 1864. Wherefore, etc.

Complaint on a note by a surviving partner.

(*Title and commencement, as ante*, 1040.)

That at the time of making the note hereinafter mentioned and set

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forth, the plaintiff and one A. B. were partners, doing business at the city of Albany, N. Y., under the firm name of Smith & Mead; that on the 13th day of January, 1864, at Albany aforesaid, the defendant made and delivered to the said firm, under their firm name of Smith & Mead, his promissory note in writing, of which the following is a copy (*set out a full copy of the note*); that on the 25th day of January, 1864, at Albany, aforesaid, the said Mead died, leaving the plaintiff the sole surviving partner of said firm; and that there is now due to the plaintiff on said note from the defendant the sum of \$100, with interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, pp. 521, 546, 547; *ante*, 76.

Complaint on note by payee against surviving maker.

(*Title and commencement, as ante*, 1040.)

That at the time of making the note hereinafter mentioned and set forth, the defendant and one A. B. were partners, doing business at Albany, N. Y., under the firm name of Wright & Simmons; that on the 13th day of January, 1864, at Albany aforesaid, they made, in their firm name, and delivered to the plaintiff their promissory note in writing, of which the following is a copy (*set out a full copy of the note*); that on the 10th day of March, 1864, at Albany aforesaid, the said defendant Wright died, leaving the defendant Simmons the sole surviving partner of said firm; and that there is now due on said note from the defendant to the plaintiff the sum of \$150, with interest from the 13th day of January, 1864. Wherefore, etc. See *ante*, 83-85.

Complaint by first indorsee against maker of note.

(*Title and commencement, as ante*, 1040.)

That on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his promissory note in writing, of which the following is a copy (*set out a full copy of the note*), and delivered the same to the defendant C. D., therein named as payee, who, then and there, for value received, indorsed it to the plaintiff; and that there is now due to the plaintiff thereon from the defendant the sum of \$100, with interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on note by second indorsee against maker.

(*Title and commencement, as ante*, 1040.)

That on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his promissory note in writing, of which the following is a copy (*set out a full copy of the note*), and delivered the same to C. D., the payee therein named, who then and there indorsed it and delivered it so indorsed, and thereafter, and before its maturity, the same came lawfully into the possession of the plaintiff for value; that the plaintiff is now the lawful owner and holder of the same, and that there is now due to him thereon from the defendant the sum of

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\$175, with interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on note ; first indorsee against payee and indorser.

(*Title and commencement, as ante, 1040.*)

That on the 10th day of January, 1864, at Albany, N. Y., one A. B. made his promissory note in writing, of which the following is a copy (*set out a full copy of the note*), and delivered it to the defendant C. D., who was named a payee therein ; that the said defendant then and there indorsed the said note to the plaintiff for value ; that at maturity the said note was duly presented for payment but was not paid, of which the defendant had due notice ; and that the defendant is now justly indebted on said note, to the plaintiff, in the sum of \$100, with interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on a bill of exchange ; payee against acceptor.

(*Title and commencement, as ante, 1040.*)

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy (*set out a full copy of the bill*) ; that there is now due to the plaintiff thereon, from the defendant, the sum of \$100, with damages and interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on bill of exchange ; payee against drawer for non-acceptance.

(*Title and commencement, as ante, 1040.*)

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, of which the following is a copy (*set out a full copy of the bill*), and delivered the same to the plaintiff ; that the same was duly presented to C. D., therein named as drawee, for acceptance, but was not accepted, of which the defendant A. B. had due notice ; that the said bill of exchange had not been paid, nor any part thereof, and that there is now due thereon, to the plaintiff from the defendant, the sum of \$170, with interest from the 13th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on a bill of exchange ; payee against drawer and acceptor.

(*Title and commencement, as ante, 1040.*)

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, dated on that day, and directed the same to C. D., and thereby required the said C. D. to pay to the order of the plaintiff \$100, three months after the date thereof, for value received, and delivered it to the plaintiff ; that then

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and there (*or on the* *day of* , 186 , *at*) the defendant C. D., upon sight, accepted the said bill; that at maturity the same was duly presented to the defendant C. D., for payment, but was not paid, of which the defendant A. B. had due notice; and that the defendants are now justly indebted upon said bill to the plaintiff in the sum of \$100, with interest from the 15th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on a bill of exchange; indorsee against drawer and acceptor for non-acceptance.

(*Title and commencement, as ante, 1040.*)

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange in writing, dated on that day, and directed it to one C. D., and thereby required the said C. D. to pay to the order of the defendant E. F., \$100, sixty days after the date thereof, for value received, and delivered it to the defendant E. F.; that the said E. F. then and there indorsed the same to the plaintiff; that the same was duly presented to the said C. D. for acceptance, but was not accepted, of which the defendants had due notice; that the plaintiff is now the lawful owner and holder of said bill, and that the same has not been paid, or any part thereof; and that the defendants are now justly indebted to the plaintiff thereon in the sum of \$100, with interest from the 15th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint on a bill of exchange, against drawer, acceptor and indorser, for non-payment.

(*Title and commencement, as ante, 1040.*)

That, on the 13th day of January, 1864, at Albany, N. Y., the defendant A. B. made his bill of exchange, in writing, dated on that day, and directed it to the defendant C. D., and thereby required said defendant C. D. to pay to the order of the defendant E. F. \$100, ten days after date thereof, for value, and delivered it to the defendant E. F.; that on the 13th day of January, 1864, at Albany, N. Y., the defendant C. D., upon sight thereof, accepted said bill; that on the 14th day of January, 1864, at Albany, aforesaid, the defendant E. F. indorsed the same and delivered it so indorsed, and thereafter, and before maturity, the same came lawfully into the possession of the plaintiff, for value; that at maturity the same was duly presented to the defendant C. D. for payment, but was not paid, of which the defendants A. B. and E. F. had due notice; that the plaintiff is the lawful owner and holder of the said bill, and that the same has not been paid, nor any part thereof, and the defendants are now justly indebted to him therefor in the sum of \$100, with interest from the 14th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

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Complaint on a bill of exchange, drawer against acceptor, on a bill returned to drawer and taken up by him.

(*Title and commencement, as ante, 1040.*)

That on the 13th day of January, 1864, at Albany, N. Y., the plaintiff made his bill of exchange in writing, dated on that day, and directed it to the defendant, and thereby required the defendant to pay to the order of one A. B., \$90, ten days after the date thereof, and delivered the same to the said A. B.; that on the 14th day of January, 1864, at Albany, aforesaid, the defendant, upon sight thereof, accepted said bill for value received; that on the 26th day of January, 1864, at Albany, aforesaid, the same was returned to the plaintiff for non-payment, and the plaintiff, as drawer thereof, was then and there compelled to pay to said A. B. (*or to the holder thereof*) the sum of \$100, being the amount of said bill with costs of protest and interest; that the plaintiff is now the lawful owner and holder of said bill, and that the same has not been paid, nor any part thereof; and that the defendant is now justly indebted to him thereon in the sum of \$100. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint upon check; payee against drawer.

(*Title and commencement, as ante, 1040.*)

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed the same to the Commercial Bank of Albany, N. Y., and thereby required said bank to pay to this plaintiff or order (*or bearer*), \$100 for value received, and delivered said check to the plaintiff; that the same was duly presented to the said Commercial Bank for payment, but was not paid, of which the defendant had due notice, and he is now justly indebted to this plaintiff thereon in the sum of \$100, with interest from the 14th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint upon check; indorsee or bearer against drawer.

(*Title and commencement, as ante, 1040.*)

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed to the Commercial Bank of Albany, N. Y., and thereby required the said Commercial Bank to pay one A. B. or order (*or bearer*), \$150, for value received, and delivered it to said A. B. (*if payable to order, add who indorsed the same and delivered it so indorsed*); and the same thereafter came lawfully to the possession of the plaintiff; that thereafter the same was duly presented to said Commercial Bank for payment, but was not paid, of which the defendant had due notice; that this plaintiff is now the lawful owner and holder of the same, and that the defendant is now justly indebted to him thereon in the sum of \$150, with interest from the 15th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

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Complaint on a check; indorsee against drawer; drawer insolvent, non-presentment therefor excused.

(*Title and commencement, as ante, 1040.*)

That on the 14th day of January, 1864, at Albany, N. Y., the defendant made his check in writing, dated on that day, and directed the same to the Commercial Bank of Albany, N. Y., and thereby required the said Commercial Bank to pay to the order of one A. B. \$75, for value received, and delivered the same to the said A. B., who thereupon indorsed it to the plaintiff; that on the said 14th day of January, 1864, said Commercial Bank had stopped payment (*or the said drawer was insolvent*), and said check has not been paid, nor any part thereof; and the defendant is now justly indebted to this plaintiff thereon, in the sum of \$75, with interest from the 14th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint upon check; indorsee or bearer against drawer and indorser.

(*Title and commencement, as ante, 1040.*)

That on the 14th day of January, 1864, at Albany, N. Y., the defendant A. B. made his check in writing, dated on that day, and directed to the Commercial Bank of Albany, N. Y., and thereby required said Commercial Bank to pay to the defendant C. D., or order (*or bearer*), \$100, for value received, and delivered the same to the defendant C. D.; that thereupon the said defendant C. D. indorsed the same to the plaintiff (*or indorsed the same and delivered it so indorsed; and thereafter it came lawfully into the possession of the plaintiff, for value*); that said check was duly presented for payment, but was not paid, of which the defendants A. B. and C. D. had due notice; that the plaintiff is now the lawful owner and holder of said check, and the defendants are now justly indebted to the plaintiff thereon, in the sum of \$100, with interest from the 16th day of January, 1864. Wherefore, etc. See vol. 1, *Bills and Notes*.

Complaint against bank on certified check.

(*Title and commencement, as ante, 1040.*)

That the defendants are a corporation, created by and under the laws of this State, organized pursuant to an act of the legislature entitled "An act to authorize the business of banking" (*or if acquired under a special charter, state the title, date of act, etc.*), and the acts amending the same; that on the 14th day of January, 1864, at Albany, N. Y., one A. B. made his check in writing, bearing date on that day, and directed it to the defendants, and thereby required them to pay to the plaintiff, or order (*or bearer*), \$100, for value received, and delivered the same to the plaintiff; that on the 14th day of January, 1864, the defendants, by their agent duly authorized thereto in writing, accepted and certified the same to be good; that thereafter the same was duly presented for payment, but was not paid; and the defendants are now justly indebted to this plaintiff thereon, in the sum of \$100, with in-

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terest from the 14th day of January, 1864. Wherefore, etc. See vol. 1, pp. 226, 227, 448.

Complaint upon a chattel note; holder against maker.

(*Title and commencement, as ante, 1040.*)

That on the 22d day of April, 1850, at New York city, the defendants, for value received, and expressed in the note hereinafter mentioned and set forth (*or when no consideration is expressed in the note, for and in consideration of, etc., stating the real consideration*), made their promissory note in writing, of which the following is a copy: "For value received, we jointly and severally promise to pay to C. L. Brown, or order, in merchandise, on demand, after May 1, 1850, \$100. T. G. Richardson. New York, April 22d, 1850. David Woods," and delivered the same to the said C. L. Brown; that afterward, and on the 22d day of April, 1850, at New York aforesaid, the said note was duly indorsed by the said C. L. Brown to the plaintiff; that thereafter, and on the 2d day of May, 1850, the plaintiff duly demanded the payment of said note of the defendants, in merchandise, at their store, in the city of New York, at No. 500 Broadway, which merchandise the plaintiff was ready and willing to accept and receive of the defendants, in payment of said note, according to its terms and conditions; that the said defendants then and there refused to pay the said note in merchandise or in money; that the plaintiff is now, and was at the commencement of this action, the lawful owner and holder of said note; that the plaintiff has duly performed all the conditions of the same on his part, but that the same has not been paid nor any part thereof, and that the defendants are now justly indebted to the plaintiff therein, in the sum of \$100, with interest from the 2d day of May, 1850. Wherefore, etc. See vol. 1, pp. 721-727. See, also, *Brown v. Richardson*, 20 N. Y. 472.

Complaint on a guaranty of payment.

(*Title and commencement, as ante, 1040.*)

That, on the 1st day of May, 1863, at Albany, N. Y., one A. B., by agreement in writing with this plaintiff, hired, and the plaintiff let to him, the building No. 55 State street, in the city of Albany, aforesaid, at the yearly rent of \$150, payable quarterly, which rent the said A. B., by said agreement, promised punctually to pay; that the defendant, in consideration of the premises and of one dollar to him paid and as a security for the punctual payment of said rent, then and there subscribed and delivered to the plaintiff an agreement in writing, of which the following is a copy (*set out a full and literal copy of the guaranty*); that the said A. B. occupied the said premises under the said agreement of hiring, from the 1st day of May, 1863, to the 1st day of May, 1864; that the said A. B. has made default in the payment of the rent thereof, and is now justly indebted to the plaintiff in the sum of \$100 for the rent of said premises, due on each quarter; that the plaintiff

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iff duly demanded the rent of said A. B. on the proper quarter day for the payment thereof; and on the 1st day of May, 1864, he requested the said A. B. to pay the full amount of said rent, which he neglected and refused to pay, and that the whole rent of said premises remains due and unpaid; that before the commencement of this action and on the 4th day of May, 1864, the plaintiff duly notified said defendant of said demand and non-payment of rent by the said A. B., and the plaintiff then and there duly demanded payment from the defendant of said sum of \$100, which he neglected and refused to pay; and that the said rent has not been paid nor any part thereof, to the plaintiff's damage of \$100. Wherefore, etc. See vol. 1, pp. 687-689

Complaint on guaranty to pay for goods sold, etc.

(*Title and commencement, as ante, 1040.*)

That, on the 14th day of January, 1864, at Albany, N. Y., in consideration that the plaintiff, at the request of the defendant, would sell to one A. B., on a credit of three months, such goods, etc., as the said A. B. should desire to purchase of the plaintiff, the defendant promised to be answerable to the plaintiff for the payment by the said A. B. of the price of goods, etc., so sold on credit to the said A. B.; that a memorandum of said agreement was thereupon made in writing expressing the consideration thereof, and was subscribed by the defendant, of which the following is a copy (*set out a full copy of the memorandum*); that the plaintiff afterward, and on the faith of said guaranty, sold and delivered to said A. B. (*state the goods sold*), for the sum of \$200, on a credit of three months, which sum became due therefor to the plaintiff on the 20th day of April, 1864; that payment of the same was then duly demanded of the said A. B., but the same was not paid, of all of which the defendant had due notice; that on the 21st day of April, 1864, at Albany, aforesaid, payment of the same was duly demanded by the plaintiff from the defendant, but the same has not been paid, nor any part thereof, to the plaintiff's damage of \$200. Wherefore, etc. See vol. 1, pp. 687-689.

Complaint on guaranty of a precedent debt.

(*Title and commencement, as ante, 1040.*)

That on the 14th day of January, 1864, at Albany, N. Y., one A. B. was indebted to the plaintiff in the sum of \$100, which was then (*or on the 16th day of January, 1864, became*) due and payable to the plaintiff; that on the 15th day of January, 1864, at Albany aforesaid, the defendant made and subscribed a memorandum in writing, of which the following is a copy (*set out a full copy of the memorandum*), and thereby promised and agreed, for value received, to answer to the plaintiff for said debt, and to pay the same to him; that on the 17th day of January, 1864, at Albany aforesaid, payment of the said money was duly demanded by the plaintiff from the said A. B., but the same was not paid, of all which the defendant had due notice; that on the 18th day of January, 1864, at Albany aforesaid, payment of the same

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was duly demanded by the plaintiff from the defendant, but the same has not been paid, nor any part thereof, to the plaintiff's damage of \$100, with interest from the 14th day of January, 1864. Wherefore, etc. Vol. 1, pp. 687-689.

On contract of sale or return.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the city of Albany, N. Y., the plaintiff, at the request of the defendant, delivered to him (*briefly describe the goods*) then and before that time the property of the plaintiff, of the value of \$200, upon the condition and consideration that the defendant would purchase the same for \$200 (*or at a reasonable price*), or return the said property to the plaintiff within a reasonable time, which the defendant then and there undertook and promised to do; that the plaintiff has duly performed all the conditions of said agreement on his part; that although a reasonable time for the defendant to purchase or pay for said goods, or to return them to the plaintiff, had elapsed before the commencement of this action, he has not done so, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 2, pp. 23, 24.

For services; general form.

(*Title and commencement, as ante, 1040.*)

That from the 1st day of May, 1865, to the first day of October, 1865, the plaintiff rendered services to the defendant, at his request, as a clerk in his store (*or as the fact may be*); that for said services the defendant promised to pay the plaintiff \$50 a month (*or that the same were reasonably worth \$50 a month, which sum became due on the day of , 1865*); that no part of the same has been paid. Wherefore, etc. See vol. 1, pp. 199-240; vol. 2, pp. 351-373.

For services; upon an account.

(*Title and commencement, as ante, 1040.*)

That the defendant is indebted to the plaintiff on an account for the work, labor and services of the plaintiff and his servants in (*state briefly the nature of the services rendered*), performed at the request of the defendant, between the 1st day of January, 1864, and the 1st day of October, 1865, in the sum of \$150, with interest thereon from the first day of November, 1865; that no part of the same has been paid (*except the sum of, etc.*). Wherefore, etc. See vol. 1, pp. 199-240; vol. 2, pp. 351-373.

For work and materials furnished.

(*Title and commencement, as ante, 1040.*)

That, from the 1st day of January, 1865, to the 1st day of July, 1865, the plaintiff rendered services to the defendant, at his request, in printing five thousand copies of a work called "Abbott's Forms," and

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that the plaintiff then and there furnished the paper and other materials necessary in the said work, upon the like request, and that he delivered the same to the defendant; that the said services and materials were reasonably worth the sum of \$, which sum became due on the day of November, 1865; that no part of the same has been paid. Wherefore, etc. See vol. 2, pp. 373-376.

For goods sold; seller against buyer.

(*Title and commencement, as ante, 1040.*)

That, on the day of , 1865, at the city of Albany, N. Y., the plaintiff sold and delivered to the defendant (*here designate the articles, as dry goods, crockery, groceries, etc.*); that the same were reasonably worth the sum of \$100; that no part of the same has been paid (*except, etc.*). Wherefore, etc. See vol. 2, p. 345.

Goods sold; price agreed on.

(*Title and commencement, as ante, 1040.*)

That, on the day of , 1865, at the village of Valatie, N. Y., the plaintiff sold and delivered to the defendant (*briefly designate the articles*); that the defendant then promised to pay therefor the sum of \$100 (*if a credit was given, say, on the day of , 1865*); that on the day of , 1865, the plaintiff demanded of the defendant payment of the said sum, that no part thereof has been paid (*except, etc.*). Wherefore, etc.

Goods sold; upon an account.

(*Title and commencement, as ante 1040.*)

That, on the day of , 1865 (*or between two days, naming them*), the defendant was indebted to the plaintiff in the sum of \$100 on an account for goods sold and delivered to the defendant, at Valatie, N. Y.; that the same became payable on the day of , 1865, but no part thereof has been paid (*except the sum of*). Wherefore, etc.

For board and lodging.

(*Title and commencement, as ante, 1040.*)

That from the day of , 1865, until the day of , 1865, the defendant occupied certain rooms in, and part of the house No. street (*or in the plaintiff's dwelling-house, in the village of Johnstown*), by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance and other necessities; that in consideration thereof, the defendant promised to pay to the plaintiff the sum of dollars (*or that the same were reasonably worth the sum of dollars*); that the defendant has not paid the same. Wherefore, etc.

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Hire of personal property.

(*Title and commencement, as ante, 1040.*)

That between the day of , 1865, and the day of , 1865, the defendant hired from the plaintiff horses, carriages and saddles, for which he owes the plaintiff on an account thereof, the sum of \$100, which was due and payable on the day of , 1865; that no part of the same has been paid (*except the sum of, etc.*) Wherefore, etc.

Hire of chattels, with damages for ill use.

(*Title and commencement as ante, 1040.*)

First. For a first cause of action, that on the day of , 1865, at the city of Albany, N. Y., the defendant hired from the plaintiff household furniture, plate, pictures and books, the property of the plaintiff, to-wit (*describe or enumerate the articles, or refer to a schedule annexed*), for the space of six months then next ensuing, to be returned by him to the plaintiff at the expiration of said time, in good condition, reasonable wear and tear thereof excepted; that he promised to pay the plaintiff for the use thereof \$100 at the expiration of said six months (*or otherwise as the case may be*); that no part thereof has been paid (*except the sum of, etc.*) *Second.* For a second cause of action, this plaintiff further states that the value of the property so hired by the defendant, as above alleged, was \$500; that the defendant, not regarding the said undertaking to return the said property in good condition, took so little care thereof, that through his negligence, carelessness and ill use, the same became broken, defaced and damaged, beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage of \$100. Wherefore, etc. See vol. 1, pp. 586-591.

Money lent; lender against borrower.

(*Title and commencement, as ante, 1040.*)

That, on the 1st day of January, 1865, at the city of Albany, N. Y., the plaintiff lent to the defendant, at his request, the sum of \$150, on the condition and terms that it should be repaid (*with interest*) upon demand (*or repaid on the 1st day of May, 1865*); that thereafter and before this action was commenced (*or on the 1st day of November, 1865*), the plaintiff duly demanded payment of the same from the defendant, but no part thereof has been paid (*except the sum of, etc.*); and the defendant is now justly indebted to this plaintiff in the sum of \$150, from the 1st day of May, 1865 (*or if it was to be repaid on demand, claim interest from the day of demand.*) Wherefore, etc. See vol. 2, pp. 376-378.

Money lent; assignee of lender against borrower.

(*Title and commencement, as ante, 1040.*)

That, on the day of , 1865, at the city of Albany,

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N. Y., the defendant was indebted to one A. B. in the sum of \$100, on account for money lent by said defendant, and for money paid, laid out and expended by said A. B. to and for the use of said defendant, and at his request; that thereafter and before the commencement of this action, the said A. B. duly assigned said indebtedness to this plaintiff, of which the defendant had due notice, but no part of the same has been paid, and there is now due and payable to this plaintiff thereon the sum of \$100 (*with interest from the day of, etc.*). Wherefore, etc.

Money had and received.

(*Title and commencement, as ante, 1040.*)

That, on the day of , 1865, at the city of Albany, N. Y. (*or, at sundry times between the day of , 1865, and the day of , 1865, at the city of Troy, N. Y.*), the defendant received from one A. B. (*or received from the plaintiff, and as his agent, or otherwise as the case may be*) the sum of \$100 to the use of the plaintiff; that thereafter, and before the commencement of this action, the plaintiff demanded payment thereof from the defendant; that he has not paid any part thereof (*except the sum of, etc.*) Wherefore, etc. See vol. 2, pp. 391-407.

To recover money lost by betting.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the village of Saratoga Springs, the plaintiff and one A. B. entered into a wager, depending upon the result of the general election in this State, in that year, which was then about to take place (*or, upon the event of a horse-race then about to take place*); that while the event upon which said wager was made was still contingent (*or, unknown, or both*) the plaintiff deposited in the hands of the defendant, as stakeholder, the sum of \$200, to abide the event of such wager, whereby an action has accrued to the plaintiff, according to the provisions of the statute of betting and gaming. Wherefore, etc. See vol. 2, pp. 402-405.

Money received on judgment afterward reversed.

(*Title and commencement, as ante, 1040.*)

That, on or about the 1st day of January, 1865, the defendant recovered judgment, duly given against this plaintiff, in a justice's court, held by and before Harley Bartlett, Esq., a justice of the peace of the town of Mayfield, Fulton county, N. Y., in an action for the recovery of money lent, etc., in which action the defendant was plaintiff and this plaintiff was defendant, for the sum of \$100; that on the day of , 1865, at the said town of Mayfield, the plaintiff was compelled to pay, and did pay to the defendant, the sum of \$100 in satisfaction thereof; that afterward, on the 1st day of April, 1865, by the judgment of the County Court of Fulton county (*or other appellate court*),

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said first-mentioned judgment was duly reversed, but that no part of the sum paid in satisfaction thereof has been repaid to this plaintiff. Wherefore, etc. See *Lott v. Swezey*, 29 Barb. 87, 93; *Scholey v. Halsey*, 72 N. Y. 578; *Sturges v. Allis*, 10 Wend. 355; *Marriott v. Hampton*, 7 Term R. 269; *Walker v. Ames*, 2 Cow. 428; *White v. Ward*, 9 Johns. 232; vol. 2, p. 755.

Money paid.

(*Title and commencement, as ante*, 1040.)

That, on the day of , 1865, at the city of Albany, N. Y., at the request of the defendant, the plaintiff paid to one A. B. the sum of \$100; that in consideration thereof, the defendant promised to repay the same to the plaintiff (*on demand*); that (*on the day of , 1865, the plaintiff demanded payment of the same from the defendant, but*) he has not repaid the same. Wherefore, etc. See vol. 2, pp. 378-391.

By surety against principal, for money paid on undertaking on appeal.

(*Title and commencement, as ante*, 1040.)

That, on the day of , 1865, one A. B. recovered, in a justice's court, held by and before Harley Bartlett, Esq., a justice of the peace of the town of Mayfield, in Fulton county, N. Y., a judgment duly given against the defendant, for the sum of \$100, for money lent (*or as the case may be*), from which judgment the defendant appealed to the County Court of Fulton county; that, on the day of , 1865, at the request of the defendant, the plaintiff executed an undertaking in writing, of which the following is a copy (*set out a copy*); that, on the day of , 1865, the said County Court duly affirmed the said justice's judgment, and the sum of \$40 was awarded and adjudged as damages and costs on the said appeal; that, on the day of , 1865, the plaintiff paid \$140 upon the said appeal undertaking, to the said A. B.; that, on the day of , 1865, this plaintiff demanded of the defendant the said sum of \$140, but that no part of the same has been paid to him. Wherefore, etc. See vol. 1, pp. 677-679.

Money due on an account.

(*Title and commencement, as ante*, 1040.)

That the defendant is indebted to the plaintiff in the sum of \$200, upon an account for (*state briefly the consideration, as for goods sold, money lent, services rendered, etc.*), at the city of Albany, N. Y., between the day of , 1865, and the day of , 1865; that the said sum of \$200 became payable thereon on the day of , 1865, but no part thereof has been paid. Wherefore, etc. As to furnishing a bill of particulars, see *ante*, 315-318.

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*On an account stated.**(Title and commencement, as ante, 1040.)*

That, on the day of , 1865, at the city of Albany, N. Y., an account was stated between the plaintiff and the defendant, and upon such statement a balance of \$200 was found to be due from said defendant to the plaintiff; that *(the defendant then and there promised to pay said sum, but)* no part thereof has been paid. Wherefore, etc. See vol. 2, pp. 4114-17 as to an account stated.

*On an award.**(Title and commencement, as ante, 1040.)*

That, on the day of , 1865, at the city of Albany, N. Y., disputes and differences were subsisting between the plaintiff and the defendant, touching a demand made by the plaintiff against the defendant, for the sum of \$200 for services rendered by the plaintiff to the defendant, as a clerk in his store, and at his request, which demand the defendant disputed and refused to pay *(or other claim, as the case may be)*; that for the purpose of putting an end to said disputes and differences, they then and there, by an agreement in writing, submitted themselves to the arbitrament, award and final determination of one A. B., indifferently chosen on behalf of the plaintiff and defendant, to arbitrate and determine concerning said disputes and differences, and mutually promised each other to abide by and perform his award; that thereafter * the said arbitrator, having undertaken the arbitration, heard the plaintiff and the defendant; and on the day of , 1865, at the city of Albany, duly made and published his award, in writing, of and concerning the matter so referred, which award bears date the day of , 1865, and thereby he awarded and declared, that after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the said sum of \$200 for the services aforesaid *(or as the case may be)*; that the plaintiff has duly performed all the conditions on his part, and afterward, and on or about the day of , 1865, he gave notice of said award to the defendant, and demanded of him payment of the said sum of \$200; that the defendant then and ever since has refused to pay the same, and there is now due from the defendant to the plaintiff thereon, the sum of \$200, with interest from the day of , 1865. Wherefore, etc. See vol. 2, pp. 831-869.

For revoking submission to arbitrators.

*(Title and commencement as ante, 1040, then set forth the submission and subsequent proceedings according to the facts substantially as in preceding form to the *, then add.)*

On the day of , 1865, at Albany, aforesaid, the said arbitrator proceeded upon the said submission so made as aforesaid, and the said parties then appeared before the said arbitrator and proceeded to the trial and investigation of the matters so submitted to such arbi-

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trator; that afterward, and on the day last mentioned, and after the investigation had been commenced, and before the cause was finally submitted to said arbitrator, the said defendant revoked the said submission (*by a revocation in writing*), whereby the powers of the said arbitrator in the premises ceased, and were annulled, and whereby the said plaintiff sustained great damages, to-wit, to the amount of \$200, for his costs, expenses and damages, in employing and paying counsel, subpoenaing and paying witnesses, and in otherwise preparing for the trial of the said cause before the said arbitrator. Wherefore, etc. See vol. 2, pp. 862, 863.

Upon a compromise of an action.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, an action was pending between the parties to this action, brought by the plaintiff to recover from the defendant the sum of \$200, which the defendant owed to the plaintiff, but which he disputed; that in consideration that the plaintiff would discontinue his said action, and would accept \$100 in satisfaction of said disputed claim, the defendant promised to pay the plaintiff the sum of \$100 (*on the day of, etc.*); that the plaintiff did, accordingly, discontinue his said action; and that no part of the said sum of \$100 has been paid. Wherefore, etc.

§ 2. **Complaints for torts.** The general rules relating to complaints in actions for torts or wrongs will be found in a preceding chapter. See *ante*, 318. The essential allegations in the several actions will readily be gathered from the following precedents.

Trespass to land.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, the defendant wrongfully broke and entered certain lands of the plaintiff (*briefly designating them*), and depastured the same with cattle to his damage of \$100. Wherefore, etc. See vol. 2, p. 472.

The same; another form.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the town of Kinderhook, the defendant forcibly broke and entered (*or wrongfully entered*) upon the plaintiff's lands (*briefly designating them*),* and trod down the grass, cut the timber, and otherwise injured said premises, to the plaintiff's damage of \$100. Wherefore, etc.

The same, for cutting and converting timber.

(*Title and commencement, as ante, 1040.*)

(*As in the last form down to *, and then continue thus:*) and then cut down and carried away the trees and timber of this plaintiff, and con-

Complaints for torts.

verted and disposed of the same to his own use, to the plaintiff's damage of \$100. Wherefore, etc.

For treble damages for injuring trees.

(*Title and commencement, as ante, 1040.*)

That the defendant, in the month of _____, 1865, wrongfully and unlawfully entered upon the land of the plaintiff, in the town of Kinderhook (*briefly describe premises, the same then being in the possession of the plaintiff*), and did, without the leave of the plaintiff, the owner thereof, cut down (*or carry off, or cut down and carry off*) ten maple trees and five oak trees (*or otherwise describe the wood, underwood, trees or timber*), of the value of \$100; and girdled (*or otherwise despoiled*) other trees (*designating number and kind*) of the value of \$25; whereby the plaintiff lost said trees and timber, and the land belonging to the plaintiff was greatly damaged and lessened in value to the amount of \$25; and thereby the defendant, by the force of sections 1667 and 1668 of the Code of Civil Procedure, became liable to pay to the plaintiff treble the amount of said damages. Wherefore, etc. See vol. 2, pp. 482, 483.

For diverting water from plaintiff's mill.

(*Title and commencement, as ante, 1040.*)

That at the times hereinafter mentioned, the plaintiff was lawfully possessed of a water mill, called a grist-mill (*or saw-mill*), situated upon the Kinneatto creek, at Vail's Mills, in the town of Mayfield; that the plaintiff then had a right to use and employ the water of said creek, and to have the same flow to and through his mill in a convenient and customary manner, according to the natural and usual flow of said creek, and without the hindrance of the defendant or any other person; that on the _____ day of _____, 1865, and on various other days between that time and the _____ day of _____, 1865, the defendant (*knowing the premises, and intending to injure the plaintiff*) wrongfully *dug up and removed the banks of said creek above the said mill, and for sixty days diverted the water (*or a part of the water*) thereof from running to and through said mill (*or built a dam across said creek above said mill, and for sixty days stopped the water thereof from running to and through said mill*); that, by reason of such acts of the defendant, the plaintiff's mill, which was able, and, before such obstruction or diversion of water, was used, to grind five hundred bushels of grain each day, but that thereafter, and during the time of such obstruction or diversion, said mill was in consequence thereof unable to grind more than two hundred and fifty bushels of grain each day, to the plaintiff's damage of \$200. Wherefore, etc. See vol. 2, p. 509.

For erecting a dam below, causing backwater.

(*Title and commencement, as ante, 1040.*)

(*As in the preceding form to the *, and then continuing:*) erected a dam and mill upon the same stream, a little below the plaintiff's said

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mill, and has continued the same ever since, whereby the defendant causes a backwater that hinders a free course of said stream from the plaintiff's mill, to the nuisance of his mill, and to the hindrance of his business, to his damage of \$200; that by reason of such acts of the defendant, the plaintiff's mill, which was able, and, before such obstruction of the water of said stream, was used to grind five hundred bushels of grain each day, but that thereafter, and during the time of such obstruction of the water, the said mill was unable, in consequence of such obstruction, to grind more than two hundred and fifty bushels a day, to the plaintiff's damage of \$200. Wherefore, etc. See vol. 1, p. 522.

Nuisance arising from slaughter-house.

(*Title and commencement, as ante, 1040.*)

That the plaintiff is, and at the times hereinafter mentioned was (*the owner*), and possessed of the house and lot No. , in street, in the city of , which he inhabited with his family; that the defendant was also then possessed of certain premises contiguous to (*or in immediate vicinity of*) those of the plaintiff;* that the defendant, in the month of , 1865, erected on his said premises a slaughter-house and cattle-pens, and thereafter † kept and slaughtered therein large numbers of cattle and hogs, thereby causing noxious and offensive smells, and loud and offensive noises, and tainting and corrupting the atmosphere, so as to render the dwelling-house and premises of the plaintiff unfit for habitation, to the nuisance of the said dwelling-house and premises of the said plaintiff, and to his damage of \$200. Wherefore, etc. See vol. 2, pp. 445-458.

For continuing a nuisance.

(*As in the last form to the* and then continue:*) that ever since the day of , 1865, the defendant has maintained a slaughter-house on his premises contiguous thereto (*or in the immediate vicinity thereof*), and has (*as in the last form from the † to the end of the form.*)

Trespass for taking goods, etc.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the city of Albany, N. Y., the defendant unlawfully took from the possession of the plaintiff, and carried away (*here briefly designate the goods*) the property of the plaintiff, of the value of \$200 (*and still unlawfully detains the same from the plaintiff*), to his damage of \$200. Wherefore, etc. See vol. 2, pp. 541-553.

Trover, for converting goods, etc.

(*Title and commencement, as ante, 1040.*)

That before and until the time hereinafter mentioned, the plaintiff was lawfully possessed of (*very briefly designate the goods, or, where*

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he was not in possession, say, was entitled to immediate possession of, designating the goods), which was his property, and was of the value of \$200; that on the day of , 1865, at the village of Valatie, the defendant then being in possession of said goods, unlawfully converted and disposed of the same, to his own use, to the plaintiff's damage of \$200. Wherefore, etc. See vol. 2, pp. 553-585.

Trover by assignee after conversion.

(Title and commencement, as ante, 1040.)

That before and until the time hereinafter mentioned, one A. B. was lawfully possessed of (*briefly designate the goods*), or was entitled to the immediate possession of (*designating the goods, etc.*), which was then the property of said A. B., and of the value of \$200; that on the day of , 1865, at the village of Kinderhook, the defendant, being then in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the said A. B., of \$200; that afterward, and on the day of , 1865, the said A. B. duly assigned to the plaintiff his claim against the defendant for the damages for said conversion. Wherefore, etc.

Replevin; ordinary form.

(Title and commencement, as ante, 1040.)

That at the time hereinafter mentioned, the plaintiff was lawfully possessed of (*describe the goods particularly*), of the value of \$100, then and ever since his property; that on the day of , 1865, at (*state the particular place*), the defendant wrongfully took said goods and chattels from the possession of this plaintiff, and still detains the same to the damage of the plaintiff of \$100.* Wherefore the plaintiff demands judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of \$100, the value thereof, in case a delivery cannot be had; together with \$100, his damages and for his costs, etc. See vol. 2, pp. 631-644.

Replevin; owner against wrong-doer for taking goods from plaintiff's bailee.

(Title and commencement, as ante, 1040.)

That at the time hereinafter mentioned the plaintiff was, and still is, the owner of (*describe the chattels particularly*), of the value of \$100; which goods were then in possession of one A. B., to whom the plaintiff had leased or let the same for a certain term (*or otherwise, as the case may be*); that on the day of , 1865, at Valatie, the defendant wrongfully took said goods and chattels from the possession of the said A. B., and still unjustly detains the same, to the plaintiff's damage of \$100; that before the commencement of this action the said term expired, and, therefore, the plaintiff became entitled to the immediate and exclusive possession of said goods and chattels. (*Then demand judgment as in the last form after the *.*)

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*Replevin ; assignee against wrong-doer.**(Title and commencement, as ante, 1040.)*

That at the time hereinafter mentioned, one A. B. was lawfully possessed of (*briefly designate the goods*) the property of the said A. B., of the value of \$100; that on the day of , 1865, at the village of Kinderhook, the defendant wrongfully and unlawfully took said goods and chattels from the possession of the said A. B., and ever since has unjustly detained the same, to the damage of the said A. B. of \$100; that on the day of , 1865, the said A. B. duly assigned to the plaintiff said goods and chattels, and his claim to damages for said taking and detention. (*Demand for judgment as in the last two forms.*) See vol. 2, pp. 631-644. As to the practice in replevin action, see *ante*, 204-231.

*For a false warranty of a horse.**(Title and commencement, as ante, 1040.)*

That on the day of , 1865, at the village of Kinderhook, the defendant offering to sell to the plaintiff a certain horse, warranted, and falsely and fraudulently represented said horse to be sound, kind and true, and gentle and quiet in harness; that the plaintiff, relying upon said warranty and representations, then and there purchased said horse, and paid to the defendant therefor the sum of \$200; that at the time of said warranty, representations and sale, the said horse was unsound, unkind and untrue, and restive and ungovernable in harness, and had an infectious disease, and was actually worthless (*or was worth \$100 less than he would have been had he been as represented and warranted*), and was well known by the defendant to be so at the time of such sale, etc., and that the said horse still so remains (*if special damages are claimed, allege them as follows, or as the case may be*); that the plaintiff relying upon the said representations and warranty of the said defendant, afterward attempted to use the said horse in harness, and the said horse being unkind, unsteady, restive and ungovernable in harness, without the fault of the plaintiff, ran away, greatly injuring and breaking the plaintiff's wagon, and greatly injuring and bruising the plaintiff, whereby the plaintiff became sick, sore and lame, and was hindered from attending to his work, as a mason, and was put to great expense in repairing his wagon and harness, and in recovering from his hurts and injuries; that by reason of the premises the plaintiff was misled and injured to his damage of \$200. Wherefore, etc. See vol. 2, pp. 349. 350.

*For a fraudulent concealment on a sale.**(Title and commencement, as ante, 1040.)*

That on the day of , 1865, at the village of Kinderhook, the plaintiff bought of the defendant his certain horse for the sum of \$200, then paid therefor; that the defendant then and there well knew that the said horse had the heaves, which fact was then unknown

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to the said plaintiff; he, the said defendant, then intentionally, falsely and fraudulently concealed the said fact from the knowledge of the said plaintiff, and thereby sold the said horse to him for the price aforesaid; and that the said horse so purchased from the defendant had the heaves at the time of the said sale and purchase thereof to the knowledge of the said defendant, and was thereby rendered, and has since continued, utterly unfit for use, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 2, pp. 625-629.

For fraudulently obtaining goods on credit.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the village of Gloversville, the defendant, with intent to deceive and defraud the plaintiff by inducing the plaintiff to sell him goods, falsely and fraudulently represented to the plaintiff that he was solvent, and worth \$20,000 over and above all his liabilities (*or otherwise as the representations were*); that the plaintiff, relying on said representations, was thereby induced to sell (*and deliver*) to him (*briefly designate the goods*) of the value of \$200; that said representations were false in that (*stating in what respect*), and were then known by the defendant to be so; that no part of the price thereof has been paid (*and, if the goods were not delivered*); that the plaintiff, in preparing and shipping the said goods, and in stopping them in transit, expended \$25, to his damage of \$200. Wherefore, etc. See vol. 2, pp. 55-74.

Fraudulently representing credit of another person.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, at the village of Gloversville, the defendant, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him that one A. B. was in good credit and safe to be trusted, and worth the sum of \$20,000 over and above his debts and liabilities (*or otherwise, as the fraudulent representations were*); that the plaintiff, relying on said representations, sold and delivered twenty-five dozens of buckskin gloves (*or other goods*), of the value of \$200, to said A. B., upon a credit of four months; but, although said time has expired, said A. B. has neglected and refused to pay for said goods; that, in truth, and as the defendant then well knew, said A. B. was, at the time of such representations, insolvent, and not in good credit, nor safe to be trusted, nor worth any thing over and above his debts and liabilities; that by means of said promises the plaintiff has wholly lost said goods, and the value thereof, to his damage of \$200. Wherefore, etc. See vol. 2, pp. 424-430.

Against owner, for act of driver of carriage.

(*Title and commencement, as ante, 1040.*)

That on the day of , 1865, the plaintiff was riding along the public highway, in the town of Kinderhook, in a one-horse car-

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riage, drawn by one horse, both the property of the plaintiff, of the value of \$500; that the defendant was then the proprietor of a stage and four horses, which were then passing along said highway in the possession of the defendant (*or of the defendant's servant*), who was driving the same; that the defendant (*or, that the said servant*) so carelessly drove and managed said stage and horses, that by reason of his negligence said stage struck the plaintiff's carriage, and overthrew and broke the same, and threw down the plaintiff's horse, breaking his leg, and threw the plaintiff out of his carriage upon the ground (*or otherwise describe the injury according to the fact*), whereby the plaintiff was bruised and wounded, and was for sixty days prevented from attending to his business, and was put to great expense in repairing his chaise, and in endeavoring to get healed of his own hurts, and he was obliged to kill his said horse in consequence of his leg being broken as aforesaid, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 1, pp. 439-443.

For neglecting to return execution.

(*Title and commencement, as ante, 1040.*)

That at the time of issuing the execution hereinafter mentioned the defendant was sheriff of the county of Montgomery, in this State; that on the day of _____, 1865, in an action in a justice's court before Joseph French, a justice of the peace in and for the town of Amsterdam, in the county of Montgomery, in this State, wherein this plaintiff was plaintiff, and one A. B. defendant, the plaintiff recovered a judgment duly given by said justice against said A. B. for \$200, which judgment was thereafter duly docketed in the office of the clerk of the county of Montgomery; that on the day of _____, 1865, an execution against the property of the said A. B. was duly issued by this plaintiff on said judgment and directed, and then delivered to the defendant as sheriff of the county of Montgomery, of which execution the following is a copy (*set out a copy with the indorsements*); * that although (*more than*) sixty days elapsed after the delivery of the said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff of \$200. Wherefore, etc.

For neglecting to levy.

(*As in the last form to the *, then continue thus*): That although at the time of the said delivery of said execution to the defendant there was within said county personal property belonging to the said defendant, to-wit (*designate it briefly*), out of which the defendant might have satisfied the execution (*of which property he then and there had notice*); nevertheless, in violation of his duty as such sheriff, he failed to levy the moneys or any part thereof, as by said execution he was required to do, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 2, p. 432.

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For false return to an execution.

(*Title and commencement, as ante, 1040.*)

That at the time of the issuing and return of the execution hereinafter mentioned the defendant was a constable of the town of Amsterdam, in the county of Montgomery, in this State; that on the day of , 1865, this plaintiff recovered a judgment, duly given in an action in a justice's court before Joseph French, a justice of the peace of the town of Amsterdam, in the county of Montgomery, against one A. B. for the sum of \$200; that on the day of , 1865, an execution against the goods and chattels of the said A. B. was duly issued upon said judgment by the said justice, and directed and then delivered to the defendant as such constable, of which execution the following is a copy (*set out a copy*); that the defendant, as such constable, did, within sixty days thereafter, by virtue of said execution, levy on certain goods and chattels of said A. B., within said county, of a value sufficient to satisfy said judgment, together with the defendant's fees and poundage; that notwithstanding the premises, and in violation of his duty as constable, he did not satisfy said judgment or any part thereof; but has returned upon said execution to the said justice, that the said A. B. had not any goods or chattels within the said county, whereby he could cause to be levied the amount of the said judgment, or any part thereof, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 2, p. 443.

For an escape.

(*Title and commencement, as ante, 1040.*)

That at the time of the issuing of the execution and of the escape hereinafter mentioned the defendant was one of the constables of the county of Columbia, in this State; that on the day of , 1865, in an action brought in a justice's court before James Miller, Esq., a justice of the peace of the town of Kinderhook, in the said county of Columbia, by this plaintiff against one A. B. for wrongfully and unlawfully converting certain personal property belonging to the plaintiff, this plaintiff recovered judgment duly given by said court against said A. B. for \$200; that on the day of , 1865, an execution, in proper form, against the goods and chattels and against the person of the defendant was duly issued by said justice upon said judgment and delivered to the defendant as such constable, which execution was as follows (*set out a copy*); that thereafter the defendant, as such constable, at the town of Kinderhook, arrested said A. B. pursuant to said execution; but, in violation of his duty as such constable, he neglected and refused to commit the said A. B. to jail as he was by said execution demanded; and on the day of , 1865, at Kinderhook aforesaid, the said defendant, without the consent of the plaintiff, unlawfully permitted the said A. B. to escape, to the damage of the plaintiff of \$200. Wherefore, etc. See vol. 2, pp. 438-443.

Complaints for torts.

For keeping a mischievous dog, by which plaintiff was bitten.

(*Title and commencement, as ante, 1040.*)

That at the time hereinafter mentioned, the defendant wrongfully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite mankind (*that the defendant, while he kept his dog as aforesaid, wrongfully and negligently suffered such dog to go at large, without being properly guarded or confined*); that on the day of , 1865, at the village of Valatie, the said dog, while in the keeping of the defendant, attacked and bit the plaintiff, and wounded him in the leg, whereby this plaintiff became lame and so remained for six weeks, and was thereby occasioned great pain, and prevented from going on with his business as a day laborer, and was obliged to, and actually did, expend \$25 in endeavoring to heal himself of said wounds, to his damage of \$100. Wherefore, etc. See vol. 2, pp. 611-617.

For keeping a dog accustomed to bite sheep and other animals

(*Title and commencement, as ante, 1040.*)

That at the time hereinafter mentioned, the defendant wrongfully kept a dog (*well knowing him to be accustomed to hunt, chase, bite, worry, and kill sheep, lambs and other domestic animals*), which said dog on the day of , 1865, and on other days, between that day and the commencement of this action (*wrongfully came upon the plaintiff's land and there*) hunted, chased, bit and worried ten sheep and twenty lambs of the plaintiff, being of the value of \$200; that by means thereof five of the said sheep and ten of the said lambs of the plaintiff, being of the value of \$100, died and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, to his damage of \$200. Wherefore, etc. See vol. 2, p. 616.

For a penalty given by statute.

(*Title and commencement, as ante, 1040.*)

That the plaintiff is an inhabitant of the town of Athens, in Greene county; that on the day of , 1865, at the said town of Athens, the defendant set a stationary fish net in the creek commonly called the Murderer's creek, in the town of Athens, in the county of Greene, that is to say, in a portion of said creek running through said town, and contrary to the provisions of an act of the legislature of the State of New York, entitled "An act to prevent the destruction of fish in Murderer's creek, in the town of Athens," passed March 13, 1838; that by reason thereof, the defendant is indebted to the plaintiff in the penalty and sum of \$10, one-half for himself and one-half for the overseers of the poor of said town, for the use of the poor, and an action has accrued to the plaintiff to recover the same. Wherefore, etc. See vol. 2, p. 458.

Complaints for torts.

*Against depositary (or bailee) for not taking care of goods.**(Title and commencement, as ante, 1040.)*

That on the 10th day of January, 1865, the plaintiff delivered to the defendant a large quantity of goods, wares and merchandise, to-wit, (*designate or describe the articles*), of the value of \$200, to be by the defendant safely and securely kept for the plaintiff (*for a reasonable compensation, to be paid therefor by the plaintiff to the defendant*); and the said goods, etc., were to be returned and redelivered to the said plaintiff when the said defendant should be thereafter requested; that, although the said defendant received the said goods, etc., from the plaintiff, as aforesaid, and, although the said defendant was afterward, on the 1st day of May, 1865, and before the commencement of this action, requested by the said plaintiff to redeliver the said goods, etc., to him, the said plaintiff, yet the said defendant, not regarding his said promise and undertaking, and his duty, did not, nor would take due proper care of and safely and securely keep the said goods, etc., or any part thereof, for the said plaintiff, nor did, nor would he at the same time when he was so requested as aforesaid, or at any time afterward, redeliver the same to the plaintiff; but on the contrary thereof, he, the said defendant, so carelessly and negligently conducted himself with respect to the said goods, etc., and took so little care thereof, that by and through the mere carelessness, negligence and improper conduct of the said defendant, and his servants in that behalf, that the said goods, etc., were wholly lost to the said plaintiff, to his damage of \$200, etc. Wherefore, etc.

*Against mechanic (or bailee) for doing work badly.**(Title and commencement, as ante, 1040.)*

That on the day of , 1865, at the village of Kinderhook, a written agreement was made by and between the plaintiff and the defendant, by virtue, or by the terms of which, it was agreed that the defendant should take down a certain store in the said village of Kinderhook, and would build another store at the village of Valatie for the said plaintiff, agreeably to certain plans thereof, then in the possession of the defendant; that the said contract was as follows (*set out a copy*); that afterward, and before the commencement of this action, the defendant erected and built the said store, with the appurtenances, for the plaintiff, yet the said defendant did not build the said store agreeably to the said plans, agreement and particulars, with good and proper materials, and in a sound, substantial, and workmanlike manner, but wholly neglected and refused so to do; but on the contrary, the defendant erected and built the last-mentioned store, with the appurtenances, different from and contrary to the said plans, agreement and particulars, and with bad and improper materials, and in a slight, inartificial and unworkmanlike manner, contrary to the form, effect and intention of the said plans, specifications and agreement, to the damage of the plaintiff of \$200. Wherefore, etc.

Complaints for torts.

Against mechanic for not using due care and skill in repairing.

(*Title and commencement, as ante, 1040.*)

That the defendant, being a watchmaker (*or, as the case may be*), at the city of Albany, N. Y., the plaintiff, on the day of , 1865, delivered to him a watch (*or other article*) of the plaintiff, of the value of \$200, to be repaired by the defendant for reward; that in consideration of the premises, the defendant then undertook said employment, and to use due care and skill in repairing said watch (*or other article*), and to take due care thereof while in his possession, and to redeliver the same to the plaintiff on request; that the said defendant did not take due and proper care of the said watch whilst in his possession, whereby the said watch was broken and injured; and he did not use due care or skill in repairing the said watch, but did his work in so careless and unworkmanlike manner, that no benefit was derived therefrom, and the watch was not improved, but, on the contrary, was materially injured, to the plaintiff's damage of \$100. Wherefore, etc.

Against common carrier for loss of goods.

(*Title and commencement, as ante, 1040.*)

That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire, between the places hereinafter mentioned;* that on the day of , 1865, at Albany, N. Y., in consideration of the sum of \$ then paid (*or agreed to be paid*) to him by the plaintiff, the defendant agreed safely to carry to the city of Utica, N. Y., and there to deliver to James Paywell, or order (*as the case was*), certain goods, the property of the plaintiff, of the value of \$200, consisting of (*here briefly describe the goods*), which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned; that the defendant did not safely carry and deliver the said goods pursuant to said agreement (*although on the day of , 1865, at Utica, and before the commencement of this action, the plaintiff, or said James Paywell, demanded the same of him*); but, on the contrary, the defendant so negligently conducted and so misbehaved, in regard to the same in his calling as a carrier, that they were wholly lost to the plaintiff, to his damage of \$200. Wherefore, etc. See vol. 1, pp. 614-650.

For breach of carrier's duty.

(*As in the last form to the*, and then continue:*) That on the day of , 1865, at Albany, N. Y., one A. B. delivered to the defendants, and they, as such carriers, received certain goods, the property of the plaintiff, to-wit: (*describe the goods*) of the value of \$200, to be by the defendants safely carried to Port Jackson, in Montgomery county, N. Y., and there to be delivered to Adam W. Kline, for a reasonable reward, to be paid by the plaintiff (*or as the case may be*) therefor; that the defendant did not safely carry and deliver the said goods, but, on the contrary, so negligently conducted, and so misbe-

Answers.

haved in regard to the same in their calling as carriers, that the same were wholly lost to the plaintiff, to his damage of \$200. Wherefore, etc.

This last form is a proper one to be used in those cases in which no special contract was made with the carrier, but it is sought to make him liable for a breach of his duty toward the public.

Against an innkeeper for loss of a trunk, etc.

(Title and commencement, as ante, 1040.)

That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the city of Albany, N. Y., known as the "Merchants' Hotel," that on the day of , 1865, this plaintiff was received by the defendant into his said inn as a traveler (*or guest*) together with his baggage, to-wit, a trunk (*or valise, etc.*) containing (*here designate contents lost*), the property of the plaintiff; that the defendant and his servants so negligently conducted themselves in regard to the same, that while he so remained at said inn, as a traveler (*or guest*), his said trunk (*or valise, etc.*) was taken away from the room of this plaintiff by some person or persons to the plaintiff unknown; and thereby the same became wholly lost to the plaintiff, to his damage of \$200. Wherefore, etc. As to the liabilities of innkeepers, see vol. 1, pp. 603-614.

§ 3. **Answers.** In selecting subjects of defense, and in framing precedents of answers, it will be intended to give such forms as shall be most useful in practice, and such subjects as have been discussed in this work. To give a form for every particular defense will not be attempted, though it is believed that such a variety will be found as will materially assist the young practitioner.

Formal parts of an answer.

IN JUSTICE'S COURT.

John Doe, plaintiff,	}	Before DAVID KENNEDY, Esq.
<i>agst.</i>		
Richard Roe, defendant.		

The defendant in the above, entitled action answers the complaint therein, etc. (*state defense*). Wherefore the defendant demands judgment in his favor for costs, etc.

If there are several defendants, and there is a defense interposed by one defendant the commencement may be changed so as to read as follows: "The defendant A. B., in the above entitled action, answers the complaint," etc.

Answers.

*Non-joinder of plaintiffs in actions upon contract.**(Title of action.)*

The defendant answers the complaint of the plaintiff in this action, and alleges * that the supposed contract mentioned in the complaint was made by the said defendant, with this present plaintiff, and one A. B., jointly, and not otherwise; that the said A. B. is still living, and now resides in the town of _____, in the county of _____, in this State. Wherefore † the defendant demands judgment that this action abate and that judgment be rendered in his favor for the costs of this action.

If the action is one in which a set-off is interposed as a defense, the claim for judgment may be as follows:

Wherefore the defendant demands judgment in his favor for the sum of \$200, besides the costs of this action.

*Non-joinder of plaintiffs in actions of tort.**(Title of action.)*

(As in the last form to the *, then continue:) that as to the taking (or the converting) of said horse (or other property), the same was, at the time of the said supposed trespass (or conversion), the property of the plaintiff and one A. B., as tenants in common, and not of the plaintiff alone; that the said A. B. is still living and now resides in the town of _____, in the county of _____, in this State. Wherefore (as in the last form from the †). See ante, 79.

*Non-joinder of defendant in actions upon contract.**(Title of action.)*

(As in the last two forms to the *, and then continue:) that the said work and labor mentioned in the complaint were done, and the said money mentioned was paid by the plaintiff at the request of the defendant, jointly with one A. B., who is still living, and resides at the town of _____, in the county of _____, in this State. Wherefore (as in two last forms from the †).

Action brought in wrong town.

(Title and commencement, as above, to the *, and then continue:) That the said plaintiff, at the time of the commencement of this action, resided and had a legal residence in the town of Ephratah, in the county of Fulton; and that the said defendant, at the same time, resided and had a legal residence in the town of Northampton, in said county, and had not absconded from his said residence; and that this action was brought in the town of Perth, in said county, and the summons (or other process) was made returnable in the said town of Perth, which does not adjoin either the said town of Ephratah or Northampton. Wherefore, the defendant demands judgment that this action abate, and that he recover his costs. See ante, 16-22.

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Another action pending.

(*Title and commencement, as ante, 1085, to the *, and then continue :*) That at the commencement of this action there was, and still is, another action pending in a justice's court, before William Kennedy, Esq., a justice of the peace of the town of Broadalbin, in Fulton county, in this State, between the same parties as in this action, and for the same cause as that set forth in the complaint in this action. Wherefore, etc. (*as in last form*). See vol. 2, pp. 659-662.

*General denial.**(Title of action.)*

The defendant, answering the complaint in this action, denies each and every allegation thereof.

As to what matters may be proved under a general denial, see vol. 2, pp. 651-656. As to what matters must be specially pleaded by setting them up in the answer, see vol. 2, pp. 656-659.

*General denial of one of several causes of action.**(Title of action.)*

The defendant, answering the first cause of action contained in the complaint in this action, denies each and every allegation of the complaint respecting the same. See vol. 2, pp. 651-656.

*Specific denial.**(Title of action.)*

The defendant, answering the complaint in this action, denies that he ever indorsed said note mentioned therein.

*Infancy of defendant ; action on contract.**(Title and commencement, as ante, 1084.)*

That at the time of making the supposed contract (*and on delivery of the goods, or other consideration*) alleged, he was under the age of twenty-one years, to-wit, twenty years of age. Wherefore, etc. See vol. 2, pp. 662-672.

*Infancy of defendant ; actions for torts.**(Title and commencement, as ante, 1084.)*

That at the time of the supposed wrongful acts and grievances alleged in the complaint, said horse was in the possession of the defendant, by virtue of a contract of bailment for hire, and that the alleged beating, and the fatiguing by over-driving occurred and took place through the unskillfulness and the want of knowledge, discretion, and judgment of the defendant ; that on the termination of the contract of bailment, the defendant returned and redelivered said horse to the plaintiff in full life ; that at the time of the bailment, and of the committing of the supposed wrongful acts and grievances, the defendant was an infant

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under the age of twenty-one years, to-wit, of twenty years of age. Wherefore, etc. See vol. 2, pp. 662-672.

Insanity of defendant.

(*Title and commencement, as ante, 1084.*)

That at the time of making the alleged promise (*or agreement, or, of executing the alleged deed*), the defendant was of unsound mind, and thereby incapable of making (*or executing*) and understanding the same, as the plaintiff then well knew. Wherefore, etc. See vol. 2, pp. 672-675; see also the next form.

Intoxication of defendant.

(*Title and commencement, as ante, 1084.*)

That before, and at the time when the defendant made the said promissory note (*or indorsed it*), he was so drunken, intoxicated, and under the influence of intoxicating liquor, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, object, nature, or effect of the said promissory note (*or indorsement*), or to contract or promise thereby, of all which premises the plaintiff, before and at the time when he, the defendant, made the said note (*or indorsed it*), and always since, had full knowledge and notice. Wherefore, etc. See vol. 2, pp. 675-678.

Rescission of contract.

(*Title and commencement, as ante, 1084.*)

That after the making of the contract alleged in the complaint, it was agreed by and between the plaintiff and the defendant, that the said contract should be waived, abandoned and rescinded, and they then waived, abandoned, and rescinded the same accordingly. Wherefore, etc. See vol. 2, pp. 62-74.

Coverture of the defendant.

(*Title and commencement, as ante, 1084.*)

That at the time of making the promissory note mentioned in the complaint, the defendant was and still is a married woman, the wife of one John Smith; that said note was not given in or about the carrying on of any separate business by defendant, nor for property purchased by her, nor does said note relate to defendant's separate estate, nor was it made for the benefit thereof. Wherefore, etc. See vol. 2, pp. 311-323.

Alteration of instrument without consent.

(*Title and commencement, as ante, 1084.*)

That after the making (*or acceptance*) and issue of said promissory note (*or bill*) and before the commencement of this action, the same was materially altered, without the consent of the defendant, by adding

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the signature of A. B. as a joint maker thereof (*or, by cutting off the signature of one A. B. who was a joint maker thereof, or by adding the words "payable at or otherwise, as the case may be".* Wherefore, etc. See vol. 2, pp. 682-694.

Illegal demand; money lost at play.

(*Title and commencement, as ante, 1084.*)

That heretofore, to-wit, on the day of , 1865, at the city of Albany, N. Y., the defendant and the plaintiff played together at a game of chance called , for stakes, upon credit, and not for ready money; and at said gaming the plaintiff won \$ of the defendant, which he did not pay; that thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost at play. Wherefore, etc. See vol. 2, pp. 403-405.

Note given for liquors sold without license.

(*Title and commencement, as ante, 1084.*)

That the only consideration for said note was for the sale of strong or spirituous liquors, sold by (*the payee of the note*), in quantities less than five gallons to said defendant, in the town of , and county of , the said (*the seller*), at the time of such sale, having no license for the sale thereof, as required by the Laws of 18 , either grocer or tavern license; that the said note was transferred to the plaintiff after it was due, and without consideration, and after he had full knowledge of the foregoing facts. Wherefore, etc. See vol. 2, pp. 714, 715.

Higher security taken.

(*Title and commencement, as ante, 1084.*)

That after said account (*or note, or other simple contract debt*) became due, and before the commencement of this action, the plaintiff and this defendant agreed that the defendant should give the plaintiff his bond under seal (*or should confess judgment to the plaintiff*), for said sum so due; that in pursuance of said agreement, this defendant, on the day of , 18 , gave to the plaintiff his bond under seal, in the penal sum of \$, conditioned for the payment by him to said plaintiff of said sum of \$, so due, on the day of , 18 , at the city of Albany, N. Y., with interest. Wherefore, etc. See vol. 2, pp. 724-728.

Former action; and judgment for defendant.

(*Title and commencement, as ante, 1084.*)

That after the supposed cause of action in the complaint in this action mentioned had accrued, and before the commencement of this action, and on the day of , 18 , at the town of Kinderhook, Columbia county, in this State, in an action brought before James Miller, a justice of the peace in and for said town and county, by the

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present defendant against the present plaintiff,* for the same cause of action as that set forth in the complaint in this action, the said present defendant recovered judgment duly given, upon the merits thereof, against the said present plaintiff, for \$200 (*or state the judgment given*). Wherefore, etc. See vol. 2, p. 740.

Former action by defendant, and plaintiff set off his demand.

(*As in the last form to the *, then continue:*) in an action arising upon contract, and in which a set-off was allowable, the present defendant recovered judgment duly given, upon the merits thereof, against the present plaintiff, for the sum of \$200, with the costs of action; that in the said action before the said James Miller, † the present plaintiff did set off against the said demand of the present defendant the same cause of action now set forth in the present plaintiff's complaint, which cause of action so set off as aforesaid, with the other matters in question, were then and there heard, tried and determined by the said court, before the said James Miller. Wherefore, etc. See vol. 2, p. 736.

Former action in which plaintiff ought to have set off, but did not.

(*As in the last two forms to the †, then continue:*) The present plaintiff did neglect to plead or set off his demand, mentioned in his complaint as his cause of action, against the demand of the defendant in the action aforesaid, before said James Miller; and that the action before the said James Miller was commenced after the cause of action mentioned in this complaint had accrued. Wherefore, etc. See vol. 2, p. 738.

Former recovery by plaintiff for same cause of action.

(*Title and commencement, as ante, 1084.*)

That on the day of , 18 , at the town of Kinderhook, in Columbia county, in this State, in an action brought before James Miller, a justice of the peace in and for said town and county, and at a court then and there held by and before him, the said plaintiff complained for the same cause of action mentioned and set forth in the complaint as the cause of action herein; that such proceedings were thereupon had in said court, that on the day of , 18 , at the said town of Kinderhook, the said plaintiff, by the judgment of the said court, recovered against the said defendant, by a final judgment on the merits, the sum of \$200 for same cause of action mentioned in the complaint therein, with the costs of suit, etc. Wherefore, etc. See vol. 2, p. 735.

Recoupment in action for goods sold, alleging breach of warranty on the sale.

(*Title and commencement, as ante, 1084.*)

That the said goods were sold and delivered in the piece or package, and without an opportunity for the defendant to examine the same; and

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that at the time of the sale of the same it was represented and agreed by the said (*seller, or plaintiff*), that the same should be free from any defect or injury, and would be marketable; whereas, in fact, a portion of said goods, being dry goods and hosiery, were unmarketable, defective, and injured, and the colors of the same were destroyed and changed, which was unknown to the defendant at the time of the sale and delivery, whereby the defendant sustained damage to the extent of \$100, being the amount of the price of the goods so injured or defective; which said last-mentioned amount the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action. Wherefore the defendant demands judgment that his said damages be deducted from the plaintiff's demand. See vol. 2, p. 757.

Recoupment in an action upon a note given for property sold, and a breach of warranty on the sale.

(*Title and commencement, as ante, 1084.*)

That the said note was not, before it became due, transferred and delivered to the plaintiff for value; that the said note was made and delivered by the defendant to one A. B., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of segars, which was sold by sample at that time by said A. B. as such agent; that when said segars were delivered to this defendant, they did not correspond with the samples, and were not worth more than \$100; that as soon as the defendant learned the character of said segars, he offered to said A. B., as such agent, to return them, which he is still ready and willing to do. Wherefore the defendant claims judgment that he may recoup \$100, the amount of his damages in this behalf, from the amount of said note.

Set-off.

(*Title and commencement, as ante, 1084.*)

That before, and at the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of \$200 for the following cause: (*here state the cause of action or matter relied on as a set-off*), out of which said sum of money so due to the defendant, which exceeds the amount of the plaintiff's demand, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages or demand, if any, in respect to the alleged matters complained of in the complaint. Wherefore the defendant demands judgment against the plaintiff for the balance due from him to the defendant, together with costs, etc. See vol. 2, p. 766.

Statute of limitations.

(*Title and commencement, as ante, 1084.*)

That the cause of action stated in the complaint did not accrue within six (*or other number, as the case may be*) years before the commencement of this action. Wherefore, etc. See vol. 2, pp. 779-821.

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Release.

(*Title and commencement, as ante, 1084.*)

That after the making of the contract (*or other instrument*), and the alleged breach thereof (*or after committing the supposed wrongs or grievances*), in the complaint mentioned, and before the commencement of this action, to-wit: on the day of , 18 , the plaintiff, in consideration of \$10, by deed released this defendant from the claim set up in the complaint (*or, executed to this defendant a release of which the following is a copy, giving copy*). Wherefore, etc. See vol. 2, pp. 821-831.

Arbitrament and award.

(*Title and commencement, as ante, 1084.*)

That after the maturity of the note (*or after the accruing of the other cause of action*) mentioned in the complaint, to-wit: on the day of , 18 , the plaintiff and the defendant (*by their bonds of arbitration*) mutually submitted the demand alleged in the complaint (*among other controversies*) to the arbitration of one A. B., who, thereafter and before the commencement of this action, to-wit: on the day of , 18 , by his award duly made and published, awarded that, etc. (*stating the substance of the award*); that the defendant, on the day of , 18 , and before the commencement of this action, duly performed the said award on his part by (*here state payment or tender, etc., as the case may be*). Wherefore, etc. See vol. 2, pp. 831-869.

Accord and satisfaction.

(*Title and commencement, as ante, 1084.*)

That after making the contract (*or other instrument*) and the alleged breach thereof (*or, after committing the supposed grievances*), in the complaint mentioned, and before the commencement of this action, to-wit: on the day of , 18 , this defendant delivered to the plaintiff, and the plaintiff accepted and received from the defendant \$200 (*or one valuable horse*), in full satisfaction and discharge of the damages (*or moneys, or liability, or debt, or as the case may be*) in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance (*or non-payment, or neglect, or acts*) therein alleged. Wherefore, etc. See vol. 2, pp. 869-880.

Tender of payment.

(*Title and commencement, as ante, 1084.*)

That before the commencement of this action, and on the day of , 18 , at Kinderhook, N. Y., this defendant tendered to the plaintiff \$200 in payment of said note and interest (*or other indebtedness*), but he refused to receive the same; that this defendant has ever since remained, and still is, ready and willing to pay to the plaintiff said sum, but the plaintiff has hitherto refused to receive the same; that

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this defendant now brings the said sum of \$200 into court (*or if already put into court, that this defendant has paid said sum of \$200 into this court in this action*) ready to be paid to the plaintiff, if he will accept the same. Wherefore, etc. See vol. 2, p. 880.

Justification of entry into plaintiff's house, and seizing his goods under an execution against him.

(*Title and commencement, as ante, 1084.*)

First defense. A general denial. See *ante*, 1086.

Second defense. And for a further answer in this action the defendant says, that heretofore, to-wit, on the day of , 18 , one John Doe duly recovered a judgment in a civil action against this plaintiff, Richard Roe, before one Harley Bartlett, then (*and now*) a justice of the peace in and for the town of Mayfield, in the county of Fulton, in this State (*here state the manner of obtaining the judgment as stated in an action upon a justice's judgment, down to and including the rendition of judgment, as in the form, ante, , and then continue*); that afterward, to-wit, on the day of , 18 , the said justice duly and legally issued an execution upon the said judgment, which execution was as follows (*set out a copy*); that said execution was on the same day delivered to this defendant, who then was (*and now is*) a constable of the county of Fulton; that afterward, and before the return day of the said execution, this defendant, as such constable, and by virtue of said execution, did peaceably and quietly enter the dwelling-house of this plaintiff (*the outer door thereof being then open*), in order to seize upon, levy and take in execution the goods and chattels of this plaintiff; that in so entering upon said premises the defendant did not make any unnecessary noise, nor do any unnecessary damage, nor remain longer than necessary to execute the said process; that afterward, to-wit, on the day of , 18 , and before the return day of said execution, the defendant at the time aforesaid did duly sell the goods and chattels so levied upon, for the sum of \$200; that afterward, to-wit, on the day of , 18 , and on the return day of said execution, the defendant duly returned said execution to the said justice, Harley Bartlett, and on the same day also paid over the said \$200 to said justice, as by said execution he was commanded; that the said levy and sale are the same acts, and constitute the same cause of action alleged in plaintiff's complaint. Wherefore, etc. See vol. 2, pp. 433-436, 550.

Justification of trespass by reason of defective fences.

(*Title and commencement, as ante, 1084.*)

First defense. A general denial. See *ante*, 1086.

Second defense. That the plaintiff and the defendant occupy farms which adjoin each other, and which are separated by a line fence which the plaintiff was legally bound to keep in repair; that the plaintiff, and all other tenants or occupants of the plaintiff's farm, which is the same

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premises mentioned in the complaint, from a time whereof the memory of man is not to the contrary, have repaired and ought to repair said fence; and the plaintiff, at and before the times mentioned in the complaint, ought to have repaired and maintained said fence so as to prevent the cattle of the defendant from escaping on to the land of the plaintiff (*if the obligation to maintain the fence rests in agreement, allege it accordingly*); that the plaintiff neglected to keep the said fence in repair, by means whereof the cattle of the defendant escaped over the said fence, and on the premises of the plaintiff, and thereby, and without the fault of the defendant, was committed the supposed injury in the complaint alleged; that the defendant, as soon as he had notice of the escape of the said cattle, entered upon the plaintiff's premises for the sole purpose of driving said cattle therefrom, and the defendant did then drive the said cattle off from the plaintiff's premises as soon as possible, and doing no unnecessary damage, which said acts are the supposed wrongs and injuries in the complaint mentioned and alleged. Wherefore, etc. See vol. 2, pp. 501-503.

Justification for taking property; damage feasant.

(*Title and commencement, as ante, 1084.*)

That at the times mentioned in the complaint, this defendant (*or one A. B.*) was lawfully possessed of the real property upon which the (*cattle*) therein mentioned were taken, to-wit, a certain meadow called, etc. (*or describe as the fact may be*); that the (*cattle*) alleged in the complaint to have been taken and carried away by the defendant were, at the time therein stated, wrongfully upon the said premises of the said defendant (*or of one A. B.*), and then and there incumbering the same and doing damage thereon; that (*acting by the command of the said A. B.*) this defendant then and there took said property, and removed the same away to a convenient distance, doing no unnecessary damage thereto, and there left the same for the use of the plaintiff; that these acts are the same of which the plaintiff complains in his complaint. Wherefore, etc. See vol. 2, p. 506.

Eviction of tenant.

(*Title and commencement, as ante, 1084.*)

That after making of the lease (*or after the letting*) mentioned in the complaint, and before any part of the rent in the complaint demanded became payable, the plaintiff forcibly entered upon the premises, and removed the defendant therefrom (*or from a part thereof, describing the part*), and kept him out of possession from thence until the day of 18 (*or until after the rent became due*). Wherefore, etc. See vol. 1, pp. 366-373.

Surrender of premises.

(*Title and commencement, as ante, 1084.*)

That before the rent claimed in the complaint became due (*or before the alleged breaches, or the breaches by this defense answered*) the de-

Answers.

fendant surrendered to the plaintiff the demised premises, and all the residue of the said term then to come, and unexpired therein, and the plaintiff then accepted such surrender, and took possession of the said premises. Wherefore, etc. See vol. 1, pp. 359-364.

Want or failure of consideration.

(*Title and commencement, as ante, 1084.*) .

That the bill (*or note*) mentioned in the complaint was accepted (*or given*) by the defendant, for the price of goods to be sold and delivered by the plaintiff to the defendant before the said bill (*or note*) should become due; that the defendant has always been ready and willing to buy and accept said goods from the plaintiff, and has duly performed all the conditions on his part; that the plaintiff has not sold or delivered the same to the defendant (*though the defendant, on the day of , 18 , at , duly requested him so to do*); that, except as aforesaid, there never was any consideration for the acceptance or payment of said bill (*or giving as payment of said note*) by the defendant. Wherefore, etc. See vol. 1, pp. 188-210, 758-763; vol. 2, p. 902.

Statute of frauds; leasing or sale of lands.

(*Title and commencement, as ante, 1084.*)

That neither the said lease, though for a longer period than one year (*or said contract for the sale of said lands*), nor any note or memorandum thereof expressing the consideration, was ever in writing, and subscribed by the defendant by whom the lease (*or sale*) is alleged to have been made, or by any lawfully authorized agent of said defendant (*nor was said agreement ever partly performed*). Wherefore, etc. See vol. 2, pp. 273-284. .

Statute of frauds; agreement not to be performed within one year.

(*Title and commencement, as ante, 1084.*)

That although the said agreement by its terms was not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof (*expressing the consideration*) was ever in writing, and subscribed by the said defendant, who is sought to be charged therewith, or by his lawful agent. Wherefore, etc. See vol. 2, pp. 245-257.

Statute of frauds; promise to answer for debt or default of another.

(*Title and commencement, as ante, 1084.*)

That the supposed promise in the complaint alleged is a special promise to answer for the debt (*or default, or miscarriage*) of another person, to-wit, of one A. B. in said complaint mentioned; that no note or memorandum of such contract (*expressing any consideration*) was made in writing, or subscribed by the party to be charged therewith, to-wit, this defendant (*but on the contrary, the same was wholly without consideration*). Wherefore, etc. See vol. 2, pp. 257-273.

Answers.

Statute of frauds ; sale of personal property.

(*Title and commencement, as ante, 1084.*)

That although the alleged contract was for the sale of goods (*or chattels, or things in action*) for the price of \$50 or upwards, no note or memorandum thereof was ever made in writing, and subscribed by the said defendant sought to be charged thereby, or by his lawful agent ; nor did the said defendant accept or receive any part of such goods (*or any of the evidences of such things in action*) ; nor did the said defendant at the time pay any part of the purchase-money. Wherefore, etc. See vol. 2, pp. 110-126.

Payment.

(*Title and commencement, as ante, 1084.*)

That before the commencement of this action the defendant satisfied and discharged the plaintiff's claim by payment. Wherefore, etc. See vol. 2, pp. 907-928.

Payment by bill or note.

(*Title and commencement, as ante, 1084.*)

That after the accruing of the alleged debt, and before the commencement of this action, the defendant delivered to the plaintiff, and the plaintiff received from him, for and on account of said debt, a bill of exchange drawn by the plaintiff upon, and accepted by the defendant (*or a promissory note made by the defendant*), for the sum of \$200, payable to the plaintiff, or order (*or bearer*) at three months after date, which period had not elapsed at the commencement of this action. Wherefore, etc. See vol. 2, pp. 918-922.

Duress by imprisonment.

(*Title and commencement, as ante, 1084.*)

That the defendant at the time of the making of the said (*contract*), was impressed by the said plaintiff (*and others in collusion with him*), and then and there detained until, by the force and duress of imprisonment, the defendant made and delivered the same. Wherefore, etc. See vol. 2, p. 928.

Duress by threats.

(*Title and commencement, as ante, 1084.*)

That the instrument in the complaint mentioned was obtained from the defendant by the plaintiff (*and others in collusion with him*) by duress of the defendant in threatening (*or beating*) the defendant, in consequence of which, and in fear and apprehension thereof, the defendant executed the instrument. Wherefore, etc. See vol. 2, p. 928.

Contract or instrument obtained by fraud.

(*Title and commencement, as ante, 1084.*)

That the plaintiff induced the defendant to make the note mentioned in the complaint, by representing that said plaintiff was authorized by one A. B., to whom defendant owed the amount of the note, to take a note to himself in satisfaction of such debt; that the said representation was false, and was made with intent to deceive and defraud this defendant; that the defendant received no consideration whatever for said note. Wherefore, etc.

Usury in making note.

(*Title and commencement, as ante, 1084.*)

That the note mentioned in the complaint was made and delivered to the plaintiff upon the usurious agreement between the defendant and the plaintiff, that the defendant should pay the plaintiff, and that the plaintiff should receive, reserve and secure to himself, for the loan of the money for which said note was given, a greater sum than at the rate of six per cent per annum, to-wit, at the rate of (*ten*) per cent per annum; that the said sum was deducted and reserved from the amount of said note by the plaintiff, and the balance only paid to this defendant; that is to say, that this defendant agreed to pay, and the plaintiff agreed to receive the sum of (*twenty-five*) dollars for said loan, the plaintiff reserving and securing to himself for the loan of money on the said note, until the maturity thereof, the sum of (*twenty-five*) dollars. Wherefore, etc. See vol. 1, pp. 559-579.

Cause of action assigned.

(*Title and commencement, as ante, 1084.*)

That after the sale and delivery of the goods (*or other cause of action*) in the complaint mentioned, and before the commencement of this action, the plaintiff duly assigned his cause of action against this defendant arising therefrom (*or said judgment, or other thing in action*) to one A. B., who then became, and who still is the lawful owner and holder thereof. Wherefore, etc.

Mistake in amount of note.

(*Title and commencement, as ante, 1084.*)

That the said note was given upon a settlement of account between the defendant and the plaintiff, and was intended by them to be made and received for the sum of \$100, then claimed by the plaintiff to be the amount due him from the defendant; but that when it was made, it was, by mistake of the parties, given for the sum of \$200 mentioned in the complaint, instead of the sum of \$100, which was all that was due; and as to the excess, to-wit, \$100, there is not, and never was, any consideration. Wherefore, etc.

Answers.

License.

(*Title and commencement, as ante, 1084.*)

That on the day of , 18 (*and at various times between that day and the day of , 18*), the plaintiff gave to this defendant license to enter (*etc., according to the facts*); that under and in pursuance of said license of the plaintiff, the defendant did enter (*etc., state acts of the defendant according to the facts*), which acts are the same of which the plaintiff complains; and the defendant denies each and every allegation of the complaint inconsistent with the foregoing. Wherefore, etc. See vol. 2, pp. 483-490.

Lien for services.

(*Title and commencement, as ante, 1084.*)

That said goods and chattels were manufactured by the defendant as a carpenter and joiner (*or as the case may be*); and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of \$100, the money due him from the plaintiff for work and labor in manufacturing them; that the said sum is still due from the plaintiff therefor, and unpaid. Wherefore the defendant detained (*and still detains*) said goods and chattels. Wherefore, etc. See vol. 1, pp. 650-662.

Replevin; title in defendant or in a stranger.

(*Title and commencement, as ante, 1084.*)

That the goods and chattels mentioned in the complaint were the property of the defendant (*or the property of one A. B.*) at the time mentioned in the complaint, and not the property of the plaintiff (*if title is in the defendant, demand judgment as follows*): wherefore, this defendant demands judgment for a return of said goods and chattels, with damages for the taking and detention thereof, and for the costs of this action. See vol. 2, pp. 640-644; vol. 1, pp. 862-878.

Estoppel.

(*Title and commencement, as ante, 1084.*)

That the plaintiff ought not to be admitted to allege or say that the defendant is not the owner of the said horse in the complaint mentioned, because the defendant says that on the day of , 18 , at the town of , in the county of , in this State, he purchased said horse of one A. B., and paid the sum of \$200 therefor; that at the time of making said purchase the said plaintiff was present and knew that this defendant was about to purchase said horse; that the said plaintiff did not at the said sale, nor at any time prior thereto, disclose to this defendant that the plaintiff claimed or owned the said horse, or any interest in him; that this defendant made said purchase in good faith, without any notice or knowledge that the plaintiff had any interest in it, or any ownership thereof. Wherefore, etc. See vol. 2, pp. 934-952.

Demurrer.

Answer, puis darrein continuance.

(*Title and commencement, as ante*, 1084.)

That the plaintiff ought not to have or to maintain his aforesaid action further against this defendant, because since the last continuance of this action on the day of , 18 , to the day of , 18 , the said plaintiff by deed duly released the defendant from all claims or demands, actions or causes of action, etc. Wherefore, etc.

If the matter set up in the answer arose or accrued during the trial, and before the close, the defense should be interposed by amending the answer. *Price v. Peters*, 15 Abb. 197.

§ 4. **Demurrer.**

Demurrer to complaint.

(*Title of action.*)

The defendant demurs to the complaint (*or to the first cause of action set forth in the complaint*) in this action, and for grounds of demurrer states, that the complaint (*or the first cause, etc.*) does not state facts sufficient to constitute a cause of action. See *ante*, 338-344.

Demurrer to answer.

(*Title of action.*)

The plaintiff demurs to the counter-claim stated in the defendant's answer upon the ground that it does not state facts sufficient to constitute a counter-claim. See *ante*, 338-344.

CHAPTER II.

SPECIAL PROCEEDINGS.

SECTION 1. Summary proceedings to recover the possession of real property.

Notice to pay rent or surrender possession.

To A. B. :

Take notice, that you are indebted to me in the sum of \$ for rent of the house, real property and premises now occupied by you, situate in the , of , in the county of , and described as follows: (*briefly describe demised premises*) and that I require the payment of said rent within three days from the service of this notice, or the possession of said premises.

(*Date.*)

(*Signature.*)

See vol. 1, pp. 155, 343.

Affidavit of service of notice.

COUNTY OF , ss. :

C. D., being duly sworn, says he did, on the day of 18 , personally serve a notice, of which the foregoing is an original duplicate, upon A. B., the tenant therein named, by delivering such notice to, and leaving the same with, said A. B., at the of , in said county, at the same time showing said A. B. the foregoing original notice.

(*Jurat.*)

(*Signature.*)

Notice to terminate tenancy at will.

To A. B. :

Take notice, that you are required to surrender and deliver up possession of the real property, house and premises which you now hold of me situated in the , of , county of , and described as follows: (*briefly describe premises*), and to remove therefrom within one month pursuant to the statute relating to the rights and duties of landlord and tenant.

(*Date.*)

(*Signature.*)

See vol. 1, p. 158, § 2236 ; id., p. 343.

Petition to remove tenant for non-payment of rent after demand.

COUNTY OF , ss. :

To Y. Z., Esq., a *Justice of the Peace of the (town) of W. :*

The petition of A. B. respectfully shows that your petitioner is the owner in fee (*or if not such owner, state the interest entitling to posses-*

Summary proceedings to recover the possession of real property.

sion) of the real property, house and premises situated in the (town) of (W.) in said county, described as follows: (*describe the premises*) that on or about the day of , 1883, your petitioner as landlord let and rented the said real property, house and premises unto C. D., for the term of , from the day of , 1883, ‡ at the rent of \$, payable monthly in advance; * (*or otherwise as the fact may be*) that said C. D. is now justly indebted to your petitioner in the sum of \$ for the rent of said real property, house and premises pursuant to the agreement under which the same are held as aforesaid, to-wit, for (*one month*) rent due by the terms of said agreement on the day of , 1883; † that on the day of , 1883, at (ten) o'clock in the (*forenoon*) at said real property, house and premises, your petitioner demanded said rent of said C. D., which he then and there refused to pay. That said rent has not been paid nor has any part thereof. That said C. D. holds over and continues in possession of the demised real property, house and premises (*or if only a part, state what part*), after demand of said rent has been made without the permission of your petitioner, his said landlord. †

Your petitioner, therefore, prays for a final order removing said C. D. as tenant (*or if the premises have been under-let or assigned, or any part thereof, add* and E. F. as under-tenant and G. H. as his assignee) from said real property, house and premises, pursuant to law.

(*Date, signature of petitioner and verification, as ante, p. 118.*)

If the original tenant has died, under-let or assigned the premises, or any part thereof, state the facts in the petition at the *, and to whom, and what portion, if only a part. See Code of Civil Pro., §§ 2231, 2235; vol. 1, pp. 155, 157.

Petition to remove tenant for non-payment of rent after notice.

(*Proceed as in above form to the †, then omit the matter between the ††, and insert in the place thereof*), and your petitioner further shows that he has caused at least three days' notice, in writing, to be duly served upon said C. D., on the day of , 1883, as appears by the affidavit hereto annexed, requiring in the alternative the payment of the rent or possession of the premises; that said rent has not been paid or any part thereof. That said C. D. holds over and continues in possession of said demised real property, house and premises (*if only part, state what part*), after a default in the payment of rent without the permission of your petitioner, his said landlord. (*Conclude as in preceding form from the last †.*)

Petition to remove tenant holding over.

(*Proceed as in form on page 1099 to the †, then add*) which said term has expired †; that the said C. D. holds over and continues in possession of the said demised real property, house and premises (*or if only a part, state what part*), after the expiration of his term without the

Summary proceedings to recover the possession of real property.

permission of your petitioner, his said landlord. Your petitioner, etc. *(concluding as in form on page 1100, ante.)*

Petition to remove tenant at will.

(Same as preceding form, except that the following allegation as to nature and termination of the tenancy should be inserted at the †): Your petitioner further shows that the said C. D. has held and occupied the real property, house and premises as the tenant at will of your petitioner from the day of said letting and renting as aforesaid until the expiration of such tenancy as hereinafter mentioned. Your petitioner further shows that on the day of , 1883, he caused a notice in writing to be served upon the said C. D. requiring the said C. D. to remove from the said premises within one month. That the time within which the said C. D. was required to remove has expired. *(Concluding as in last form from the †.)*

Precept to remove tenant.

COUNTY OF , ss. :

The People of the State of New York to C. D., greeting :

WHEREAS A. B. has presented to me, the undersigned, a justice of the peace of the town of , in said county, a petition, duly verified, showing that he is the owner in fee of the real property, house and premises situated in the town of , in said county described as follows *(insert description)*; that on or about the day of , 1883, said petitioner, as landlord, let and rented the said real property, house and premises unto C. D. for the term of, etc. *(reciting the substance of all the material allegations of the petition)*, and praying for a final order removing you as tenant from said real property, house and premises, pursuant to law ;

Now, therefore, you, the said C. D., are hereby required forthwith to remove from said real property above described, or to show cause before me, as such justice of the peace, at , in said town of , on the day of , 1883, at ten o'clock in the forenoon, why possession of the said real property should not be delivered to the petitioner.

(Date.)

X. Y.,
Justice of the Peace.

A copy of section 2241 of the Code of Civil Procedure must be indorsed upon each copy of a precept served otherwise than personally. See vol. 1, pp. 159, 160, § 2241. As to the time in which the precept should be made returnable, see vol. 1, p. 158, § 2238.

Affidavit of personal service on tenant.

COUNTY OF MONTGOMERY, ss. :

Cornelius Van Horn, being duly sworn, says he is over twenty-one years of age; that deponent did on the 7th day of July, 1883, before

Summary proceedings to recover the possession of real property.

one o'clock in the afternoon, at Fonda, in the town of Mohawk in said county, personally serve the annexed precept upon John Stiles and Richard Roe, the persons to whom it is directed, by delivering a copy of said precept to said John Stiles and Richard Roe and to each of them, and leaving a copy of said precept with them and each of them, and at the same time showing them and each of them, the annexed original precept.

(*Jurat.*)

(*Signature.*)

Affidavit of service on tenant at property sought to be recovered.

COUNTY OF MONTGOMERY, ss. :

Cornelius Van Horn, being duly sworn, says he is over twenty-one years of age ; that on the 7th day of July, 1883, John Stiles, the person to whom the annexed precept is directed, had a (*or no*) dwelling-house in the town of Mohawk, the town in which the property described in the annexed precept is situated ; * that on said last-mentioned day, at about nine o'clock in the forenoon, deponent having the annexed precept in his possession for service upon said John Stiles, went, for the purpose of serving said precept upon said Stiles, to his said dwelling-house in said town of Mohawk, but he was absent therefrom, and there was no person at said dwelling-house who resided there, and deponent could find no person there ; that deponent remained at said dwelling-house for some time, but the same was locked and admittance thereto could not be gained.* (*If defendant has no dwelling-house in the town omit matter between the **.*)

That deponent thereupon on said 7th day of July, 1883, between eleven o'clock in the forenoon and one o'clock in the afternoon, at Fonda, in said county, served the annexed precept upon John Stiles, the person to whom it is directed, by delivering a copy thereof, at the property described in the annexed precept, and sought to be recovered, to Richard Roe, a person of suitable age and discretion, to-wit : of about thirty years of age (*residing there*). (*If the person did not reside there, omit that statement and add, employed there at the business of farming ; that at the time of such service no person of suitable age and discretion residing there, and no person but said Richard Roe could be found by deponent.*)

(*Jurat.*)

(*Signature.*)

Affidavit of service by fixing on property.

COUNTY OF MONTGOMERY, ss. :

Jacob Rhynders, being duly sworn, says he is over twenty-one years of age ; that on the 7th day of July, 1883, A. B., the person to whom the annexed precept is directed, had a dwelling-house in the town of Mohawk, in which the property described in the annexed precept is situated ; that deponent on said last-mentioned day had the annexed precept in his possession for service upon said A. B. That deponent at the town of Mohawk on that day made diligent inquiry for the said A. B. among other persons of Y. Z., G. H. and V. A., and in good

Summary proceedings to recover the possession of real property.

faith made diligent inquiry and efforts to find said A. B. and to serve the annexed precept upon him personally, but was unable so to do.

That deponent on said 7th day of July, 1883, at about ten o'clock in the forenoon, having the annexed precept in his possession for service upon said A. B., for the purpose of serving said precept upon said A. B., went to his said dwelling-house in said town of Mohawk, but he was absent therefrom, and there was no person at said dwelling-house who resided there, and deponent could find no person there; that deponent remained at said dwelling-house for some time, but the same was locked and admittance thereto could not be gained.

That deponent thereupon between eleven o'clock in the forenoon and one o'clock in the afternoon of said 7th day of July, 1883, still having the annexed precept in his possession for service upon said A. B. as aforesaid, went to the property sought to be recovered in the town of Mohawk and described in the annexed precept, and made diligent effort and search to find some person residing or employed there, but could find no person residing or employed there, whereupon deponent, on said 7th day of July, 1883, between three and four o'clock in the afternoon affixed a copy of the annexed precept upon a conspicuous part of the said property sought to be recovered and described in the annexed precept, to-wit: upon the front door of a barn near the highway, that being a conspicuous place thereon.

(*Jurat.*)

(*Signature.*)

Affidavit of service on tenant by leaving at dwelling-house.

COUNTY OF MONTGOMERY, ss.:

Andrew Plank, being duly sworn, says he is over twenty-one years of age; that A. B., the person to whom the annexed precept is directed, resides, and did on the day of the service, as hereinafter stated, reside in the town of Mohawk, in which the property described in the annexed precept is situated; that deponent did on the day of , 1883, before o'clock in the noon, serve the annexed precept upon A. B., the person to whom it is directed, by delivering a copy thereof, at the dwelling-house of said A. B. in said town of Mohawk, to E. F., a person of suitable age and discretion, to-wit: about years of age, who resides and then resided there.

That at the time when deponent so made such service as aforesaid, said A. B., the person to whom such precept was directed, was absent from his said dwelling-house.

Subscribed and sworn to before me, } ANDREW PLANK.
this day of , 18 . }

D. Y., *Justice of the Peace.*

Summary proceedings to recover the possession of real property.

Answer to the petition.

JUSTICE'S COURT.

In the Matter of the Petition of
A. B. for the removal of C. D.
from certain premises therein
described.

} Before D. Y., Esq., *Justice of the Peace.*

The above-named C. D. answering the petition of A. B. bearing date the day of , 1883, heretofore filed in the above-entitled proceeding, denies (*set forth a general denial of all the allegations of the petition, or a specific denial of any material allegation or allegations therein, and add date, signature and verification*).

Final order against tenant upon default.

(*Title as above.*)

The above-named A. B. having presented to me, the undersigned justice of the peace, a petition bearing date the day of , 1883, praying for a final order (*reciting the prayer of the petition*) and a precept, returnable this day, having been issued by me thereupon, directed to the said C. D., and the said precept having been duly served upon the said C. D. and due proof of such service having been filed, and the said C. D. having failed to show cause on the return of said precept as therein required, it is hereby ordered and determined, that there was due to the petitioner from said C. D. on the day of , 1883, for rent of the premises described in said petition, the sum of \$, and that said sum remains unpaid; that the said C. D. holds over and continues in possession of said property after default in the payment of said rent without the permission of the petitioner; that the possession of said property be delivered to A. B., petitioner; that the said A. B. recover against the said C. D. the sum of \$ for his costs in this proceeding; and that a warrant issue to put the said A. B. in possession of said premises, and that he have execution for the collection of said costs.

(*Items of cost.*)

(*Signature of Justice.*)

(*Date.*)

(*If a trial was had before the justice or a jury, modify the recitals accordingly.*)

Warrant to remove tenant for non-payment of rent after demand. — Default.

The People of the State of New York, to the Sheriff of the county of Fulton and to any Constable of the town of Johnstown, in the county of Fulton, greeting:

WHEREAS, A. B. presented to me, the undersigned, a justice of the peace of the town of Johnstown, in said county, a petition, duly verified, showing among other things that* on the 1st day of May, 1883, he was the owner in fee of the real property, house, and premises situate in the town of Johnstown, in said county, and described

Special proceedings relating to animals straying on highways.

as follows: (*describe property.*) That on or about said 1st day of May, 1883, said petitioner as landlord let and rented said real property, house and premises unto C. D. for the term of one year from the 1st day of June, 1883, at the yearly rent of \$400, payable, etc. (*reciting the substance of the petition as to the terms of renting, demand, default in payment, holding over, etc., and the prayer for a final order*). * Whereupon I issued a precept requiring the said C. D. forthwith to remove from the said real property, above described, or to show cause before me, as such justice of the peace, at my office in Johnstown, in the town of Johnstown, in said county of Fulton, on the day of _____, 1883, at ten o'clock in the forenoon, why possession of said real property should not be delivered to the said petitioner; and, at the time and place last mentioned, due proof of the due service of said precept having been made, † and sufficient cause not having been shown at the time when such precept was returnable, and I having duly made a final order awarding to said A. B. the delivery of the possession of the said real property; you are, therefore, commanded to remove all persons from the real property above described, and to put the aforesaid petitioner, the said A. B., into the full possession thereof.

Witness my hand this _____ day of _____, 1883,

D. Y., *Justice of the Peace.*

(*The above form will be readily adapted to any other case by inserting between the ** a correct recital of the substance of the petition.*)

Warrant to remove tenant issued after trial.

(*Proceed as directed above to the † then add*) And WHEREAS the said C. D., at the time when such precept was returnable, filed with me as such justice a written answer, duly verified, denying generally the allegations (*or specially, material allegations*) of the petition, and the issue so joined having been tried before me and * a jury duly summoned for that purpose, who after hearing the evidence of the parties rendered a verdict in favor of said A. B. (*or if no jury was summoned, omit the matter following the *, and substitute after hearing the evidence of the parties, I rendered and made a decision in favor of said A. B.*) for the delivery to him of the possession of the said real property, whereupon on the _____ day of _____, 1883, I duly made a final order awarding to said A. B. the delivery of the possession of the said real property. You are, therefore, hereby commanded (*etc., concluding as in preceding form*).

§ 2. Special proceedings relating to animals straying on highways.

Petition by person seizing animals trespassing, etc.

To A. B. Esq., *Justice of the Peace of the town of Johnstown, in the county of Fulton*:

The petition of C. D. respectfully shows:

1. That he is the owner (*or occupant*) of certain real property known

Special proceedings relating to animals straying on highways.

as the "Hardy Farm" situate in said town and county upon a public highway leading from the village of Johnstown to the village of Rockwood, commonly called the "State road."

2. That on the day of , 1883, your petitioner seized and took into his possession (*describe the animals seized*) then trespassing upon the real property so owned (*or occupied*) by him, which had entered thereupon from said public highway, and still keeps the same in his possession, to be disposed of as prescribed by law.

3. That the owner of the animals so seized by your petitioner is E. F. (*or if unknown, that the name of the owner of the animals so seized is not known to your petitioner, and cannot be ascertained by him with reasonable diligence.*)

4. That the amount of damage sustained by your petitioner, by reason of such trespass, is the sum of \$.

Wherefore, your petitioner prays that a final order may be made directing the sale of the animals so seized, and the application of the proceeds thereof as prescribed in title 10 of chapter 19 of the Code of Civil Procedure.

(*Date.*)

(*Signature.*)

(*Add verification as in form on page 118, ante.*)

Precept on seizure of cattle.

COUNTY OF FULTON, ss. :

The People of the State of New York to E. F., owner of (or if the name of the owner is unknown, to all persons having an interest in) the animals hereinafter described :

WHEREAS, C. D. has presented to me, the undersigned, a justice of the peace of the town of Johnstown in said county, a petition, duly verified, bearing date on the day of , 1883, whereby it appears (*state the substance of the petition and describe animals seized*), and praying for a final order (*state prayer of petition*).

You are, therefore, required to show cause before me, the said justice, on the day of , 1883, at 10 o'clock in the forenoon, at my office in the village and town of Johnstown, in said county, why the prayer of said petition should not be granted.

Given under my hand this day of , 1883.

A. B., *Justice of the Peace.*

Proof of service of precept.

(*Proceed as in forms for service of precept in proceedings against a tenant, ante, 1101, 1102.*) See vol. 1, pp. 67, 68, § 3089.

Summary proceedings relating to animals straying on highways.

Final order on default.

JUSTICE'S COURT.

In the Matter of the Petition
of C. D. for the sale of cer-
tain animals seized by him
as estrays, etc.

} Before A. B., Esq., *Justice, etc.*

WHEREAS, C. D. presented to me, the justice above named, a petition, duly verified, bearing date the day of , 1883, whereby it appeared (*state substance of petition*), praying for a final order (*state prayer of petition*); and

WHEREAS, a precept was thereupon duly issued by me directed (*state direction and contents of precept*); and

WHEREAS, said petition was duly served on the day of , 1883 (*state time and mode of service*); and

WHEREAS, on the return day of said precept * no person appeared and answered:

Now, on motion of the said C. D., it is

Ordered, That said animals be sold, and that the proceeds of such sale be applied as directed in title 10 of chapter 19 of the Code of Civil Procedure.

(*Date.*)

A. B., *Justice of the Peace.*

Order of sale after trial.

(*Proceed as in the preceding form to the *, then add*): E. F. appeared and filed a written answer, duly verified, setting forth his interest in the animals seized, and denying (*state substance of the answer*); and the said E. F. having demanded a jury, and a jury having been duly impaneled and sworn, and a trial of the issues raised by the petition and answer having been this day had, and the jury having rendered a verdict in favor of the petitioner, it is, therefore, *ordered* (*conclude as in preceding form*).

If the proceeding was tried before the justice without a jury the form above given can be modified to show that fact. If the verdict or decision is in favor of one or more of the persons answering the petition, the order must conform to the verdict or decision. See vol. 1, p. 75, § 3110.

Warrant for the sale of animals seized.

The People of the State of New York, to any Constable of the county of Fulton, greeting:

WHEREAS, the undersigned, a justice of the peace of the town of Johnstown, in the county of Fulton, on the day of , 1883, made a final order in a special proceeding then pending before him, wherein C. D. was petitioner, directing the sale of (*describe the animals*) and the application of the proceeds thereof as prescribed in title 10 of chapter 19 of the Code of Civil Procedure:

Forms in arbitrations.

You are, therefore, commanded to sell the said animals at public auction for the best price which can be obtained therefor, and to make return thereof to the undersigned on the day of , 1883.

Witness my hand this day of , 1883.

A. B., *Justice of the Peace.*

§ 3. Forms in arbitrations.

General submission to arbitration.

Whereas, divers disputes and controversies have existed and arisen, and are now existing and pending between A. B., of the town of , in the county of , and C. D. of the same place: Now, therefore, we the undersigned, A. B. and C. D., aforesaid, do hereby mutually covenant and agree to and with each other that E. F., G. H. and K. L. of, etc., or any two of them, shall arbitrate, award, order and adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, bills, bonds, judgments, quarrels, controversies, trespasses, damages, claims and demands whatsoever, now pending, existing or held by and between us, the said parties; and we do further mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall in all things by us, and each of us, be well and faithfully kept and observed; provided that the said award be made in writing, and signed by the said E. F., G. H. and K. L., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the day of , next ensuing the date hereof.

(If a judgment is intended to be entered on the award in pursuance of the statute, add the following clause:) And it is hereby further mutually agreed by and between the said parties, that judgment in the Supreme Court of the State of New York *(or County Court of county, or other court of law and of record)* shall be rendered upon the award to be made pursuant to this submission.

Witness our hands this 15th day of November, 1865.

In presence of A. H. TREMAIN.

A. B.

C. D.

(Add acknowledgement of the parties.) For the statutes relating to arbitrations, see vol. 1, pp. 831-836. For a general discussion as to the requisites of a submission, see vol. 1, pp. 837-844.

Bond of arbitration.

Know all men by these presents, that I, A. B., of the town of , in the county of , am held and firmly bound unto C. D., of the same place *(or as the case may be)*, in the sum of \$500, lawful money of the United States, to be paid to the said C. D., or his certain attorney, executors, administrators or assigns, for which payment to be well and faithfully made, I bind myself, my heirs, executors, administrators, firmly by these presents. Sealed with my seal, and dated the 15th day of November, 1865. *

The condition of this obligation is such that if the above-bounden

Forms in arbitrations.

A. B. shall well and truly submit to the decision and award of E. F., G. H. and K. L., arbitrators named, selected and chosen, as well by and on the part and behalf of the said A. B. as of the said C. D., to arbitrate, award, order, adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever, now depending, existing or held by and between the said A. B. and the said C. D., so as the said award be made in writing and signed by the said E. F., G. H. and K. L., or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the day of , 18 , then this obligation to be void, or else to remain in full force and virtue.

(If there is no submission in writing separate from the bond, and it is intended to have a judgment on the award in pursuance of the statute, insert the following clause:) And the above-bounden A. B. hereby agrees that judgment in the Supreme Court of the State of New York *(or County Court of county, or other court)* shall be rendered upon the award to be made pursuant to this submission.

Signed, sealed and delivered } A. B. [L. s.]
in presence of }

A. H. TREMAIN.

The parties should execute bonds to each other. The obligor in one will be the obligee in the other.

Bond for an award by an umpire.

(Proceed as in last form to the and then continue:)* The condition of the above obligation is such that if the above-bounden A. B. shall well and truly submit to the decision and award of E. F. and G. H., arbitrators indifferently named, selected and chosen as well by and on the part and behalf of the said A. B. as of the said C. D. to arbitrate, award, order, adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever now depending, existing or held by and between the said A. B. and the said C. D., so as the said award be made in writing, signed by the said E. F. and G. H., and ready to be delivered to the said parties, or such of them as shall desire the same on or before the day of , 18 ,* but if the said arbitrators do not make such their award of and concerning the premises by the time aforesaid, then if the said A. B. shall, in all things, well and truly stand to, obey, perform, fulfill and keep the award, order, arbitrament, umpirage and final determination of such person as the said arbitrators shall appoint as an umpire between the said parties, of and concerning the premises aforesaid, so as the said umpire do make his award or umpirage of and concerning the said premises in writing, signed by the said umpire and ready to be delivered to the said parties, or such of them as shall desire the same on or before the day of , 18 , then the above obligation to be void, or else to remain in full force and virtue.

Forms in arbitrations.

(If a judgment is intended to be entered on the award in pursuance of the statute, then add the following clause :) And the above-bounden A. B. hereby agrees that judgment in the Supreme Court of the State of New York (or other court) shall be rendered upon the award to be made pursuant to this submission.

Signed and sealed in }
presence of }

A. B. [L. S.]

A. H. TREMAIN.

Condition providing for a third arbitrator.

The condition of this obligation is such, etc. (as in the last form to the *, then proceed :) But if the said arbitrators do not make such their award by the time aforesaid, then if the said A. B. shall, in all things, well and truly stand to obey, perform, fulfill and keep the award, order, arbitrament and final determination of and concerning the premises aforesaid, which either of said arbitrators shall make with such person as they shall appoint as an arbitrator to act with them, or one of them, in hearing and determining the said matters in controversy, so as the said award be made in writing and signed by the said arbitrators, or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the day of , 18 , then the above obligation to be void, or else to remain in full force and virtue, etc. (as in last form).

Arbitrator's oath.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy submitted to you as arbitrators, by and between A. B. of the one part, and C. D. of the other part, and a just award thereof make, according to the best of your understanding.

Notice of hearing before arbitrators.

In the Matter of an Arbitration
of, and concerning certain mat-
ters in difference between A.
B. of the one part, and C. D.
of the other part.

To C. D. :

SIR — Take notice, that the above matter will be brought to a hearing before the arbitrators appointed therein, at the office of Alva H. Tremain, at No. 55 State street, in the city of Albany, on the 10th day of November, 1865, at ten o'clock in the forenoon of that day.

Yours, etc.,

A. B.

Forms in arbitrations.

Oath on application for a subpoena.

You do swear that you will true answers make to such questions as I shall put to you, touching the necessity and propriety of my issuing a subpoena upon your present application for the same.

Subpoena to appear before arbitrators.

The People of the State of New York, to O. P., Q. R. and S. T. :

You and each of you are commanded personally to appear and attend at the office of Alva H. Tremain, at No. 55 State street, in the city of Albany, in the county of Albany, on the 16th day of November, 1865, at ten o'clock in the forenoon of that day, before E. F., G. H. and K. L., arbitrators, chosen to determine a controversy between A. B. on the one part, and C. D. on the other, then and there to testify as a witness in relation thereto, before the said arbitrators, on the part of the said A. B. Hereof fail not at your peril.

Given under my hand this 10th day of November, 1865.

WILLIAM C. SCHUYLER,
Justice of the Peace

Oath of witness.

You do swear that the evidence you shall give to these arbitrators (*or this arbitrator, or this umpire*), touching and concerning the matters in difference submitted for their (*or his*) determination and award by and between A. B. of the one part, and C. D. of the other part, shall be the truth, the whole truth, and nothing but the truth. (*Or the oath may be varied as follows:*) You do solemnly, sincerely and truly affirm and declare that, etc. (*as above*).

Revocation.

To E. F., G. H. and K. L. :

Take notice, that I do hereby revoke your powers as arbitrators, under the submission made to you by C. D. and myself by our mutual bonds (*or agreement in writing*) dated, etc.

Witness my hand and seal (*the revocation need not be under seal unless the submission was under seal*) this 16th day of November, 1865.

A. B.

Notice of revocation.

To C. D. :

Take notice, that I have this day revoked the powers of E. F., G. H. and K. L., arbitrators chosen to settle the matters in controversy between us, by an instrument of revocation, of which see a copy below.

Yours, etc.,

A. B.

(*Here insert copy of revocation.*)

Forms in arbitrations.

Award.

To all to whom these presents shall come or may concern, E. F., G. H. and K. L. send greeting:

WHEREAS divers suits, disputes, controversies and differences have happened and arisen and are now depending between A. B., of _____, and C. D., of _____, for pacifying, composing and ending whereof, the said A. B. and C. D. have entered into a written agreement, dated the _____ day of _____, last past, to submit the said matters to the award and final determination of the said E. F., G. H. and K. L., arbitrators, selected by the said parties, as by reference to which agreement will more fully appear (*or the said A. B. and C. D. have bound themselves, each to the other, in the penal sum of \$ _____, by bonds bearing date the _____ day of _____, last past, with condition thereunder written, to stand to, obey, abide, perform and keep the award, order, arbitrament, final end and determination of the said E. F., G. H. and K. L., arbitrators, selected by the said parties, as by reference to the said bonds of submission will more fully and at large appear*):

Now, therefore, know ye that the said E. F., G. H. and K. L., having taken upon themselves the charge and burden of the said award, and having deliberately heard the allegations and proofs of the said parties, do by these presents arbitrate, award, order and adjudge of and concerning the premises in manner and form following, that is to say:

First. They do award, order and adjudge that the said C. D., or his representatives, shall and do, on or before the _____ day of _____, next ensuing the date hereof, make and execute a good and sufficient conveyance of his interest as lessee for years of a certain farm in the possession of the said C. D., situate (*describe the premises*), pursuant and according to the true intent and meaning of certain articles of agreement bearing date on or about _____ day of _____, and made between the said C. D., of the one part, and the said A. B., of the other part.

Second. The said arbitrators do further award, order and adjudge that the said C. D., his executors or administrators, shall and do, on or before the _____ day of _____, next ensuing the date hereof, pay, or cause to be paid, unto the said A. B., his executors, administrators or assigns, the sum of _____ dollars in full payment, discharge and satisfaction of and for all moneys, debts and duties due or owing unto the said A. B. by the said C. D., upon any account whatsoever, at any time before their entering into the said agreement of submission (*or bonds of arbitration*), as aforesaid.

Third. The said arbitrators do hereby further award, order and adjudge that all actions and suits commenced, brought or depending between the said A. B. and C. D. for any matter, cause or thing whatsoever, arising or existing at the time of or before their entering into the said agreement of submission (*or bonds of arbitration*), shall from henceforth cease and determine, and be no further prosecuted or proceeded in by them, or either of them, or by their, or either of their, means, consent or procurement.

Forms in arbitrations.

And *lastly*. The said arbitrators do hereby further award, order and adjudge that the said A. B. and C. D. shall and do, within the space of days next ensuing the date of this present award, seal and execute unto each other mutual and general releases of all actions and causes of actions, suits, controversies, trespasses, debts, duties, damages, accounts and demands whatever, for or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of the said agreement of submission (*or bonds of arbitration*), as aforesaid.

In witness whereof, the said arbitrators have hereunto set their hands and seals, this day of , 18 .

(*Signatures and seals.*)

(*Add acknowledgment.*)

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